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State Report Citation of Cases in the NORTHWESTERN REPORTER, VOL. 184.

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‡ Superseded by opinion 188 N. W. 917.

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ALL THE DECISIONS OF THE SUPREME COURTS OF
MINNESOTA, MICHIGAN, IOWA, WISCONSIN
NEBRASKA, NORTH DAKOTA, AND
SOUTH DAKOTA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF NORTHWESTERN CASES IN WHICH REHEARINGS
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¹ Ceased to be Chief Justice September 4, 1921.

² Became Chief Justice September 4, 1921.

AMENDMENTS TO RULES

PROBATE COURTS OF MICHIGAN¹

Rule 17. ORDERS AND DECREES.

Sec. 1. All orders and decrees of the court shall be in writing, or printed, and signed by the judge. Such original orders or decrees, after being recorded, shall be placed in the files of the court. Upon the final settlement of any estate, or the completion of any proceedings in the court, all petitions, orders and other papers filed therein shall be arranged and attached in the order in which they are filed, and a certificate of enrollment annexed thereto by the judge, register or clerk of the court.

Sec. 2. In any county having more than one probate judge the judge who has served the longest period continuously shall be called the presiding judge who may, by an order duly made and entered in the journal of the court, authorize the register thereof to sign in the name of the judge who made the same, all orders or decrees of such court, with the same force and effect as though said judge had signed them. In all such cases said register shall place his initials under said signature.

Adopted by the Supreme Court December 22, 1921.

¹ For other rules, see 175 N. W. vii; 177 N. W. xi; 181 N. W. vii.

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HAUER et al. v. HAUER. (No. 4879.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

Wills §119—Evidence held to show sufficient declaration by testatrix to witnesses that instrument was her will.

Evidence that before testatrix, who could not speak English, signed the will, it was read over to her by one of the subscribing witnesses, who informed her in her native language of its provisions, whereupon, in the presence of the subscribing witnesses, she nodded her head and signed the will, held sufficient to sustain a finding that testatrix had declared the instrument was her will and requested the subscribing witnesses to sign it (citing 7 Words and Phrases, First Series, p. 6121).

Whiting, J., dissenting.

Appeal from Circuit Court, Grant County; Frank Anderson, Judge.

Proceeding to contest the will of Natalie Hauer, deceased, by Fred Hauer and others against Otto F. Hauer. The judgment and order of the county court admitting the will to probate was affirmed by the circuit court on appeal, and contestants appeal from the judgment and from the order denying a new trial. Affirmed.

Thad L. Fuller, of Milbank, J. M. Huff, of Belvidere, Ill., and Howard G. Fuller, of Pierre, for appellants.

Geo. S. Rix, of Milbank, for respondent.

McCOY, J. This is an appeal from a judgment of the circuit court of Grant county, affirming a judgment and order of the county court admitting to probate the will of one Natalie Hauer, deceased. The probate of said will was opposed, and contest interposed on the grounds, first, that said testatrix had not sufficient mental capacity to make a will; second, undue influence and fraud in securing her to execute said will; and, third, that said will was not executed according to law. It appears that the testatrix executed said will on the 14th day of July, 1909, and died November 28, 1917, aged about 75 years. No evidence of fraud, undue influence, or incapacity

to make a will appears from the record; while, on the other hand, the surrounding circumstances and evidence indicate that at the time of making said will said testatrix was of sound and disposing mind and memory, and that the making of said will was her free and voluntary act. It will serve no useful purpose to refer to or repeat the evidence in relation to these propositions.

The important and substantial question presented by the record is whether or not the said will was executed in accordance with the provisions of our statute. The statute, so far as material to the facts of this case, provides that every will, other than a nuncupative will, must be in writing, subscribed at the end thereof by the testator himself, or some person, in his presence and by his direction, must subscribe his name thereto; that the subscription must be made in the presence of the attesting witnesses; that the testator must at the time of subscribing declare to the attesting witnesses that the instrument is his will; that there must be two attesting witnesses, each of whom must sign his name as witness at the end of the will, at the testator's request, and in his presence. Section 613, Code 1919.

In this case it appears that the testatrix was German, who could not speak or understand the English language. The will was drawn up and executed in the office of her attorney, who called the subscribing witnesses. After the will was prepared, one of the subscribing witnesses, one Mittelstaedt, who spoke both German and English, read over the instrument, and then read and interpreted the substance thereof in German to decedent, and then and there in German explained to her the disposing parts of said will, explaining to her what was in the instrument, and the manner in which she was disposing of her property, and that she then and there said in German that that was according to her wishes, and nodded her assent thereto, and she then and there signed and executed the instrument in the presence of both the subscribing witnesses. Thereafter Mittelstaedt signed the said instrument as a subscribing witness. Thereafter McKenna,

then an employee in the office of the attorney who drew the will, and who had previously read the will, and knew the contents thereof, and knew that it was intended as her will, and who saw and heard what took place between the subscribing witness, Mittelstaedt, and the testatrix, immediately before and at the time she executed the same, and who saw her nod her assent to what Mittelstaedt had apparently stated to her, and then saw her execute the will thereafter also executed and signed the said instrument as a second subscribing witness thereto. The subscribing witness McKenna could not speak or understand the German language. We are of the opinion that what took place at the execution of the will in question fully satisfied the provisions of the statute.

It is contended by contestant that no declaration that it was her will and no request to sign was made to the subscribing witnesses by the testatrix. We are of the view, however, that the evidence was sufficient to imply such a declaration and request on her part. In the case of *In re Johnson*, 152 Cal. 778, 93 Pac. 1015, among other things, the court said:

"There was no very satisfactory evidence that at the time of its execution the deceased made an express declaration to the subscribing witnesses that the document executed was her will, or expressly requested them to attest it. But an express declaration and request are not absolutely necessary. It is sufficient if, at the time, she did, by words or conduct, convey to them the information that the instrument was her will, and that she desired them to attest it as witnesses."

In the case of *Brengle v. Tucker*, 114 Md. 597, 80 Atl. 224, among other things the court said:

"The statute requires that the testator shall request the subscribing witnesses to attest his will; but it is not necessary that he should in terms ask them to sign, as other facts may constitute a legal request on his part."

See *Gross v. Burneston*, 91 Md. 383, 46 Atl. 993; *Craig v. Trotter*, 252 Ill. 228, 96 N. E. 1003; 7 Words and Phrases, First Series, 6121.

Finding no error in the record, the judgment and order appealed from are affirmed.

WHITING, J. (dissenting). I can find no evidence showing that Mittelstaedt ever read the whole will himself or translated or attempted to translate any portion thereof to Natalie Hauer. All he claims to have done was to read a part of the will and then advise decedent as to what would be the effect of the provisions which purported to dispose of her property. He did not read the attestation clause. There is absolutely no evidence that, either by word or sign, testator asked either witness to sign the instrument

as a witness. There is absolutely no evidence to support the statement in the majority opinion that the witness McKenna "saw her nod her assent to what Mittelstaedt had apparently stated to her." The only evidence as to her nodding to any one was the evidence of McKenna who swore that he did not "recall the conversation with Mrs. Hauer no more than the time I met her she spoke to me, nodded her head." While there is evidence that Mrs. Hauer desired to make a will, there is not one syllable of evidence that she knew the paper she signed that day was a will and not a deed—no one swears to having used the word "will" in her presence, or to her using any term showing she knew the nature of the instrument. To my mind, the decision herein should be controlled by our holdings in *Ross v. Taylor*, 39 S. D. 608, 165 N. W. 1079, wherein we held that the burden of proving due execution of a will was upon the proponent thereof; that when an attestation clause is not read by or to a subscribing witness, the recitations in such clause are without weight; that there must be something to show that testator knew the nature of the instrument she signed; and that there must be some declaration by testator to the subscribing witnesses (though not necessarily by word) conveying the information that the instrument is her will.

OVERGAARD v. GOODHOPE. (No. 4778.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

1. New trial $\S$ 155—Court can entertain motion more than a year after judgment where record does not show judgment roll had been filed.

Where an appeal from a judgment could be taken at any time within a year after the filing of the judgment roll, and the record does not show when, if ever, the judgment roll was filed, but the appellant's statement that the appeal was taken within the time allowed by law was not controverted, the time for appealing had not expired, and the trial court had not lost jurisdiction to hear the motion for new trial noticed more than one year after the judgment was rendered.

2. Exchange of property $\S$ 8(4) — Evidence held to show plaintiff accepted note as payment of sum due from defendant.

In a suit to cancel a contract for the exchange of lands, evidence that when defendant was unable to satisfy an incumbrance against the land, plaintiff accepted a promissory note from a third party for the amount involved, and then took a deed to defendant's property, which he subsequently sold to a third party, held to show that plaintiff accepted the note as

payment of the incumbrance, so that he was not entitled to cancel the contract for nonpayment thereof, and could be compelled to deliver a deed for the land he agreed to convey to defendant.

Appeal from Circuit Court, Hand County; John F. Hughes, Judge.

Action by Mads N. Overgaard against T. B. Goodhope to cancel a contract for the exchange of property. Judgment for defendant, and plaintiff appeals from the judgment, and from the order overruling his motion for new trial. Appeal from judgment dismissed, and order overruling motion for new trial affirmed.

Chas. H. Bartelt, of Sioux Falls, and Alan Bogue, Jr., of Parker, for appellant.

Gardner & Churchill, of Huron, for respondent.

POLLEY, P. J. In this action the judgment was entered in the circuit court of Hand county on the 4th day of October, 1918. On the 23d day of January, 1920, appellant served notice of motion for a new trial. This notice fixed the hearing of the motion for February 2, 1920, and on that day the motion was heard and denied. Notice of the entry of the order denying a new trial was served on counsel for appellant on the 12th day of May, 1920, and on the 8th day of July, 1920, appellant perfected an appeal from the judgment and the order denying the new trial. On the 6th day of October, 1920, respondent moved to dismiss the appeal, on the ground that said appeal had not been taken within the time allowed by law. Upon the return of this motion an order was entered by this court dismissing the appeal from the judgment on the ground that the appeal had not been taken within a year after the entry of such judgment. But, the appeal from the order denying a new trial having been taken within 60 days after the service of the notice of the entry of such order, the motion to dismiss the appeal as to this order was denied. The matter is now submitted on the merits, upon the appeal from the order denying a new trial, and respondent moves to have the order denying a new trial affirmed, on the ground that the trial court was without jurisdiction to grant a new trial.

[1] This motion cannot be granted. Prior to the first of July, 1919, an appeal from a judgment could be taken any time within a year after the filing of the judgment roll. There is nothing in the record to show when, if ever, the judgment roll in this case was filed, and appellant states in his brief that

the appeal was taken within the time allowed by law. This statement is not controverted by respondent, and, in the absence of anything in the record to the contrary, appellant's statement will be taken to be true. The judgment roll not having been filed, the time for appealing had not expired, and the trial court had not lost jurisdiction to hear the motion for new trial on the 2d day of February, 1920; and, the appeal having been taken within 60 days after serving notice of the entry of the order denying the motion, the appeal was taken within the time allowed by law, and the motion to affirm the order must be denied. This necessitates a consideration of the case on the merits.

[2] The controversy grew out of a contract to trade or exchange certain real estate owned by plaintiff and defendant respectively. Under the terms of the contract each party was to deliver to the other a deed conveying title clear of incumbrance, but when the abstracts were examined it was found there were incumbrances against defendant's property. Certain negotiations were had with a view of disposing of the differences arising out of these incumbrances, and everything was finally adjusted except an item of \$165, that plaintiff claimed defendant should pay. This sum defendant does not appear to have been able to pay; but plaintiff was anxious to close the deal, and in order to get it closed he accepted a promissory note for the amount involved from a third party. Defendant then delivered the deed to his property. The deed was accepted by plaintiff, and he immediately sold the property to a third party. But he refused to deliver the deed conveying his property to defendant because the \$165 had not been paid, and brought this action to cancel the contract because of the nonpayment of said sum of money, although he makes no offer to return the property he had received from defendant or to make restitution of any kind. Findings and judgment were for defendant, and plaintiff appeals.

The trial court found as a fact that the \$165 above referred to was accepted by plaintiff in payment of the amount plaintiff claimed was due him from defendant as a condition for the delivery of plaintiff's deed. We believe this finding is fully supported by the evidence; in fact, the execution and delivery of this note is explained on no other theory, and when it was accepted by plaintiff defendant was entitled to a deed for plaintiff's property according to the terms of the contract, and a decree to that effect was properly entered.

The order appealed from is affirmed.

McALPIN v. GREMMELS. (No. 4336.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

1. Seduction — Only unmarried woman may recover damages for her own seduction.

A virtuous woman, married or unmarried, may be seduced by a man, single or married; but, under Rev. Code 1919, § 2977, only an unmarried woman may recover damages for her own seduction.

2. Seduction — Married man may be guilty though woman knew he was married.

A married man may be guilty of seduction, though the woman knew he was married.

Appeal from Circuit Court, Minnehaha County; John T. Medin, Judge.

Action by Edna Alice McAlpin against Charles F. Gremmels. From an order overruling a demurrer to the complaint, defendant appeals. Reversed.

Kirby, Kirby & Kirby and W. J. Ellwood, all of Sioux Falls, for appellant.

Christopherson, Melquist & Davenport, of Sioux Falls, for respondent.

SMITH, J. Appeal from an order overruling a demurrer to plaintiff's complaint. The amended complaint covers 24 printed pages of the brief. The substance of the complaint is that plaintiff, since February 17, 1919, has been and is a single and unmarried woman, and at all times previous to her acquaintance and association with defendant was a chaste and virtuous woman; that since the latter part of October, 1918, when they first became acquainted, the defendant frequently visited plaintiff at her residence in Sioux Falls, and by means of protestations and promises of love and affection caused her to love and trust him, and by promises of marriage in the near future, and by the furnishing and use of intoxicating liquors, all with intent to debauch the plaintiff—setting forth the acts and protestations of defendant at great length, and with nauseating detail—the plaintiff was persuaded and induced to have sexual intercourse with defendant, and thereby became and now is pregnant.

[1] A virtuous woman, married or unmarried, may be seduced by a man, single or married; but, under the statutes of this state, only an unmarried woman may recover damages for her own seduction. Rev. Code 1919, § 2977; *Smith v. Yaryan*, 69 Ind. 445, 35 Am. Rep. 232; *Greenman v. O'Riley*, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466; *Velthouse v. Alderink*, 153 Mich. 217, 117 N. W. 76, 18 L. R. A. (N. S.) 587, 15 Ann. Cas. 1111; *Love v. Masoner*, 6 Baxt. (Tenn.) 24, 32 Am. Rep. 522; 24 R. C. L. 744, § 17.

[2] A married man may be guilty of seduction, though the woman knew he was mar-

ried. *Marshall v. Taylor*, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 144; 24 R. C. L. 734, §§ 5, 6; *Hawk v. Harris*, 112 Iowa, 543, 84 N. W. 664, 84 Am. St. Rep. 352; *Morgan v. Muench*, 181 Iowa, 719, 156 N. W. 819. The complaint alleges and the demurrer admits that plaintiff, prior to her association with defendant, was a chaste and virtuous woman. No discussion of that proposition is necessary at this time. But under the statute only an unmarried woman may maintain an action for damages for her own seduction. *Gover v. Dill*, 3 Iowa, 337; *Dowling v. Crapo*, 65 Ind. 209.

The complaint fails to allege that plaintiff was unmarried at the time the alleged seduction was accomplished, and for that reason does not state a cause of action.

The order of the trial court overruling the demurrer is reversed.

BURDICK v. FARMERS' MERCANTILE CO. et al.

(Supreme Court of North Dakota. June 22, 1921.)

*(Syllabus by the Court.)***1. Execution — Doctrine of caveat emptor applies to assignee of purchaser.**

The doctrine of caveat emptor applies to the assignee of a purchaser at an execution sale.

2. Evidence — Supreme Court takes judicial notice of its determinations alleged in complaint.

The Supreme Court may take judicial notice of its determinations alleged in a complaint.

3. Execution — Assignee of sheriff's certificate of sale not liable for subsequent failure of title.

In the absence of an express warranty or fraud the assignee of a sheriff's certificate upon execution sale of real property is not liable for the failure or partial failure of title thereafter resulting.

Appeal from District Court, Ramsey County; Burr, Judge.

Action by Orlin L. Burdick against the Farmers' Mercantile Company and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Serumgard & Conant, of Devils Lake, for appellant.

Clyde Duffy, of Minnewaukan, for respondents.

C. W. Buttz, of Devils Lake, pro se.

Statement.

BRONSON, J. The plaintiff has appealed from an order sustaining a demurrer to the

complaint, on the grounds that the same does not state a cause of action. The complaint alleges that in 1905 Wm. Burdick, then a minor, 15 years old, received a consignment of nursery stock valued at \$217; that the same was worthless, and the customers of Burdick refused to accept the same; that plaintiff refused to become responsible for his son's indebtedness, and that Cashman sold the claim to one Christianson, or the State Bank of Minnewaukan; that in April, 1908, Kitsey G. Burdick, wife of the plaintiff, conveyed 560 acres of land in Benson county to Jessie James, who thereupon went into possession; that, in May, 1908, through threats and duress, Christianson procured from Kitsey G. Burdick a note for \$217, payable to the State Bank of Minnewaukan, for the claim against the minor; that, in August, 1908, Kitsey G. Burdick, after consulting an attorney, received advice to be adjudged a bankrupt, and thereupon, pursuant to proceedings, she was adjudged a bankrupt; that Christianson thereupon had himself appointed as trustee in bankruptcy, and instituted proceedings to set aside the deed from Kitsey G. Burdick to Jessie James; that subsequently Christianson died, and, upon application of the State Bank, the defendant Buttz was appointed trustee instead; that, in 1911, the defendants Buttz and Sinness, lawyers, forced such action to trial, and the same, in March, 1912, was dismissed by the district court; that from September, 1908, until March, 1912, the plaintiff and his wife resided in northern Canada, and were in this state for only short visits; that they believed that the decision by the trial court ended the matter, and vested the title in Jessie James; that in the spring of 1912(?) the defendant Aaker, as managing officer of the defendant Mercantile Company, employed the defendants Buttz and Sinness to collect the debt against John James and Jessie James, and that, pursuant to action, judgment was obtained against John James and Jessie James for \$811.79 on or about November 14, 1911; that subsequently the defendants Buttz and Sinness caused execution to be issued against the property of John James and Jessie James, and levied upon the grain raised upon the lands mentioned in 1912 and applied the same upon the judgment; that subsequently the defendant Buttz, who had become district judge, confirmed the sale; that there still remained upon the judgment unpaid about \$900; that in November, 1913, the defendant Sinness issued an execution on the judgment, made a levy upon the land mentioned, and caused the same to be sold for some \$869 to the defendant, Mercantile Company; that the defendant Buttz, as district judge, in December, 1913, confirmed the sale; that during such time the plaintiff and his wife were living in Canada, and had no notice of the sale of the land until the fall

of 1914; that in the meantime Jessie James had conveyed the land to the plaintiff; that the plaintiff, in 1914, had rented the land to Johnson; in October, 1914, Johnson notified the plaintiff that the Mercantile Company claimed the crop; that thereupon the plaintiff went to Benson county and investigated; that he was informed that, unless he redeemed or got an assignment of the sheriff's certificate of sale, he would lose the land, and the Mercantile Company would claim title thereto; that thereupon the plaintiff negotiated with the Mercantile Company, and, in consideration of \$925, received an assignment of the sheriff's certificate of sale; that thereafter, in February, 1915, the sheriff executed a sheriff's deed to the plaintiff; immediately thereafter the plaintiff went to Canada, on information and belief that the defendant Buttz, upon learning that the plaintiff had obtained a sheriff's deed, as trustee of the estate of Kitsey Burdick, a bankrupt, together with Sinness, perfected an appeal to the Supreme Court of this state from the judgment dismissing the action mentioned; that thereafter the Supreme Court, upon hearing, set aside the conveyance to Jessie James from Kitsey Burdick, and vested the title in Buttz as trustee; "that the order of said Supreme Court was subsequently followed out, and that for said reason the title of Jessie James to such property failed;" that by reason of the decision of the Supreme Court the assignment of the sheriff's certificate of sale from the Mercantile Company to the plaintiff failed, and the payment of \$526 by the plaintiff was wholly without consideration, and was obtained through misrepresentations; that the plaintiff would not have purchased the same unless he believed that the sale was in all respects valid, and that the assignment of the certificate of sale would mature into a fee simple upon the issuance of the sheriff's deed; that, in addition, relying upon representations made, the plaintiff paid taxes between December, 1914, and December, 1915, amounting to \$532, also erected two frame buildings on the premises worth \$1,000, and cleared 25 acres of land reasonably worth \$500, employed counsel and incurred expenses to the amount of \$250—for all of which judgment was claimed against the defendant for about \$3,200, with interest.

Decision.

The plaintiff presents the question of whether the assignee of the purchaser at an execution sale can recover from such purchaser upon the failure of title in the premises concerned. It is contended that the sheriff's certificate of sale involved herein conveyed no title; that it was merely a chose in action, and as such personal property; that section 5984, C. L. 1913, applies, which provides:

"One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act thereby warrants the instrument to be what it purports to be and to be binding according to its purport upon all parties thereto; and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, when that is material, the extinction of its obligations, or its invalidity for any cause."

It is contended that the Mercantile Company, when it sold this sheriff's certificate, warranted to the plaintiff that the certificate purported to be an instrument which entitled the plaintiff to a good and sufficient deed at the expiration of a year from its date, or a refund of the money paid; that furthermore, plaintiff in this connection was entitled to rely upon the state of title as then existing, and upon the regularity and validity of the proceedings in the execution sale as they then appeared of record; that the defendant Sinness, as attorney for the Mercantile Company, as well as the defendants Buttz and Aaker, then knew or had knowledge of matters concerning the pending litigation which affected the title upon the execution proceedings which eventually made the title of James, upon which the execution proceedings depended, invalid; that the acts of the defendants in parting with the assignment of the sheriff's certificate and their connections in the litigation and proceedings had concerning this land operated to deceive the plaintiff, and created a trap, so that the plaintiff was compelled either to purchase the rights of the Mercantile Company or lose the land. It is further contended that the allegations of the complaint concerning the determination made by this court in the case of *Buttz v. James* must be taken as true, and that proof may be introduced to show that in fact, pursuant to such allegations, the title of James did fail; further, that the plaintiff, through the purchase of the sheriff's certificate, does not stand in the position of a purchaser at a judicial sale, and was entitled further to rely upon representations appearing of record or as made through acts of the parties concerned.

[2] Hon. A. G. Burr, trial judge, in extensive memoranda opinions, held that the gist of the action was the sale of the certificate, the assignment of that instrument by the Mercantile Company to the plaintiff; that neither Buttz nor Sinness had anything to do with such sale; and the confirmation of the sale by the defendant Buttz as a judge did not render him liable; that all he did under such order of confirmation was to declare that the sale had been made in compliance with the statute; that the fact that Judge Buttz was trustee in bankruptcy, and that there was pending an action to have the conveyance to James set aside, had no bearing upon the order confirming the sale; that the defendant Sinness was merely the attor-

ney who prosecuted both actions to a successful conclusion; that he had nothing to do with the transfer of the certificate of sale; that the defendant Aaker was merely the manager of the Mercantile Company, and was so known by the plaintiff to be; that there is no attack made upon the judgment of the Mercantile Company against James, and that this company bought the land upon the execution sale at its own peril; that the assignment of the certificate carried whatever interest the Mercantile Company had in the land; that it possessed such interest as James had in the land at the time the judgment was docketed and levy made before James sold the premises to the plaintiff; that in this case there was a valid judgment and a valid execution; that there was no warranty of title contained in the assignment, nor any statement made as to the extent of the interest sold; that there is nothing to show that the company did not know that the sale would pass good title to the property; that no fraud is set up; that in the case of *Buttz v. James*, 33 N. D. 162, 178, 156 N. W. 547, the title of the trustee in the land was for the creditors to the extent of their claims, and that after the debts were paid the remainder of the estate was to be turned over to the parties entitled thereto; further, the plaintiff got title to the land from two sources, through Jessie James direct, by her conveyance alleged in the complaint, and through the certificate of sale and sheriff's deed issued thereunder; that, upon taking judicial notice of these matters in connection with the demurrers, it was very clear that the plaintiff had no cause of action against the company; that without taking judicial notice the complaint itself fails to state a cause of action, for it seeks to recover the amount paid upon the grounds that the certificate of sale did not convey any interest in the land; that Jessie James was not the owner thereof, and that the execution sale did not sell any property of Jessie James.

We concur in the decision of the learned trial court. The sheriff's certificate issued upon the execution sale carried the right, title, and interest of the judgment debtor, subject to the right of redemption. Section 8084, C. L. 1913. The assignment of this sheriff's certificate operated likewise to transfer the rights of the judgment debtor in the land, subject to redemption. It transferred a property right in realty. Upon the expiration of the period of redemption and the issuance of a sheriff's deed in February, 1915, to the plaintiff, these rights of the judgment debtor were entirely foreclosed. The plaintiff then possessed all of the rights of the judgment debtor to which the judgment lien attached at the date it was docketed. The validity of such judgment and of the execution proceedings is not in any manner attacked. The decision of this court in *Buttz v. James*, 33 N. D. 162, 156 N. W. 547, deter-

mining the status of James' title was not rendered until February, 1916. Manifestly, if the decision of this court in such case had been the reverse, the plaintiff's title, pursuant to such sheriff's deed, would have remained unimpaired. Assuredly, it may not be premised, pursuant to the allegations of this complaint, that the defendant, with present or prophetic knowledge, could forecast the decision of this court in such case. Upon such decision by this court in that case the complaint predicates a cause of action. The decision in that case did not pretend to wholly deprive James of title in the land. It served simply to set aside the conveyance made so far as it interfered with the rights of creditors and the rights of the trustee in connection therewith. See *Buttz v. James*, 33 N. D. 162, 178, 156 N. W. 547; *Phillips v. Phillips*, 179 N. W. 671, 672; 12 R. C. L. 597; *Brasle v. Minneapolis Brewing Co.*, 87 Minn. 456, 92 N. W. 340, 67 L. R. A. 865, 889, 94 Am. St. Rep. 709. The trial court properly took judicial notice of the determination made in that case. See 7937, C. L. 1913; *Beyer v. Investors' Syndicate* (No. 4065) 182 N. W. 934.

[1,3] The complaint plainly is insufficient to allege or show grounds of either fraud or conspiracy to sell or dispose of a worthless title. Section 5984, C. L. 1913, has no application upon the facts as alleged. It is clear that the purchaser at the sale upon the execution proceedings was subject to the doctrine of caveat emptor. In the absence of fraud such purchaser could not complain of defects in the title.

The assignee of such purchaser, in the absence of an express warranty, stands in no stronger position. 39 Cyc. 1672. He would be in no stronger position if he had redeemed from such purchaser. See *Copper Belle Mining Co. v. Gleeson*, 14 Ariz. 548, 134 Pac. 285, 48 L. R. A. (N. S.) 481; note 48 L. R. A. (N. S.) 481; note 36 L. R. A. (N. S.) 1218. Upon the complaint the plaintiff purchased the assignment of the sheriff's certificate with the same knowledge and notice of rights existing therein as the company possessed. He stands in no better position than the Mercantile Company. See 39 Cyc. 1415.

The order is affirmed, with costs to the respondent.

CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J., concurs in the result.

ROBINSON, C. J. (concurring). This case presents a general demurrer to the complaint. The brief of counsel states:

"The complaint alleges that there was a complete failure of title and a complete failure of consideration for the payment of \$925. The allegation is positive and unqualified, and must

be taken as true for the purpose of the argument."

Now that is a great mistake. The court will not accept as true what it knows to be untrue, and it does know that in this case there was not a complete failure of consideration. The Mercantile Company had caused three quarter sections of land to be sold on an execution against Jessie James, the married daughter of the plaintiff. She had conveyed the title to her father, and his purchase of the sale certificate answered the purpose of a redemption. It gave him title to a valuable equity in the land, subject to some mortgages and claims asserted by the creditors against the mother of Jessie James, who had foolishly conveyed the title to her daughter with intent to hinder, delay, and defraud creditors. The mother went into voluntary bankruptcy, and the trustee in bankruptcy subjected the land to the claims of creditors, but that did not divest the plaintiff of the valuable equity under the assignment of the sheriff's certificate and the deed from his daughter. The complaint does show that Mrs. Burdick had a valid defense against the claims asserted by her creditors, but that is of no consequence. It shows only that she and her counsel acted very foolishly in attempting to defend against the claims and trying to defeat them by going into bankruptcy. An attorney whose advises such a foolish procedure should have to pay all damages and costs. Counsel for plaintiff cites authorities holding that the purchaser of a sale certificate may recover the purchase price in case the certificate is worthless; that it may be recovered as money paid without any consideration, and by mistake of fact. 23 Corpus Juris, 790; *Vanesse Land Co. v. Hewitt*, 95 Wash. 643, 164 Pac. 196; *McGoren v. Avery*, 37 Mich. 120.

These cases do correctly state the law, but they do not govern this case.

Affirmed.

OLSON v. GRAND LODGE, A. O. U. W. OF NORTH DAKOTA.

(Supreme Court of North Dakota. July 5, 1921.)

(Syllabus by the Court.)

1. Insurance ⇐ 755(1)—Beneficial order held not estopped to interpose defense that insured died in military service within insurance regulations.

The failure of a beneficial order to demand or secure from its insured member an application for war permit and the payment or refusal of an extra war premium provided by its regulations for its members engaged in military service, and the reception of regular assessments and lodge dues while knowing that the insured member was in the service do not con-

stitute, for reasons stated in the opinion, waiver or grounds of estoppel.

2. Insurance 791(1)—Provisions of beneficial certificate limiting liability where insured engages in military service held to state grounds of a status and not of causation.

The provisions in a beneficial certificate of insurance, which limits the liability of the beneficiary order if the insured member shall engage in the occupation of a soldier in time of war, engage in military service in time of war, or shall enter in the service of the United States army, state grounds of a status and not of causation as a test, where no provisions otherwise indicate.

Grace, J., dissenting.

Appeal from District Court, Stark County; Crawford, Judge.

Action by Paul Olson against the Grand Lodge of the Ancient Order of United Workmen of North Dakota. Judgment for plaintiff, and defendant appeals. Reversed, with instructions.

J. J. Mulready, of Fargo, and W. F. Burnett, of Dickinson, for appellant.

L. A. Simpson, of Dickinson, and J. W. Lee, of Rhame, for respondent.

Statement.

BRONSON, J. This is an action upon a policy of life insurance. Trial was held before the court upon stipulated facts. On April 6, 1918, the defendant, a fraternal beneficial association, issued its policy of \$1,000 upon the life of the insured, payable to his father, the plaintiff. Then the insured was a blacksmith at Tolna, N. D., aged 21 and unmarried. The application for insurance, signed by the insured, contained an agreement that if he "should hereafter enter the occupation of" "a soldier in time of war" his membership in the order would become null and void, and the rights of himself and his beneficiary in life insurance waived; further, that he agreed to be subject at all times to all laws, rules, and regulations of the Grand Lodge, existing or thereafter to be adopted. Law 200 of the order provides that no person shall be admitted to membership who "is engaged in the occupation of" "soldier in time of war." Law 222 provides that any member who shall hereafter enter any of the prohibited occupations enumerated in Law 200 shall forfeit his membership, and that "his beneficiary certificate shall become null and void without the action of any lodge or officer thereof."

At the time when the policy was issued there was in force a regulation (adopted pursuant to a resolution of the advisory board of the Grand Lodge on September 1, 1917), which provided that any insured member, if he shall enter the service of the United

States army may keep his insurance certificate in force and effect to the extent and upon the terms mentioned in three options: (1) That any member may, after first receiving a war permit, continue in force his entire insurance (not exceeding \$2,000) upon the payment of an extra war premium of \$50 per \$1,000; (2) any such member, after first receiving a war permit, may continue his insurance (not exceeding \$2,000) to the extent of 20 per cent. of the amount thereof; (3) any such member may avail himself of option 1 as to \$1,000 and option 2 as to another \$1,000.

It also provided that any such member desiring to avail himself of the options, shall make, within 30 days after he has been mustered into the service of the United States, application to the Grand Recorder for a war permit, upon blanks to be provided by the Grand Lodge, and that any such member who failed to avail himself of such options would forfeit all of his rights and benefits for himself or his beneficiary, notwithstanding the fact that he might continue to pay regular assessments and lodge dues and the Grand Lodge may have known of his entry into such service.

Attached to the beneficiary certificate, issued to the insured member, appears the following:

"This beneficiary certificate is issued and accepted upon the express consent of the member that in the event he engage in military, naval, submarine, or arial service in time of war, without first obtaining a permit signed by the Grand Master Workman and Grand Recorder, and availing himself of one of the options adopted by the advisory board of said Grand Lodge at its meeting held in September 1, 1917 (numbered one, two or three) the amount payable upon this beneficiary certificate in the event of his death during such service shall be the reserve actually maintained by the Grand Lodge in respect to this beneficiary certificate."

On June 23, 1918, the insured through the selective service law became a private in Company B, 313th Engineers, of our army, while at war with Germany. He went to France with his company. On July 29, 1918, Mr. Kiland (apparently a local officer of the order) wrote the plaintiff, as follows:

"I am in receipt of money order from you for \$2.92 being for assessment No. 6 and lodge dues. This will serve as a receipt. Being that Henry is in the service he will have to sign the inclosed application for war permit, which they require to hold. As I do not know his address, I wish that you would send it to him and have him sign it and return to us as soon as possible."

The insured did not present nor sign the application for a war permit. The extra war premium was not paid.

On October 8, 1918, the insured, while in

France in a hospital under the control of our government, afflicted with influenza, died, without ever having been in the zone of hostilities. Up to the time of his death all regular and other assessments and dues upon his insurance certificate and due the lodge had been paid. On November 11, 1918, the advisory board of the Grand Lodge adopted a resolution which provided that the board recommended to the finance committee the allowance of all claims in behalf of members in the service who had not received war permits upon the basis of 20 per cent. under option 2.

The plaintiff duly submitted proofs of the insured's death, and demanded payment of \$1,000. The defendant offered to pay \$200 in settlement of the policy, and also judgment in such amount with costs. The plaintiff rejected the offer. Pursuant to an order of the trial court without findings, judgment for the full amount of the policy was entered. The defendant has appealed therefrom.

Decisions.

The sole legal question involved in this case is whether the insured at the time of his death was subject, concerning his insurance contract, to the regulations of defendant restricting and concerning liability upon engaging in the occupation of a "soldier in time of war," upon engaging in military service, or upon entering the service of the United States army. The plaintiff contends that three months before the death of the insured the order had notice and knew that the insured was in the service; that it thereafter received payment of assessments and lodge dues of the insured, and thereby waived the rules and regulations upon which it relies, and is estopped from urging the same; that under the regulations providing for a war permit and the payment of an additional war premium the order made provisions for the signing of an application upon a blank to be furnished by it, and that thereunder it was incumbent upon the order to establish that an opportunity was accorded to the insured to make such application while the order continued to receive the payment of the insured's regular assessments and dues; that the record does not disclose that the death of the insured was occasioned by any increase of hazard through his entrance into military service or being a soldier in time of war; and that, pursuant to the decisions of this court in *Myli v. American Life Insurance Co.*, 175 N. W. 631, 11 A. L. R. 1097, and *Gorder v. Lincoln National Life Insurance Co.*, 180 N. W. 514, 11 A. L. R. 1080, the plaintiff is entitled to recover the entire amount of the insurance.

[1, 2] When the insured, while a civilian, became a member of the order with beneficial insurance, there was then in force the rules of the order concerning the options concerning which he agreed, and notice whereof

was attached to the beneficial certificate issued to him. This regulation, accepted by the insured, provided that if he should enter the service of the United States army or should engage in military service he could continue his entire insurance in force by the payment of an additional war premium of \$50 and securing a war permit, or in force to the extent of 20 per cent. of the face thereof, upon securing a war permit only. The validity of that rule on grounds of public policy or otherwise is not attacked. It formed a part of the insurance contract. We are of the opinion that no acts of waiver nor such as to create an estoppel are shown. The order knew that the insured was in the service; it sent to his father, the beneficiary, a blank application for a war permit, with the request that it be sent to the insured for signature and return as soon as possible, the order stating that it did not know the address of the insured. The father, as the record shows, did pay one assessment and lodge dues for the insured; the stipulated facts do not show that the insured paid any of such assessments or lodge dues after he entered the service. The necessity of a war permit has been voluntarily waived by the order. The failure of the order to demand or secure from the insured direct the payment of the extra war premium, and this application for a war permit, did not operate to make option one effective, in the absence of express acts of waiver. Neither the insured nor his father, the beneficiary, made any attempt to exercise option 1. The assessments and lodge dues were paid so as to invoke and make applicable option 2. The order has not attempted to claim or enforce a forfeiture of the policy. On the contrary, they assert a continuance of the policy under the limited liability of option 2. The knowledge of the order that the insured was in the service, and its continued acceptance of the assessments and lodge dues, operated, therefore, neither as a waiver or an estoppel. See *Huntington v. Reserve Assoc. (Wis.)* 181 N. W. 819; *Miller v. Bankers' Life Assoc.*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378. The limited liability under the rules of the order therefore applies, unless the provisions concerned, upon interpretation and construction, establish as grounds for the limitation causation, and not status.

In *Myli v. American Life Insurance Co.*, supra, where the policy provided that if, within five years from date, the death of the insured shall occur while engaged in military or naval service in time of war, the company's liability shall be limited, etc. This court held, upon construction of other provisions of the policy, that such provision did not exempt from liability where the death of the insured was not occasioned by extra hazard incident to military or naval service; further, that, where status or occupation are not clearly the basis for exemption from

liability, and where the language employed indicates a desire to rely only against an extra hazard, the policy will be construed to avoid forfeiture of the insurance. The court in such opinion further stated that if the provision of the insurance policy in question had stated:

"If within five years from date the insured shall enlist or become inducted into the military or naval service without having obtained a permit therefor, etc., then status would clearly have been a test."

In *Gorder v. Lincoln National Life Ins. Co.*, supra, where the insured was required to obtain permission from the insurer to engage in military or naval service in time of war and to pay an extra premium, and, upon failure so to demand, and in the event of death of the insured in consequence of such service, there was a stipulated limitation of liability not greater than the legal reserve on the policy, this court recently held that the provision concerned limited the liability of the company only where death occurred in consequence of military or naval service. In other words, the character of the service, again, not the status, was the test. Those cases have quite fully discussed the test of status or causation. In some recent cases status has been recognized as the test of limited liability as follows: Where the insured shall die while serving in any branch of the United States army or navy (*McQueen v. Woodman* [S. C.] 106 S. E. 32); if the insured shall engage in the occupation of a soldier in the regular army in time of war (*Huntington v. Reserve Assoc.* [Wis.] 181 N. W. 819); if insured shall engage in military or naval service in time of war (*Bradshaw v. Insurance Co.*, 107 Kan. 681, 193 Pac. 332, 11 A. L. R. 1091); where insurance policy excepts military and naval service in time of war (*Ruddock v. Insurance Co.*, 209 Mich. 638, 177 N. W. 242); if insured shall engage in military or naval service in time of war (*Field v. Indemnity Co.* [Tex. Civ. App.] 227 S. W. 530); where policy exempts death while in the service of the army or the navy of the government in time of war (*Miller v. Life Association*, 138 Ark. 442, 212 S. W. 310, 7 A. L. R. 378). But, see *Long v. Insurance Co.* (Mo. App.) 225 S. W. 106. Do the provisions applicable to the insurance contract involved establish status as a test? We are of the opinion that the provisions "engaged in military service in time of war," "engage in the occupation of a soldier in time of war," and "enter the service of our United States army" fixed and were intended to establish the status of the insured, and not the character of the service, as the test of the restriction of liability. We are unable to discover any provisions that indicate the contrary. The judgment accordingly is reversed, with directions to enter judgment for the plaintiff as offered by the defendant.

The defendant will recover costs of this court.

ROBINSON, C. J., and ENGLERT and COFFEY, District Judges, concur.

CHRISTIANSON and BIRDZELL, JJ., disqualified, did not participate; ENGLERT and COFFEY, District Judges, sitting in their stead.

GRACE, J. (dissenting). This action is one to recover on a life insurance policy. The trial was to the court upon stipulated facts. On the 6th day of April, 1918, the defendant, a fraternal benefit association, issued its policy, in the sum of \$1,000 on the life of the insured, payable at death to his father, the plaintiff. Insured was 21 years of age and unmarried.

We are of the opinion, the judgment should be affirmed, and this principally for three reasons:

Firstly. The following provision in the certificate, relied on by the defendant to avoid liability, is void, as being against public policy, and as tending in some degree to deter enlistments in military service in time of war. The provision is as follows:

"This beneficiary certificate is issued and accepted upon the express consent of the member that in the event he engage in military, naval, submarine, or aerial service in time of war, without first obtaining a permit signed by the Grand Master Workman and Grand Recorder, and availing himself of one of the options adopted by the advisory board of said Grand Lodge at its meeting held on September 1, 1917 (No. 1, 2 or 3), the amount payable upon this beneficiary certificate in the event of his death during such service shall be the reserve actually maintained by the Grand Lodge in respect to this beneficiary certificate."

If, for example, one of military age possess a beneficiary certificate for \$2,000 at the time war was declared by the United States against Germany, and he at that time understood that, if he enlisted in military service without the consent of the insurance company, the certificate would become void, or largely so, it can hardly be doubted that he would in some degree be deterred from enlisting; or, even after the passage of the Selective Service Act, he might for the same reason hesitate to comply with its requirements, knowing, in the circumstances, that his act might void the certificate.

If such, in some degree, should be the effect, it cannot well be denied that such provision is void. It would perhaps be otherwise if the certificate provided that, in the event of his entrance into military service, or in any of the various branches of it mentioned in the provision, a stated sum, over and above the regular assessment, would be charged as additional premium for extra hazard incurred during each year he was in

military service, and that such sum should be and remain a charge against the amount named in the policy; or if there were a provision contained in the certificate that, if this extra premium were not paid within a reasonable time after the termination of the military service, then, in that event, the certificate would be void; or even if it provided that the certificate would be void after service of notice by the defendant on the insured and his beneficiary that, if the extra premiums demanded were not paid within a reasonable time after they became due, as, for instance, within six months, the policy would be of no further effect; but such is not the tenor of the provision we are here considering. Furthermore, it is unreasonable, in that it seeks to make the status of military service, regardless of the increase of hazard, the sole cause for limiting or avoiding liability on its certificate.

In other words, if the insured should enlist in the military service, in the defense of his country, whether there was any increase in hazard or not, by his so doing his certificate of insurance is absolutely void, unless he first gets permission from the insurance company, and pays the extra premium, etc.

Assume, for instance, that in a real estate mortgage there was a provision that, if the mortgagor, a person of military age, should engage in military service in time of war, such act would constitute a default, and be sufficient authority for the mortgagee to foreclose the mortgage. Can any one believe, or reasonably contend, that such a provision would not be against public policy, and for that reason void. We think not. And so we might further illustrate by numberless contracts of different nature, but it would seem unnecessary to do so.

An insurance certificate or policy is nothing but just an ordinary contract. There is no reason why such a provision should be regarded any more favorably in an insurance contract than if it occurred in any other form of contract. The entire contract is to be construed to determine its purpose and effect, and, when so construed in the light of what has above been said, the defendant cannot, on account of the provision above mentioned, avoid its liability.

Secondly. The death of the insured being caused by influenza and not by any increased hazard because of military service, the prohibition contained in the provision is not effective to relieve the defendant of liability.

In the case of *Myll v. American Life Ins. Co.*, 175 N. W. 632, 11 A. L. R. 1097, which was an action to recover on an insurance policy, where the insured died while in military service, not, however, from any extra hazard occasioned thereby, but from the disease of influenza, this court, speaking through Mr. Justice Birdzell, construed the following provision contained in the policy:

"If, within five years from the date hereof, the death of the insured shall occur while engaged in military or naval service in time of war without previously having obtained from the company a permit therefor, the company's liability shall be limited to the cash premiums paid hereon for the three years from date of issuance and thereafter to the legal reserve on this policy."

The identity of meaning between that provision and the one presented for our consideration in the present case is indeed exceedingly marked.

Of the provision under consideration in the *Myll* Case, we said:

"The argument is that the above provisions reduce liability to a return of the premium in this case by reason of the fact that the insured was at the time of his death an enlisted man in the naval service. It is contended that the effect of the provision is to automatically cancel the life insurance stipulated in the policy the moment the policy holder becomes enlisted or inducted into the military or naval service without having previously obtained a permit therefor, and without complying with whatever provisions (not named in the policy) the company might wish to require concerning additional premiums. As against this contention the respondent asserts that it is the evident purpose of the stipulation to provide only against the consequences of extra hazard incident to actual service in connection with hostilities.

"Before the harsh construction in the direction of forfeiture can be supported it must be found to result necessarily from the provisions of the policy. The policy must be read in the light of the obvious purpose of the particular provision, and it must be found that the exemption falls clearly and directly within its terms. It seems clear to us, upon a view of the whole policy and the evident purpose underlying the particular stipulation, that the circumstances of this case do not bring the defendant within the exemption contracted for.

"Reading the whole policy, we deem the intention of its various provisions with regard to the restrictions concerning military or naval service to be clear. The express intention does, in reality, conform to the purpose of the provision as stated in the deposition of an officer, of the company, namely, to except the policy from applying where the insured has come to his death from a hazard connected with military or naval service. In short, the status of the insured is not made the test, but the character of the service. The important words in the clause relied upon and those which signify its correlation with the other provisions hereinbefore referred to are 'while engaged in military or naval service.' These words are descriptive of two forms of hazardous service that are not intended to be covered, and it is only while the insured is engaged in such service that the exemption is applicable. It is idle to say that because one's status is such that he must respond to orders from military or naval authority, he is in military or naval service within such a provision, when in fact there is nothing about his daily activities that

suggests the least physical danger that would enhance an insurance risk."

That language and reasoning is directly applicable to the case now before us. It is idle to say that, because the insured here died in the hospital, from influenza, his death was caused by military service.

Thirdly. The defendant had notice and knew that the insured was in military service, and thereafter it received payment of assessments and lodge dues, with full knowledge of this fact. Hence it waived any defense, if any it had, with reference to the insured entering the prohibited occupation of military service, unless under conditions specified in the foregoing provision. It is therefore estopped to assert that defense.

For the foregoing reasons, the court did not err in refusing to render judgment for the plaintiff for the sum of \$200 as requested by the defendant and appellant, and did not err in ordering judgment for the plaintiff in the sum of \$1145.90.

The judgment appealed from should be affirmed.

EDBERG v. JOHNSON. (No. 22330.)

(Supreme Court of Minnesota. July 8, 1921.)

(Syllabus by the Court.)

1. Municipal corporations $\S$ 705(4) — Motorcycle policeman, pursuing lawbreaker, does not violate Motor Vehicle Act.

A policeman is not chargeable with a violation of the Motor Vehicle Act solely because, while pursuing a lawbreaker to place him under arrest, he operates a motorcycle in a manner prohibited by the act.

2. Statutes $\S$ 181(2), 183 — Legislative intent to determine interpretation; construction resulting in inconvenience or absurdity should be avoided.

The intent of the Legislature determines the interpretation of a statute, though it seems contrary to the letter of the statute. A construction should be avoided which would result in inconvenience or absurdity.

3. Municipal corporations $\S$ 703(4) — "Police patrol wagons," within statute, include motorcycles.

The words "police patrol wagons," as used in Gen. St. 1913, $\S$ 2619, include motorcycles, when operated by policemen in patrolling streets and highways.

4. Municipal corporations $\S$ 705(1) — Care to be observed by peace officer pursuing lawbreaker stated.

A peace officer in pursuit of a lawbreaker is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances.

Appeal from District Court, St. Louis County; W. A. Cant, H. A. Dancer, and Bert Fesler, Judges.

Action by Oscar Edberg against J. A. Johnson. Judgment for plaintiff in the municipal court was, on appeal to the district court, reversed, and case remanded for new trial. From the order, plaintiff appeals. Affirmed.

Andrew Nelson and John Cedergren, both of Duluth, for appellant.

John B. Richards and Bert W. Forbes, both of Duluth, for respondent.

LEES, C. Plaintiff was struck by a motorcycle operated by defendant, and brought this action in the Duluth municipal court for damages for injuries to his person. He recovered a verdict, and from the judgment entered thereon an appeal was taken to the district court, where the judgment was reversed and the case remanded for a new trial. Plaintiff appealed from the order of the district court.

At the time of the accident, defendant was a Duluth traffic policeman and, mounted on the motorcycle, was pursuing the driver of an automobile who was exceeding the speed limit. In trying to overtake the offender to put him under arrest, the officer drove faster than the statute permits. Plaintiff was crossing the street and was within a few feet of the curb when the automobile passed behind him. Defendant attempted to come alongside the automobile by running to the right of it. Plaintiff was unaware of the approach of the motorcycle before he was struck. No signals were given and it carried no light. It was dusk, the hour being about 8:30 p. m.

[1] The trial court instructed the jury in substance that the Motor Vehicle Act (Gen. St. 1913, $\S$ 2619-2648) was applicable to such a case, and, if defendant disregarded the speed regulations of the act, he was presumptively guilty of negligence. In reversing the judgment, the judges of the district court of St. Louis county, before whom the appeal was heard, expressed their opinion as follows:

"A policeman, operating a motorcycle in the performance of his duties as a policeman, is not chargeable with violation of the motor vehicle act. Sections 2619-2648, G. S. 1913. In such a case a motorcycle should be held to be a police patrol wagon. * * * A 'speeder' cannot be arrested ordinarily without 'speeding' by the officer making the arrest."

Our views coincide with theirs. It would be an affront to the intelligence of the Legislature to hold that, in enacting a statute designed to suppress "speeding," it intended to restrict peace officers to the prescribed speed limits when in pursuit of violators of the statute.

In *Hubert v. Granzow*, 131 Minn. 361, 155 N. W. 204, Ann. Cas. 1917D, 563, this court held that, as a general rule, regulations governing the rate of speed on public streets do not apply to fire apparatus on the way to a fire. The reasons for the rule were suggested in *State v. Shepard*, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305, and *Warren v. Mendonhall*, 77 Minn. 145, 79 N. W. 661. The same reasons apply with equal force to vehicles used by police officers. An officer so engaged is performing a public duty. He cannot successfully perform it unless he is accorded privileges not possessed by private citizens. He would be seriously hampered if statutory provisions limiting the speed of motor vehicles applied to him while in pursuit of a fleeing criminal. For reasons of public policy, at least one court has felt free to hold that such provisions have no application even though the statute contained no exceptions in favor of peace officers. *State v. Gorham*, 110 Wash. 330, 188 Pac. 457, 9 A. L. R. 365. In another jurisdiction, a contrary view was expressed. *Keevil v. Ponsford* (Tex. Civ. App.) 173 S. W. 518. And in still another it was held that in case of military necessity a statute limiting the speed of motor vehicles should be held inapplicable. *State v. Burton*, 41 R. I. 303, 103 Atl. 962, L. R. A. 1918F, 559. Plaintiff contends that the language of our statute forbids the adoption of the rule stated in *State v. Gorham*, supra. The statute reads thus:

"The term 'motor vehicle,' as used in this act, except where otherwise expressly provided, shall include all vehicles propelled by any other than muscular power, except traction engines, road rollers, fire wagons and engines, police patrol wagons, ambulances, and such other vehicles as run only upon rails or tracks." Section 2619, G. S. 1913.

[2] The contention is that the language employed limits police officers to the use of patrol wagons whenever, in the discharge of their duties, it becomes necessary to exceed the prescribed speed limits and that a motorcycle is not a patrol wagon. We are not impressed by the argument advanced to support this contention. The statute is not worded as explicitly as it might have been to express the intent the Legislature undoubtedly had in mind. Strictly speaking, a motorcycle operated by a policeman patrolling the streets is not a police patrol wagon. If the letter of the statute rather than its spirit is to control in its interpretation, the municipal court was right and the district court was wrong. The applicable rules of construction are too well known to justify more than a mere reference to them. The intent of the Legislature controls, though it seems contrary to the letter of the statute, and a construction should be avoided which would result in inconvenience or absurdity. *Dun, Dig.* 8947. To propel a motor vehicle

at an unlawful rate of speed is a misdemeanor. When the Penal Code was enacted, the following provision was inserted therein:

"The rule that a penal statute is to be strictly construed does not apply to this code or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law." Penal Code, § 9, in substance now found in section 8468, G. S. 1913.

To secure the safety of the public is one of the principal objects of the statute. A criminal, seeking to get away from the scene of his crime, commonly travels in an automobile driven at a high rate of speed. There are reckless drivers of automobiles, who pay no attention to the speed laws. Both classes of offenders must be overtaken by the officers of the law, if they are to be placed under arrest. As an aid to officers on patrol duty no vehicle more serviceable than the motorcycle has as yet been invented. Of course it is possible for such officers to use automobiles, instead of motorcycles; but their use would be equally if not more dangerous to others if driven at a high rate of speed.

Whether the words "police patrol wagons," as used in this statute, include motorcycles, may be open to argument. This court has held, construing the exemption statutes, that a buggy is a wagon, *Allen v. Coates*, 29 Minn. 46, 11 N. W. 182; that a carriage is a wagon, *Kimball v. Jones*, 41 Minn. 318, 43 N. W. 74; and that a bicycle is not a wagon, *Shadewald v. Phillips*, 72 Minn. 520, 75 N. W. 717. Other courts have held that the word "wagon" is a generic term, and includes almost any vehicle, whether used for the transportation of persons or property. *Luce v. Hassam*, 76 Vt. 450, 58 Atl. 725; *Fifth Ave. Coach Co. v. City of N. Y.*, 58 Misc. Rep. 401, 111 N. Y. Supp. 759-776; 4 Words and Phrases, Second Series, p. 1221.

[3] Taking into consideration the objects sought to be attained by the statute, the general use of motorcycles in patrolling streets and highways when the statute was enacted, as well as at the present time, and the evident purpose of the Legislature to except from the operation of the statute vehicles employed as instrumentalities of municipal fire and police departments, we hold that motorcycles so employed come within the exceptions made by the statute.

[4] We do not hold that an officer, when in pursuit of a lawbreaker, is under no obligation to exercise a reasonable degree of care to avoid injury to others who may be on the public roads and streets. What we do hold is that, when so engaged, he is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicle Act. His conduct is to be examined and tested by another standard. He is required to observe the care which a reason-

ably prudent man would exercise in the discharge of official duties of a like nature under like circumstances.

Order affirmed.

In re MOHN. (No. 20299.)

(Supreme Court of Minnesota. July 8, 1921.)

(Syllabus by the Court.)

Attorney and client § 53(2)—Evidence in disbarment proceedings held insufficient to sustain charges of misconduct.

The evidence submitted is not sufficient to sustain the charges of misconduct made against the respondent, an attorney at law.

Brown, C. J., dissenting.

Appeal from Board of Law Examiners.

Proceedings for the removal of Thomas Mohn from the position and office of attorney at law. Charges not sustained.

H. V. Mercer & Co., of Minneapolis, for Board of Law Examiners.

Albert Schaller, of St. Paul, A. J. Rockne, of Zumbrota, W. H. Gillett, of Hastings, and F. M. Wilson, of Red Wing, for respondent.

HALLAM, J. This is an application for the removal of Thomas Mohn from his office as attorney at law. The charge is that some time during the year 1913 he affixed his signature as attesting witness to a codicil to the will of Mrs. Emma M. Hack, after the death of Mrs. Hack, and thereafter used the codicil as so attested in procuring the settlement of a lawsuit. The charge was made by a witness on the stand in a lawsuit in November, 1915. The petition in this proceeding was filed in January, 1917, and the court promptly ordered a reference for the taking of testimony and appointed attorneys to prosecute the case. After the lapse of more than 4 years the matter was presented to this court.

Respondent was admitted to the bar of Minnesota in 1897, has practiced in Goodhue county ever since, and in Red Wing since 1905. He was twice elected county attorney of Goodhue county and was holding that office at the time of the alleged misconduct. It is conceded that he is a capable lawyer, has enjoyed a large practice, and save for this charge, has borne a good reputation.

John Hack has for many years been a citizen of Red Wing and a man of substantial fortune. About 30 years ago, then a man of about 65, he married Emma M. Gallasch, a woman about half his age. Soon thereafter he became blind. In the course of years a large part of the family property found its way into the name of Mrs. Hack and on her death on April 24, 1913, a substantial part of the property which had

belonged to Mrs. Hack was found in the name or possession of Eugenia Gallasch, a sister of Mrs. Hack. The only testamentary remembrance by Mrs. Hack of her husband was that in a certain contingency, her father would "take well care" of him "and give him all the comforts he needs in his natural life and pay all his personal expenses."

In August, 1902, Mrs. Hack prepared a will and one day stepped into a store in Red Wing and signed it and asked two men of her acquaintance there present to sign as witnesses, and they did so. This will gave all her estate to her sister Eugenia, and her brother, Adolph G. Gallasch. In 1911, her brother died. Under date of September 3, 1912, Mrs. Hack wrote, in her own handwriting, a second will, complete in itself, but reciting that "this writing be added to my as in part to the will I made on the second day of August, 1902." This will is spoken of in these proceedings as the "codicil" and is the document respondent is charged with mutilating.

The so-called codicil consists of three pages. The writing on the first and second completely fills the pages. The second page closes with the words "This is my last will and only a codicil to my previous will of August 2, 1902," and is signed, "Emma M. Hack." The third page contains in the middle of the page matter apparently an afterthought and is signed at the end but near the middle of the page, "Emma M. Hack." Below the signature is written:

"This is my last will composed of three papers and my name.

"Signed by myself (Maggie Stewart is witness)

"Thomas Mohn "

"Emma M. Hack, Red Wing, Minn.

"Thomas Mohn.

"Maggie Stewart."

Maggie Stewart was a servant in the Hack home. It is conceded that she signed as a witness at or about the time Mrs. Hack signed the document, and that respondent did not sign and was not present at that time. It is conceded that he did thereafter affix his signature. Petitioner claims that he did so after Mrs. Hack's death. Respondent that he did so during Mrs. Hack's lifetime and in her presence and at her request. This is the question in the case.

The 1902 will was presented for probate by Miss Gallasch in May, 1913. It was contested by the husband of deceased. It was undoubtedly intended by Mrs. Hack as her will but probate was refused because of some alleged defect in the execution. An appeal was taken to the district court. Respondent was attorney for Miss Gallasch and he had taken the case on a contingent fee. After the appeal was taken, this codicil was produced by respondent and was used in the interest of Miss Gallasch in negotiations which fol-

lowed for a settlement of the case. The case was settled before trial in the district court. Later respondent and Miss Gallasch fell out over the matter of respondent's fees and matters in connection with the settlement. John Hack commenced an action to set aside the settlement. Several other actions between the Hacks and Miss Gallasch followed in rapid succession. It was in one of these actions that Miss Gallasch, testifying about 2 years after the codicil was first produced, made the charge on which this proceeding is based.

The testimony of Miss Gallasch and of Maggie Stewart is to the effect that they found this codicil in a safe at the Hack home a short time after the will had been found and taken to respondent, that these two and Hedvig Federle, a young lady relative of Miss Gallasch, who had studied law, together took the codicil to respondent, that he looked it over and told them that it was of no value because it had but one witness. Miss Gallasch testified that she did not examine the codicil but Maggie Stewart testified that she did, and that hers was the only attesting signature at that time. Maggie Stewart testified that the codicil produced by the three ladies in respondent's office was the same codicil which was afterwards produced by respondent with his signature affixed. Respondent's story is that Miss Gallasch and Miss Federle did bring to him a document purporting to be a codicil executed in the name of Mrs. Hack, but that it was not the same document as now bears his signature; that the signature of Mrs. Hack to the codicil brought to his office had been affixed by Miss Gallasch; that she stated that she had affixed it at the direction of Mrs. Hack; and that it was witnessed by Maggie Stewart and no one else. He testified that the codicil signed by him had the following history: That on February 25, 1913, he was called to the home of Mrs. Hack to give legal advice; that while he was there, she produced this codicil, which was signed by Mrs. Hack and already witnessed by Maggie Stewart and asked him to sign it as a witness; that he advised her to have a new will prepared and she said she would, but on her insistence he did sign the codicil as a witness; that after the will had been presented for probate and disallowed, this codicil was found by his brother and law partner, Albert Mohn, in a bank book of deceased and among some of her papers in a vault of a Red Wing bank.

The testimony is in direct conflict. For the petitioner there is the testimony of Miss Gallasch and Maggie Stewart. Miss Gallasch's testimony is much discredited. We need only mention one or two of many impeaching circumstances. It is in evidence that Judge Converse, in a memorandum attached to a decision in one of the cases tried, said that Miss Gallasch's testimony was of little assistance to him save as it was cor-

roborated by other credible evidence. Judge Erickson, probate judge of Goodhue county, expressed himself similarly after a hearing in which she testified. For example, he said that on one occasion she asked his leave to make an important insertion of figures in an inventory which she had previously filed in his court and after considerable discussion, she made the insertion, and that afterwards while on the stand as a witness before him, denied that she had made the insertion or that she had ever asked to do so and said that she thought Mr. Mohn had inserted the figures. There is also testimony of a witness, Mr. Fox, a reputable man, that he overheard a quarrel between respondent and Miss Gallasch in respondent's office over a demand of Miss Gallasch for the return of a portion of a fee he had charged, and that in that controversy she said, "If you don't give us some money, we will fix you," and when he asked, "What can you do?" she said, "Two women can do a good deal against one man." We are not disposed to accord to Miss Gallasch's testimony any substantial probative value.

The testimony of Maggie Stewart is positive and generally consistent. It is, however, impeached by the testimony of Mr. Pidgeon, one of the attorneys for Mr. Hack in the will contest. He said that after the production of the codicil signed by respondent, he made investigation in regard to it, and to that end sought out Maggie Stewart, and that she, knowing the purpose for which he inquired, told him the codicil was all right. She denied this, but Mr. Pidgeon could hardly be mistaken.

In another part of Mr. Pidgeon's testimony, he said she besought him to bring about a settlement and seemed concerned about it, and that he then asked her about the codicil, and that "she said, that is all right, passing it off in that way." He says that he did not interrogate her about the witnesses to the codicil and that she said nothing about it when the names of the witnesses were written.

Against this testimony is the testimony of respondent, that of his brother as to the finding of the codicil and the testimony of Hedvig Federle. This lady testified to the finding of a codicil by Miss Gallasch and that she and Miss Gallasch took it to respondent's office and that Maggie Stewart was not present. Her testimony is not always frank and sometimes evasive but on being shown a photograph of the codicil in controversy, she testified very positively that it was not the same codicil that she and Miss Gallasch had taken to respondent's office and she pointed out provisions in the photographic copy exhibited to her which she said she was positive were not in the codicil she had seen.

We have had some difficulty in reconciling respondent's conduct with his claims.

When he learned that this charge was made against him he sent to a reputable firm of attorneys in Red Wing, copy of alleged charges which he said he proposed to prefer against them. There is no suggestion that the retaliatory charges were well founded.

He sent for Maggie Stewart on several occasions on pretexts, some apparently subterfuges and his conferences with her were not such as to inspire confidence in his cause.

On one occasion a detective played a discreditable part, his object apparently being to help respondent and to foment trouble between Miss Gallasch and Maggie Stewart.

After this charge had been made against him, he refunded \$5,000 of the fee he had received from Miss Gallasch. He explains this on the theory that the settlement which he negotiated did not settle the controversy and he realized that there was some ground for the contention that he had not fully performed the contract under which the fee was paid.

Respondent was asked to appear and did appear before a committee of the State Bar Association and told his story. He did not there mention the existence of a second codicil. It should, in justice, he said, however, that he had before that time mentioned the second codicil to one of the attorneys engaged in the Hack family litigation.

On the other hand we are troubled to find any sufficient motive for so grave a crime. The codicil gave nothing to respondent's client that was not given her by the will of deceased. The will had been disallowed by the probate court, but from the record before us it seems hardly possible that the decision could have been sustained on appeal. The probate judge seemed overcome by the apparent want of equity in the will.

If the will was invalid it was because of defects in attestation which applied with equal force to the codicil. It is true the codicil seems to have been used in bringing about a settlement of the will contest but of so little real avail would it have been in court that it would at least seem strange that an experienced lawyer would deliberately mutilate or alter it, knowing all the time that three persons, none intimates, and two of them nearly total strangers to him, would have full knowledge of his act.

The matter is an important one both to respondent and to the public. We have considered the evidence with great care and we have arrived at the conclusion that it is not sufficient to warrant us in sustaining the charges made in the petition.

BROWN, C. J. (dissenting). The evidence shows that respondent knowingly made use of the invalid or defectively executed will to effect a settlement of the estate of Mrs. Hack favorable to his client and his own contingent fee. He should receive the pun-

ishment due for his misconduct. The veracity and intelligence of the witness Stewart in my judgment conclusively appear; all doubts on that score being completely removed by the conduct of respondent and those in his service in attempting by means strongly to be censured to discredit her as a witness. *State v. Eitenberg*, 145 Minn. 39, 176 N. W. 171.

I therefore dissent.

PETERS v. RUEBENHAGEN et al. (No. 22357.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

1. Brokers $\S$ 46—Where broker's agent has no exclusive right, owner may sell without being liable for commissions.

Where a real estate broker has no exclusive right of sale, the owner of the land is not precluded from the right of sale to any person who may present himself, and, in case sale is made before the broker presents a purchaser, is not liable to the broker for a commission on a sale subsequently made by him.

2. Brokers $\S$ 86(1)—Evidence sustaining finding that owner rejected prior sale by broker without cause.

The evidence sustains the verdict of the jury to the effect that the sale made by the broker was reported to the landowner prior to the sale by him and rejected without cause.

Appeal from District Court, Sibley County; C. M. Tift, Judge.

Action by Henry H. Peters against Ferdinand Ruebenhagen and others. Verdict for plaintiff. From a denial of a new trial, defendants appeal. Affirmed.

Geo. A. & C. H. MacKenzie, of Gaylord, for appellants.

T. Otto Streissguth and Mueller & Streissguth, all of New Ulm, for respondent.

BROWN, C. J. Action to recover a commission alleged to be due plaintiff for services rendered defendants in the sale of certain land owned and held by them for sale. Plaintiff had a verdict, and defendants appealed from an order denying a new trial.

Defendants authorized plaintiff to procure a purchaser for their lands, agreeing to pay him a commission, if successful. Of this the record presents no dispute. Plaintiff claims that he thereafter found and presented to defendants a purchaser ready, able, and willing to buy the lands on terms named by defendants; that defendants refused to accept him, and immediately thereafter sold the land to a third person for the sum of \$41,715. Plaintiff further claims that for

his services in the matter he was to receive all the land sold for over and above \$41,000, the selling price named by defendants to plaintiff, and that since defendants wrongfully rejected the purchaser presented by him and sold the land to the third person for \$715 above the named purchase price plaintiff is entitled to recover that amount.

Defendants conceded the authority of plaintiff to effect a sale of the land, and that, if successful, he would be entitled to compensation for his services. But they urged in defense that he had no exclusive right of sale, and that by the authority given him they were not precluded from selling the land, should a purchaser come to them and offer to buy the same. They further claim that a purchaser did present himself, and that defendants sold the land to him before plaintiff reported the sale to the person he subsequently presented as a purchaser. In response to this plaintiff replied that the purchaser found by him was presented to defendants before the sale to the third person, and even before the initiation of negotiations looking to such sale. On this feature of the case there was a sharp conflict in the evidence.

[1, 2] The questions presented do not require extended discussion. The principal point involved ranges around the question whether plaintiff presented the purchaser procured by him before defendants made the sale to the third person. There was, in fact, no exclusive right of sale in plaintiff, and defendants were at liberty to make a sale to any one who might come forward with an offer to buy. 1 Dunnell's Dig. 1141. But if plaintiff presented his purchaser before a sale was made by them, as he claims, he is entitled to the compensation agreed upon. Of this no controversy arises; the point is not disputed. The question, then, as to the time plaintiff presented his purchaser, whether before or after the sale by defendants, became the pivotal issue on the trial. It was submitted to the jury under clear instructions, and was answered in plaintiff's favor. The evidence on the point is conflicting. If that offered by plaintiff expressed the truth, a question for the jury, plaintiff's right of recovery is clear. Our examination of the record presents no reason for disapproving the verdict of the jury, and it must stand.

The further contention of defendants that plaintiff was not entitled to the excess over \$41,000, for which the sale was made, but to something less, measured by the acreage of the land, is not sustained by the record; at least, the evidence made the question of the amount of plaintiff's compensation one of fact for the jury.

Order affirmed.

FITZPATRICK v. INTERNATIONAL TYPOGRAPHICAL UNION OF NORTH AMERICA. (No. 22334.)

(Supreme Court of Minnesota. July 8, 1921.)

(Syllabus by the Court.)

Associations — 20(4)—Service on member of trade union held to confer jurisdiction.

The defendant union, an unincorporated voluntary association, is a trade union, having the interests and welfare of its members as an object. In addition it provides through dues received a union printers' home for infirm and invalid members, and old age pensions, and death benefits. The cause of action alleged arises from a wrongful refusal to admit the defendant to the home. Under the showing made, as set forth in the opinion, jurisdiction was acquired by service on a member of the defendant, as is provided by Gen. St. 1913, § 7689, for service when two or more do business as associates under a common name.

Appeal from District Court, Ramsey County; Jas. C. Michael, Judge.

Action by William D. Fitzpatrick against the International Typographical Union of North America. From an order vacating a service of summons, plaintiff appeals. Reversed.

O. H. O'Neill, of St. Paul, for appellant.
Morphy, Bradford & Cummins, of St. Paul, for respondent.

DIBELL, J. The plaintiff appeals from the order of the Ramsey district court vacating the service of summons.

The defendant International Typographical Union of North America is a voluntary unincorporated association having a large membership throughout the United States and Canada. It is governed by a constitution and by-laws. It has a branch or subordinate union known as the St. Paul Typographical Union No. 30. The plaintiff for 20 years has been a member in good standing of the defendant and of the subordinate lodge.

Since 1892 the defendant has maintained at Colorado Springs, Colo., a home for invalid and infirm members. On June 1, 1915, the plaintiff became afflicted with locomotor ataxia and since has been infirm and an invalid. On August 1, 1915, he applied for admission to the home. The defendant, according to the complaint, wrongfully refused him admission. This action is for damages for such refusal.

The defendant has no offices or officers in Minnesota. It has officers and offices in Indianapolis. Service was made in Minnesota on Judson D. Trimmer, a member of the union. The question is whether such service conferred jurisdiction. The applicable statute is G. S. 1913, § 7689, which is as follows:

"When two or more persons transact business as associates and under a common name, whether such name comprise the names of such persons or not, they may be sued by such common name, and the summons may be served on one or more of them. The judgment in such case shall bind the joint property of all the associates, the same as though all had been named as defendants."

There are two leading cases in Minnesota, one or the other of which controls. The first to which we call attention is *St. Paul Typothetæ v. St. Paul Bookbinder's Union No. 37*, 94 Minn. 351, 102 N. W. 725, 3 Ann. Cas. 695. The defendant was an unincorporated voluntary association. It was organized to promote the interests of its members. It had no business functions. Whether it could be sued in its association name was one question. After referring to the common-law rule that such an association is not a legal entity apart from its members the court said:

"This rule applies to the union, unless it comes within the scope of the statute [G. S. 1913, § 7689] providing for actions against persons doing business under a common name. The statute, it is clear, was not intended to include associations of this character. Its purpose was to authorize the courts to take jurisdiction over unincorporated associations engaged under a common name in some sort of business in which property is bought and sold, debts contracted—concerns owning and holding property, and incurring pecuniary liability—and not associations of the character of labor unions, having no property, engaged in no business occupation, in a proper sense of the term, and whose only function is the promotion of the interests and welfare of the persons who are members thereof."

And in referring to this general class of organizations the court said:

"Such organizations are properly divided into two classes, viz. those organized for the purpose of conducting some business enterprise, and those whose purpose is solely the promotion of the interests and welfare of their members, unaccompanied by any business functions. As to this class, it would seem that the law of principal and agent should apply."

The other case is *Taylor v. Order of Railway Conductors*, 89 Minn. 222, 94 N. W. 684. There the question arose on an appeal from an order denying a motion to set aside the service of summons. The defendant was a voluntary association, composed solely of men engaged as conductors on steam service railroads. It was a fraternal organization and had local divisions in several localities. Its mutual benefit department was a distinct organization, except that it was composed of men who when they became members of the benefit department were also members of the order. Moneys of the order and the benefit department were kept separate. The benefit department had no agents or representatives in Minnesota. It had in Iowa

where its business was carried on. It was held that service on a member, one Kelly, was good service under the statute which we have quoted, and gave jurisdiction. The court said:

"It was further urged upon the argument here that the facts that the defendant had no office in this state, and that Kelly was not one of its agents or officers, did not authorize the service in any other way than as required upon nonresident corporations. There would be force in this view but for the plain terms of the statute we have quoted above which clearly authorizes service upon an associate of any organization doing business under a common name, without any restriction dependent upon the place of its business, the location of its offices, or other conditions, save that the service must be made as therein authorized. There is no claim of fraud in making the service, and no denial that Kelly, the person served, was a member of defendant's association, and was within the state at the time. It was admitted in the brief of counsel that the Order of Railway Conductors embraced practically all the conductors in the country, many of whom must have been within this state at the time of the service. But at least one of them was; hence we must hold that he was a proper person upon whom to make such service, and any difficulties that arise from the change of members or from the trouble of enforcing any proper judgment that may be obtained after hearing are incidents of the defendant's voluntary action in the conduct of its business, and presumably must have been contemplated by it."

In referring to this case in the *St. Paul Typothetæ Case* the court said:

"The associations there before the court were engaged in the business of insuring their members, a distinct and well established * * * business."

Coming to the character of the defendant organization as determined by its constitution and by-laws, we find that its activities embrace many having no necessary connection with its activities as a union and quite apart from "the promotion of the interests and welfare of their members, unaccompanied by any business functions." The constitution provides for dues. It provides for a union printers' home. It provides for an old age pension fund. It provides for death benefits. It provides for admission to the printers' home in proper cases. The home is in the name of a distinct corporation. The defendant functions not only as a labor union, having the welfare of its members as trade unionists in view, but as an organization which through dues coming from its members gives old age pensions, death benefits, and a home for eligible infirm and invalid members. The trial court was of the opinion that the case came within the *Typothetæ Case* and that jurisdiction was not acquired. We are compelled to the conclusion that it comes more nearly within the

(184 N.W.)

Order of Railway Conductors' Case; and that jurisdiction of the defendant for the particular cause of action alleged was acquired. We decide no other question than that of jurisdiction. Whether the plaintiff can get anywhere with his case does not interest us; or whether his judgment, if he gets one, will be of use. It will be noted that in the *Typothetæ* Case the question whether the defendants bookbinders' union was an organization liable as an entity was determined at the trial, with no previous attack on the court's jurisdiction; and the statute quoted was considered in its bearing on the substantive right of recovery.

Order reversed.

GRIEBE v. HAGEN. (No. 22331.)

(Supreme Court of Minnesota. July 8, 1921.)

(*Syllabus by the Court.*)

Landlord and tenant — 154(3, 4), 159(2) — Measure of damages for landlord's failure to improve or repair is diminished rental value.

The measure of general damages for the failure of the landlord to improve or repair rented premises is diminished rental value. Special damages, if recovered, must be alleged and proved. In this case special damages were not alleged and the court properly submitted diminished rental value as the measure of damages. The verdict sustains the finding both as to the right of recovery and the amount.

Appeal from District Court, McLeod County; C. M. Tift, Judge.

Action by William A. Griebel against Henry C. Hagen. Verdict for plaintiff, and from a denial of a new trial, defendant appeals. Affirmed.

Wm. O. McNelly, of Hutchinson, for appellant.

F. P. Allen, of Glencoe, for respondent.

DIBELL, J. This is an action to recover rent accruing on a farm lease. There was a verdict for substantially the amount claimed. The defendant appeals from the order denying his motion for a new trial.

The amount of the accrued rent was not in dispute. The defendant counterclaimed for damages resulting from the failure of the plaintiff to build a machine shed, whereby he suffered damages in the sum of \$300; for his failure to furnish a suitable house or room for his cream separator, whereby he suffered damage in the sum of \$50; for his failure to repair the house, whereby he suffered damages in the sum of \$100; and for his failure to sow 40 acres in clover, whereby he suffered damages in the sum of \$250. These items aggregated \$700. The defendant alleged that

by reason of the specified defaults of the plaintiff the rental value of the premises was diminished \$700. This was the amount which he claimed in his counterclaim. He offered evidence as to the diminished rental value. The fact of a default, except in a minor particular, was denied, and the amount of damages was in issue.

No special damages were pleaded. If recovered they must be pleaded and proved. *Dunnell's Minn. Dig.* and 1916 Supp. § 2581. The proper measure of general damages for a failure to make improvements or to repair is that stated in the defendant's counterclaim—diminished rental value. *Long v. Gierlet*, 57 Minn. 278, 59 N. W. 194; *Warren v. Hodges*, 137 Minn. 389, 163 N. W. 739. The question of the recovery of special damages in particular cases recently had thorough consideration in *Force Bros. v. Gottwald*, 183 N. W. 356. The court submitted the rental value measure without objection or subsequent complaint. The finding of the jury is sustained.

Order affirmed.

HOMAN v. BARBER. (No. 22376.)

(Supreme Court of Minnesota. July 8, 1921.)

(*Syllabus by the Court.*)

Pleading — 345(1), 350(3) — Judgment for commissions on sale of land held erroneous under pleadings; on motion for judgment on pleadings they are to be construed favorably to party against whom judgment asked.

The complaint alleged that the plaintiff secured a purchaser for the defendant's land at a fixed sale price and thereby earned an agreed commission of \$1 per acre. The defendant claimed that the sale price fixed was net to him and that the plaintiff was to have as his commission all in excess; that the plaintiff sent a purchaser to whom he sold at the price fixed; that the purchaser would give no more; but that he induced the purchaser to promise to pay the plaintiff a commission of \$1 per acre. On a motion for judgment on the pleadings they are to be construed favorably to the party against whom judgment is asked; and it is held that it was error to order judgment on the pleadings in favor of the plaintiff.

Appeal from District Court, Yellow Medicine County; R. T. Daly, Judge.

Action by Royce G. Homan against Arthur E. Barber. From a judgment for plaintiff on the pleadings, defendant appeals. Reversed.

Bert O. Loe, of Granite Falls, for appellant.

C. A. Fosnes, of Montevideo, for respondent.

DIBELL, J. The defendant appeals from a judgment for the plaintiff on the pleadings.

The action is to recover a commission on the sale of 400 acres of land owned by the defendant. The complaint alleges that on May 10, 1919, the plaintiff and the defendant entered into an agreement whereby the plaintiff, if he procured a purchaser for the land at \$150 per acre, was to have a commission of \$1 per acre; that on the 8th day of June he procured a purchaser; and that the defendant on June 9 sold the land to the purchaser for \$150 per acre on acceptable terms.

The answer, in addition to the general denial, alleges that prior to June 9, 1919, he listed his land with the plaintiff at \$150 per acre net to him; that about the date stated the plaintiff notified him that he had sent a prospective purchaser and asked him to protect him in a commission of \$1 per acre if the sale were effected; that he promised that he would try to do so; that the prospective purchaser offered \$150 per acre and refused to pay more; that to protect the plaintiff in a commission the defendant agreed with the purchaser that he, the purchaser, would pay the plaintiff a commission of \$1 per acre; that he was unable to effect a sale at a price in excess of \$150 per acre except on the terms stated; and that he sold at that price. The reply was a general denial.

The plaintiff's motion for judgment was not granted upon the theory that he was entitled to \$1 per acre commission if he procured a purchaser at \$150 per acre. While this was his claim of what the contract was, the answer put his claim in issue. It was granted upon the ground that the defendant's answer showed a right of recovery in the plaintiff.

The case of *Holcomb v. Stafford*, 102 Minn. 233, 113 N. W. 449, is of value. There the owner agreed that the broker should have all that he could obtain for a piece of property in excess of \$500. He procured a purchaser at \$500, and the owner sold him for that amount. The court said:

"Under the terms of his agreement plaintiff could claim a commission only in the event he procured a purchaser for the property at a price in excess of \$500; the excess being the measure of his commission. If he procured no purchaser ready, able, and willing to pay more than that amount, he earned nothing, and the court correctly awarded judgment against him."

And the court said further:

"Here the broker was entitled to the excess over and above the net price to the owner, and he was not entitled to a commission, except on procuring a purchaser ready, able, and willing to pay more than that price. Defendant was under no obligation to make an effort to induce the purchaser to pay more than the price given the plaintiff."

The defendant says that the listing was at \$150 net; that he promised the plaintiff, when informed that he had sent a prospective purchaser, to try to protect him in a commission of \$1 per acre; that he did try to do so; that the prospective purchaser would give no more; and that he closed at a price of \$150, getting from the purchaser, however, a promise to take care of the plaintiff to the extent of \$1 per acre. That was the result of his effort to protect the plaintiff in a commission.

It may appear, when the evidence comes in, that the contract was to pay \$1 commission if a purchaser was procured at \$150 per acre. If so, the plaintiff is entitled to his commission. It may be that the defendant sought to relieve himself of the burden of his contract with the plaintiff by exacting from the purchaser a promise to pay the commission. Of course he could not shift the burden so. Or on a trial it may be shown that the sale was really at a net price of \$150 per acre and the arrangement whereby the purchaser was to pay \$1 per acre was but a subterfuge. We do not know what the evidence may show. In determining whether the motion was rightfully granted we have in mind the rule that the pleadings must be construed favorably to the party against whom the judgment is asked. *Dunnell's Minn. Dig. 1916 Supp. §§ 7689-7694*. The answer is not a model one; but the pleadings do not show that the plaintiff has an undisputed right of recovery.

Judgment reversed.

GREAT NORTHERN EXPLORATION CO. v. MIZEN (MAHNOMEN MINING CO., Garnishee). (Nos. 22013, 22061.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

Mines and minerals ⇨ 104.—Trust relationship held to exist between mining engineer and development corporation, in whose affairs he participated as a stockholder, etc., precluding him from retaining advance royalties received from sale of a lease.

The defendant and two others entered into an agreement having as its object the development of a mining property on the Cuyuna range an option on which was taken in the name of the defendant. The plaintiff corporation was organized to forward the project. The defendant's two associates were the officers of the company. Stock was issued to the defendant in consideration of the transfer of the option. A certain amount was equally divided among the three promoters, and another amount was donated to the corporation to be sold for the purpose of raising working capital for development. The defendant was a practical mining engineer, was in charge of the work of develop-

ment, and was active in the affairs of the company. Shortly before the option expired the defendant entered into an agreement with the plaintiff whereby he might have the option at an agreed price and make such use of it, or of a lease taken under it, as he could. He took a lease and sold it for the price which he gave for the option and in addition a specified royalty on the output. It is held, under the facts stated in the opinion, that there was a relation of confidence and trust between the defendant and the plaintiff and its stockholders, and that he could not retain for himself the advance royalty received.

Holt, J., dissenting.

Appeal from District Court, St. Louis County; H. A. Dancer, Judge.

Action by Great Northern Exploration Company against Ben A. Mizen, with the Mahnomen Mining Company as garnishee. Judgment for plaintiff, and from a denial of a new trial, as well as from the judgment, defendant appeals. Affirmed.

Hugh J. McClearn, of Duluth, for appellant.

I. K. Lewis, of Duluth, for respondent.

DIBELL, J. This action as it finally results is one to compel the defendant Ben A. Mizen to transfer to the plaintiff the royalty of $3\frac{1}{2}$ cents per ton granted to him in the assignment of a mining lease to Clement K. Quinn for \$15,000, and by the latter assigned to the Mahnomen Mining Company. The lease was executed to Mizen by the fee owners in pursuance of an option which, though in his name, was the property of the plaintiff mining company, and was by the company assigned and released to him that it might be assigned.

The defendant appeals from an order denying his motion for a new trial and from the judgment which in effect gives the $3\frac{1}{2}$ -cent royalty to the plaintiff. The question is whether the defendant can retain the royalty for himself or holds it under a constructive trust for the plaintiff.

Mizen was a mining engineer and apparently a capable one. L. J. Pitts was found by the court to be a competent office man experienced in mining work, and A. J. Peterson was found to be an experienced salesman of corporation stocks. Mizen had operated successfully on the Cuyuna range, in Crow Wing county. He had in prospect an option from the fee owners for a lease of lands on that range. Late in 1914 Mizen and Pitts and Peterson concluded to combine their efforts, acquire the mining option, and develop the lands covered by it to a point where the option or a lease taken under it could be sold. They were enthusiastic and saw visions of great things to come through the development of this and other properties. To carry out their project the plaintiff corporation was organized by Pitts and Peterson in January, 1915.

The option to Mizen was dated February 1, 1915. On February 3, 1915, he made a formal offer to transfer it to the plaintiff company in exchange for 75,000 shares of its capital stock of the par value of \$1 each. This offer was formally accepted. Twenty thousand shares were then transferred by Mizen to Pitts and a like number to Peterson. Fifteen thousand shares were donated to the plaintiff to be used in raising money for development. Those who bought chanced their money on the proposition that the prospect was worth developing upon an assumed present worth of \$60,000. Enough of actual money was put in for organization expenses. There was no cash or liquid capital. That was to come from the sale of stock.

Pitts and Peterson maintained the office of the company in Duluth. An attractive prospectus was issued. The public was not greedy for the stock and sales had to be pushed. It was peddled about and sold, often in small quantities, and on installment payments, and commissions were paid to Pitts and Peterson and subagents for selling. Something like 12,000 shares of the donated stock were sold, but not nearly so much as \$12,000 was received by the company. The exact condition of the stock account is not clear nor important just now. Thus the corporation was financed.

Mizen had the contract for the drilling at an agreed price. The total cost was \$10,050. He was paid \$2,422, leaving due \$7,628. In October, 1915, say about the 20th, the company had no money; or, to be precise, it had \$5.21 in bank. What had been realized from the sale of the stock, except the \$2,422, had been used in maintaining an office in Duluth and paying the salaries of Pitts and Peterson, and incidental expenses. Mizen had financed the drilling except for the \$2,422 paid him. The option expired on the 1st of November following. The late explorations were discouraging. Pitts and Peterson were losing hope and Mizen was anxious about his drill bill.

Clement K. Quinn was interested in the Mahnomen mine, which adjoined. The property under option could be mined advantageously in connection with the Mahnomen. There was doubt whether it could be otherwise used profitably. Quinn had been mentioned as a possible purchaser. Mizen told Pitts and Peterson that Quinn had said that he would not give more than \$15,000 and this was so. He told them in effect that he could get no more and that it was all the property was worth. Quinn, knowing something of the condition of the company, would not deal with it. If he took the property he insisted that the option or lease come from Mizen.

In an amended finding the court, referring to the conditions then existing, found:

"Under these circumstances it was agreed between said Peterson and said Pitts and said defendant that each of them should surrender

for cancellation fifteen thousand (15,000) shares each of the twenty thousand (20,000) they received for the assignment to the plaintiff corporation of the option of the defendant; that the plaintiff would execute to the defendant a release of all its right, title, interest and estate in and to the option which he had from the fee owners for a lease to the lands hereinbefore described, together with all the profits that defendant might make out of a lease taken thereunder, said agreement being contingent on said Peterson and said Pitts, as well as the defendant, each surrendering fifteen thousand (15,000) shares of his stock in the plaintiff company, and agreeing that neither said Pitts said Peterson nor said Mizzen should receive any dividend on the five thousand shares of stock in the plaintiff company, which each of them would then hold; and further agreeing that defendant should pay plaintiff fifteen thousand dollars (\$15,000) for said option, seven thousand dollars (\$7,000) of said amount to be applied in payment of the seven thousand six hundred twenty-eight dollars (\$7,628) due him from plaintiff on his contract for drilling said lands, and the remaining eight thousand dollars (\$8,000) to be paid by the plaintiff company to all of its stockholders, who had paid cash for their stock and the balance remaining after the stockholders had been paid dollar for dollar, to be used in defraying any expenses incident to the conduct of the office of the plaintiff company since opening thereof in March, 1915."

An agreement and an assignment or release in writing dated October 28, 1915, and acknowledged October 29, 1915, were deposited in escrow to be delivered to Mizzen upon his performance, within 21 days, of the conditions. Mizzen was not required to perform or take the property. The instruments were, as observed by the trial court, somewhat in the nature of an option. However, as noted later, he did perform. The agreement recited that the company had given the defendant 75,000 shares of stock in consideration of the option and that he held 20,000 shares. It recited that he had carried on explorations at a cost of \$10,050, for which he had been paid \$2,422. Paragraphs 1, 2, and 3 were as follows:

"1. The party of the second part [Mizzen] does hereby agree, upon the delivery of this agreement in the manner hereinafter provided, to pay to the party of the first part [plaintiff] the sum of eight thousand dollars (\$8,000.00), and to deliver or assign to it fifteen thousand shares of the capital stock of the party of the first part now appearing upon the company's records in the name of one Fallo, and the party of the second part does further agree to fully release and discharge the party of the first part from any or all claims of any kind whatsoever, which he may have or assert against it by reason of any of the transactions heretofore had between the parties hereto.

"2. The party of the first part, in consideration thereof, does hereby grant, bargain, sell, convey and release to the party of the second part any and all rights which it may have or might assert in or to said option for a mining lease, and in and to any mining lease which

may be executed pursuant to said option, and in and to the leasehold estate which may thereby be created, and in and to the lands described in said option, and does assign, set over and release to the party of the second part any and all right to the proceeds or the consideration which he may in any manner receive out of said option or said lease, and does further release him from any or all claims which it might have or assert against him on account of any transactions heretofore had between the parties hereto.

"3. It is further agreed by and between the parties hereto that each of the parties hereto shall execute to the other a simple release of all rights or claims which it, or he, might assert against the other."

The assignment or release was executed at the same time and deposited in escrow in accordance with the terms of the agreement. The portion now quoted is sufficient for present purposes:

"That the party of the first part [Great Northern Exploration Company], in consideration of the sum of one dollar (\$1.00) and other good and valuable considerations, to it in hand paid by the party of the second part, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, convey and release to the party of the second part any and all rights which it may have, or might assert, in or to that certain option for a mining lease, dated on or about February 1, 1915 [naming fee owners and describing the property], and also all the right, title and interest, which it might have or assert in any mining lease which may be issued pursuant to said option and in and to the leasehold estate which thereby may be created, and in and to the lands described in said option, and in and to the proceeds or other consideration or profits which the said party of the second part may, in any manner, receive out of said option or said lease; and the party of the first part, for said consideration, does hereby further forever release and discharge the party of the second part from any or all claims which it might have or assert against the party of the second part on account of any transactions heretofore had between the parties hereto."

Mizzen performed the conditions of the escrow agreement and received the two instruments about November 6, 1915, or soon afterward.

On October 29, 1915, he notified the fee owners of his election to take a lease. Under date of November 6, 1915, he assigned the lease to Clement K. Quinn. Before this he had obtained a reduction of the minimum output after the third year from 75,000 tons to 50,000 tons and also cleared some minor defect in the title. The assignment of the lease was acknowledged December 9, 1915. By an instrument dated and acknowledged on November 11, 1915, Quinn assigned the lease to the Mahnomen Mining Company. This instrument recited that the lease from Mizzen to Quinn was delivered on November 10.

In performing the terms of the escrow

agreement, Mizen, so the court finds, used the money obtained from Quinn. Something of this kind was contemplated when the agreement was made. The company received the equivalent of \$8,000 and Mizen took \$7,000 for his claim of \$7,628. This was in substantial accordance with the agreement.

The court finds that about October 20, 1915, Mizen became convinced that he could sell to Quinn for at least \$15,000; that he told Pitts and Peterson that he thought he would dispose of it for such sum; that he told them he could get no more for it; that he told them he had tried to get an increase over the royalty fixed; that Pitts and Peterson believed these statements and relied upon them; and that so relying executed the two agreements.

It does not seem that Mizen had abandoned hope of getting an additional royalty when the agreements recited were made and put in escrow. On the day of their execution he suggested to Quinn an increased royalty and received encouragement. He had before been negotiating with the fee owners for a decrease of the minimum output and finally obtained the reduction stated. This was advantageous to the purchaser of the lease, made the lease more saleable, but was less favorable from an income standpoint to the seller. It was something which Quinn wanted. There was also a defect in the title which Mizen cured.

The question now comes whether Mizen could take to himself the $3\frac{1}{2}$ cents additional royalty or whether it should be applied to the use of the plaintiff corporation. That a stranger making the agreements which Mizen made would be entitled to the additional royalty is clear. The trial court was of the opinion that Mizen was not in a position where he was dealing at arm's length with the company; and it was of the opinion that Mizen when he learned, as he did before the closing of the deal with Quinn, that he could get a royalty of $3\frac{1}{2}$ cents, was bound to disclose and could not take it for himself. This latter view was based on the doctrine stated in 13 C. J. 389, § 291, as follows:

"If a person makes a representation believing it to be true but afterward discovers it to be false, he must not allow the party to go on and act on the faith of the representations; if he does so he is guilty of fraud."

A number of cases are cited in support of the doctrine. They, in general, are cases of actual fraud, or cases where in the course of negotiations, and before the fixing of rights by a completed contract, a material change comes or a fact is discovered which makes a previous representation untrue. Then the maker of the representation must disclose. The trial court seems to have applied this principle upon the supposition that when Mizen found that he could get a royalty from Quinn he had not changed his position. In a later memorandum the court indicates that it was mistaken in this respect,

for Mizen at the time had taken the lease and assumed the obligations attaching to it. We gather from the findings and amended findings and the memoranda that the court was not of the view that there was actual fraud prior to October 29, avoiding the agreements then made. And we do not understand that the court would have held that a stranger could not have taken to himself the benefits of such an advance royalty as was secured.

In commenting upon the relation of the parties the trial court says in its first memorandum:

"Defendant's alliance with Pitts and Peterson was an unfortunate one for him. All the benefit he derived from it was the use for a time of \$2,422.00 paid to him on account of the drilling, while it costs him more than two-thirds of the ultimate profits of the transaction. In entering into the arrangement he undoubtedly relied upon what proved to be quite extravagant ideas of Pitts and Peterson as to the amount of stock they could sell to the public. When it developed that they could not raise money as fast as it was needed for the exploration, defendant undertook for a time to protect himself to some extent by retaining the option in his own name. And later on he attempted to secure the general stockholders from actual loss by an agreement with Pitts and Peterson that they should pay back to these stockholders, out of the \$8,000.00 turned into the company, whatever cash they had paid for their stock, which agreement was carried out in part only by Pitts and Peterson. But defendant could not protect himself in that manner. While the corporation was organized simply as an instrument to further the interests of the three individuals, yet stock thereof was sold to the general public at the instigation and with the approval of all; and the purchasers of this stock became entitled to share in any profits, regardless of the circumstances under which defendant associated himself with Pitts and Peterson. These stockholders became entitled to demand the utmost good faith and fidelity to their interests from their officers, and through them, from defendant."

The venture initiated in the fall of 1915 by Mizen, Pitts and Peterson, was a joint one. Each was entitled to repose confidence in the others and to insist upon the utmost good faith. Each was to work for all. All three contemplated that money for development would come from stockholders investing in the hope of profit. The three received \$60,000 in stock which was taken as representing the value of the option. They risked nothing, or next to nothing; just the cost of organization. Pitts and Peterson got salaries and commissions; Mizen presumably profited on the drilling. The men who purchased the \$15,000 of donation stock, if that much had been sold, paid for the development and risked their money with no hope of getting all of it back unless the property proved to be worth \$75,000; and for a value in excess of that they shared in the propor-

tion of one-fifth to four-fifths. Pitts and Peterson and Mizzen could not be unfair to them. The relation was confidential. Each owed to his associates and the stockholders open good faith and active diligence in their interests. Neither of the three could speculate upon the sale of the property for the development of which the stockholders were paying, and take a profit to himself. The principle which forbids, as applied to this case, is troublesome and the result recorded is not free of doubt; but we are constrained to hold that Mizzen, who was the active man in the actual development and disposition of the property, and active in the affairs of the corporation, was so situated that he could not make a profit by the contract with Quinn, though he was free of actual fraud or wrongdoing.

The position of Mizzen, from the viewpoint of his counsel, is forcefully presented, and merits and has received thorough consideration. It is argued that in October, 1915, when negotiations commenced, the company was without funds, and that it owed Mizzen over \$7,000, and owed others, and all this is true; that the mine was not showing well; that things looked gloomy; that the three promoters were discouraged; that Mizzen thought he could sell for \$15,000; that unless something was done by November 1, all was gone; that Mizzen was anxious for his \$7,000; that it was desired to protect the stockholders who had chanced their money on the development; that the arrangement made would do this, and would leave them their stock, while the original \$60,000 stock would be reduced to \$15,000; that Mizzen, by taking the lease, assumed liabilities which would not have rested upon him if the contract had not been carried out; that he took the risk of not being able to sell it; that he assumed liabilities when he assigned to Quinn with a warranty; that he obtained a reduction of the minimum output, which he did not owe the duty of doing for the plaintiff company, and likewise cured defects in the title; that what Quinn got by the assignment was not a lease such as was called for by the option, but a lease with a reduced minimum output, and with the warranty of Mizzen; that the plaintiff after full consideration, and upon authority of its board of directors, gave him just what he now claims; that but for the contract with him the company and its stockholders might have gotten nothing; that he was taking a chance of losing; that he might have sold for \$10,000, if he could get no more, in which event he would have been required to pay \$8,000 to the plaintiff just as when he made a better sale; that the contract was made openly and was fair; that the agreement of the company was to convey to him "all rights which it may have or might assert" in the option, and "all right to the

proceeds of the consideration which he may in any manner receive out of said option or said lease," and to "release him from any or all claims which it might have or assert against him on account of any transactions hereinafter had"; that the release executed by the company conveyed and released to him all the right, title and interest which it might have or assert "in and to the proceeds or other consideration or profits which the said party of the second part [Mizzen] may, in any manner, receive out of said option or said lease"; that it was contemplated that he should have the chance of a profit and that he took a chance of loss; that his position was not such that he could not deal at arm's length with the company; and that, in any view of it, the arrangement under all the circumstances was fair to the corporation and its stockholders and a prudent one to make.

It is true of course that even a director or officer may make a fair contract with his corporation. *Minnesota L. & T. Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255, and cases cited. We are, however, of the opinion that the relation of Mizzen to the stockholders, those who were furnishing the development money as well as those who were promoters with him, was such that he could not make a private profit out of turning the property, though in disposing of it he assumed liabilities which he was not under obligation to the company to incur, and though he was not guilty of intentional wrongdoing.

The defendant complains that Pitts and Peterson did not dispose of the \$8,000 for the benefit of the stockholders, as the agreement was, but appropriated it largely to themselves. The finding is that the "agreement was carried out in part only by Pitts and Peterson." They are not parties and nothing can be done about it here. If they did wrong in the disposition of the \$8,000 relief can be had in some form; but not in this proceeding as it now stands.

Order and judgment affirmed.

HOLT, J. (dissenting). The situation and the claims of the parties are clearly and concisely stated by Justice DIBELL, but the result reached does not appeal to me as right nor compelled by the doctrine invoked. The findings and record accords to defendant the utmost good faith in all his dealings with plaintiff and its officers, his associates, Peterson and Pitts, save in this: That, between the time he made the contract to purchase the option of plaintiff and the time he took it out of escrow by payment, he ascertained that he could obtain a royalty from Quinn in addition to the \$15,000 which, when the contract was executed, he had told Peterson and Pitts was the highest amount Quinn would pay.

From the beginning defendant refused to

be an officer of plaintiff; but, concede that he was in the same condition as if an officer, he could, nevertheless, properly enter into a fair contract with the corporation. *Minnesota L. & T. Co. v. Peteler Car Co.*, 132 Minn. 277, 156 N. W. 255. It seems to me the contract he did make was fair, and, under all the circumstances, fairly made. When it was entered into there was hope and belief, but no certainty, that defendant would be able to dispose of the option thereby transferred to Quinn so that he could pay \$8,000 to the corporation and get sufficient to pay the whole or most of the claim that he held against it. Plaintiff was then at that stage where it was evident to all that no profit could be realized for the stockholders. It was a question of saving something for them and paying the liabilities. Defendant stood a chance of losing a large sum which he alone had risked in exploring for ore under the option, and unless he was willing to make the effort to realize something therefrom all concerned would certainly sustain a loss. In order to be able to realize the amount defendant was to pay under the contract, it was, no doubt, clearly understood that he would have to sell and dispose of the option. The contract so indicates. In order to dispose of the option to Quinn he had to secure a modification of its terms, and incur certain personal obligations. The option he transferred to Quinn was in a more valuable state than when transferred to him. It was, no doubt, well understood that for the efforts he was to make he stood the chance of loss or gain. The contract was deliberately made by plaintiff and its officers. It was completely executed and irrevocable as to them. It could not be taken out of escrow or recalled by them because of anything thereafter developing. It contains no provision looking towards its cancellation by plaintiff, if defendant could dispose of the option at a higher price than the one he had represented that Quinn might be induced to give. Suppose defendant had gone to plaintiff's officers and informed them that he had succeeded in obtaining twice the price and twice the royalty that he did obtain; would plaintiff have been in a position to recall the escrow? I think not, under the finding that defendant had exercised the utmost good faith and had disclosed all that was known to him, as to the probability of his being able to dispose of the option and for what price, when the contract was signed and placed in escrow. It is clear to me that the parties dealt at arm's length, not only when the contract was negotiated, but also intended that when it was put in escrow it terminated all confidential relations that ever existed, so that as to what was developed thereafter and as to any knowledge or advantage thereafter gained no obligation rested on de-

fendant to disclose it. Neither the contract nor any tacit understanding required defendant to sell the option to Quinn or to any one. Suppose he had taken it over himself and successfully mined so as to make many times the profit now made, would that have given the plaintiff a cause of action? It would seem not. Again, suppose he had not succeeded to dispose of the option to Quinn, but had sold it to some one else for a better price and better royalty than he did obtain could this action have been maintained? The answer must be the same, for even if he had informed plaintiff and Peterson and Pitts that he had made such a sale, before he took the contract out of escrow, I see no way in which he could have been prevented from holding onto a bargain fair and just when made.

On the findings of fact as they stand, I think defendant is entitled to judgment.

HALL v. DAVIS, Agent. (No. 22425.)

(Supreme Court of Minnesota. July 22, 1921.)

(Syllabus by the Court.)

Railroads 482(2)—Finding of origin of fire sustained.

The evidence examined and held to sustain the findings.

Appeal from District Court, St. Louis County; Wm. A. Cant, Judge.

Action by Philip Hall against James C. Davis, as Agent of the President under the Transportation Act. Findings for plaintiff. Motion for amended findings or a new trial was denied, and defendant appeals. Affirmed.

M. L. Countryman, of St. Paul, and Baldwin, Baldwin, Holmes & Mayall, of Duluth, for appellant.

Arnold & Arnold, of Duluth, and J. E. Diesen and Cox & Michaelson, all of Cloquet, for respondent.

HOLT, J. Action against the Director General of Railroads for negligently setting and allowing a fire to escape, while in control of the branch of the Great Northern Railroad running from Cloquet northwesterly to Floodwood, Minn., the fire so set having reached and consumed plaintiff's property in the city of Cloquet, on the evening of October 12, 1918. This action and 277 other actions of like nature were, by stipulation, consolidated and tried to five judges, without a jury, to determine the issue of liability; and if defendant was held liable, the amount of damages was thereafter to be ascertained in each case before any one

judge. There was a determination that the Director General's negligence caused the destruction of the property of the various plaintiffs, and the loss in the case of this plaintiff was thereafter fixed. The Director General moved for amended findings or a new trial. The motion was denied, and this appeal followed.

Milepost 62, on the railroad mentioned, is a few rods south of the bed of St. Louis river, $3\frac{1}{4}$ miles east of the station Paupores. The river runs nearly east from the station to milepost 56, a mile east of Brookston; thence about southeasterly to milepost 52, near Brevator; thence northeasterly to milepost 50; thence southeasterly to milepost 47; thence southwesterly to milepost 45; thence a little east of south, entering the northwest corner of the city limits of Cloquet between mileposts 43 and 42, and continuing southeasterly to a point about equidistant from the north and south boundaries of the city; thence directly east through the center of the city limits. The railroad follows the bank of the river closely all the way. A short distance from the river banks hills rise on either side, more or less abruptly, to various heights from 100 to upwards of 200 feet. From the description of the course of the river, it can be seen that Cloquet is almost due southeast from milepost 62. The distance between the two points is about 20 miles by rail, and about 18 miles by a direct line. The territory south of the river, extending for 20 or more miles west of Cloquet, is quite broken with hills, valleys, swamps, lakes, and brooks. In some parts are quite a few settlers with small clearings. Nearly all is cut-over land. The season prior to October 12, 1918, had been unusually dry. In the region mentioned fires had run. Efforts to extinguish and control these fires had been made with more or less success. The record leaves the impression that in stumps and bogs there may have been smolderings on the 12th of October.

The issue, as made by the pleadings, was that a locomotive passing milepost 62 on October 10, 1918, set a fire which communicated with and ignited a quantity of forest products piled at a spur track at that place; that effective means to extinguish this fire were not taken; and, when on the 12th a strong wind arose, the whole stock there piled burned with great intensity, the flames spreading to adjacent ground, and running at a fearful speed with the wind, which was claimed to then come from the northwest, and heading towards Cloquet. The Director General contended that the fire at milepost 62 was not of a railroad origin, and, particularly, that the fire which came to the city was of unknown origin, starting far south of the railroad right of way; and, further, that the wind was almost due west, or not more than 20 degrees north of west, so that it was impossible for a fire from

milepost 62, or for any fire on its right of way west of Brevator, to travel and spread enough to the south, in the gale then blowing almost due east, so as to reach Cloquet.

The court found, in substance, that the Director General, while he operated said railroad, allowed combustible material to accumulate on and along the right of way between mileposts 52 and 64, and permitted large quantities of forest products to be stored at milepost 62; that no men were employed to patrol that part of the right of way to watch for and extinguish fires thereon; that while so operating the road, under the conditions mentioned, and on October 10, 1918, a locomotive engine passing milepost 62 set fire to the dry material in the immediate vicinity thereof; that the Director General negligently failed to extinguish such fire, which, on the 12th of October, caused all of the material so stored to be consumed, and, spreading therefrom to the lands adjacent, and over and across said lands to the premises of plaintiff in Cloquet, consumed the property described in the complaint.

No question is made of the damages awarded. And, with the commendable candor characteristic of defendant's able counsel, concessions were made, on the oral argument, that narrow the appeal down to the one question whether the evidence sustains the conclusions of the four judges, who concurred in the finding, that the first fire to reach and cause the conflagration in Cloquet was the one from milepost 62. The concessions alluded to relate to the conclusions of the court, as disclosed by the memoranda attached to the findings and to the order denying a new trial, that the Director General's negligence set the fire at milepost 62 on the 10th, which burst into a great and destructive conflagration on the 12th, and that the gale during the afternoon and evening of the last-named day came from the northwest. Counsel do not concede that the court ought to have reached such conclusions; but that, having done so, this court, under the well-settled rules guiding it, cannot hold that the conclusions are without adequate support, or that the court erred in refusing to make findings of contrary purport, as requested by appellant. We think also that appellant is on this appeal entitled to the benefit of the conclusion expressed in the memoranda that the evidence, though reasonably clear, was insufficient to establish that such fire as was in section 6 of T. 50, R. 17, and sections 1 and 2 of T. 50, R. 18 that evening never reached Cloquet, or mingled with the one that came from milepost 62. But the trial court was clear that the last-mentioned fire reached the city first, and that the fires which originated more southerly and westerly, whether of unknown or railroad origin, came later, and did not contribute to the destruction of the city. Defendant's counsel earnestly maintains that

the court was demonstrably wrong in this. We think not. The nature and direction of the wind as the fire swept on, and the testimony of witnesses in the path of the most northerly, as in the ones to the south thereof, seem to establish with reasonable certainty that the north fire, the one from milepost 62, came to the city first. From a comparison of the time so given by these various witnesses, and the positions they occupied in the burned territory when the main flames passed them, it rather persuasively appears that when the fire, so destructive of life and property, raged through sections 1 and 2, T. 50, R. 18, and section 7, T. 50, R. 17, the north fire had already entered the upper planer or lumber district of the city.

Of course, we realize that estimates of time under the stress and excitement attending a calamity of this nature are not very accurate; also, that timepieces in country districts are seldom correct. It is also true that the speed of fires varies exceedingly with the nature of the territory over which they pass, and the amount and kind of material upon which the flames feed. When the wind is so strong as on the day in question firebrands are carried to great distances, and the further progress depends upon the stuff into which the brands fall, and whether the wind has full sweep over it. The experienced and painstaking judges who for five weeks gave these and other matters, too numerous to here call attention to, careful consideration, were satisfied that the fire from milepost 62 reached Oloquet first. One of the judges was alone in the opinion that plaintiff had not sustained the burden of establishing beyond speculation and conjecture that any fire, originating from the railroad operated by the Director General, materially contributed to the destruction of plaintiff's property. We think the findings made by the court are amply sustained.

The court evidently refrained purposely from expressing conclusions as to the origin and course of the fire which started between mileposts 67 and 68, and as to whether the one from milepost 62 separated near the dam on Stony brook, in section 16, T. 50, R. 18, one part passing to the north and east of Cress lakes and the other to the south of those lakes, since such conclusions might relate to the destruction of property not owned by any of the plaintiffs in the suits here involved.

It is not practical to here reproduce the maps used at the trial, but in those maps and other exhibits are indications by way of areas not burned, the shape of such areas, the contour of the ground, the location of swamps, lakes, and creeks, the open fields and meadows, the light and hard burned parts which fortify not only the wind directions in accordance with the conclusions of the trial court, but also the findings of the

majority that the fire negligently allowed to escape from the locomotive operated by the Director General at Milepost 62 spread to and caused the destruction of the property involved in the actions tried.

The evidence, in our opinion, sustains the findings.

Affirmed.

STATE ex rel. HILBERT et al., State Board of Control, v. PROBATE COURT OF MAHNOMEN COUNTY. (No. 22322.)

(Supreme Court of Minnesota. July 22, 1921.)

(Syllabus by the Court.)

Infants §18—Statute held to empower juvenile court to terminate guardianship of dependent or neglected child by state board of control.

Chapter 397, Laws 1917 (Gen. St. Supp. 1917, §§ 7196—1 to 7196—35), is construed to give the juvenile court, committing a dependent or neglected child to the guardianship of the state board of control, the power to terminate such guardianship, at any time before the child is legally adopted, when the parent proves to the satisfaction of the court that he or she is able and willing to properly support, care for, and educate the child.

Appeal from District Court, Mahnomen County; Andrew Grindeland, Judge.

Certiorari by the State, on the relation of P. A. Hilbert and others, as the State Board of Control, against the Probate Court of Mahnomen County, to review an order of the Juvenile Court of Mahnomen County, discharging certain dependent children from the guardianship of the Board of Control. Writ discharged, and relator appeals. Affirmed.

Clifford L. Hilton, Atty. Gen., and Egbert S. Oakley, Asst. Atty. Gen., for the State.

Johnston & Carman, of Detroit, for mother of dependent children.

HOLT, J. Pursuant to chapter 397, Laws 1917 (Gen. St. Supp. 1917, §§ 7196—1 to 7196—35), George and Catherine Dodge, dependent children 12 and 13 years old, respectively, were placed under the guardianship of the state board of control by the probate court of Mahnomen county, sitting as the juvenile court of that county. More than a year thereafter, the mother of the children petitioned that court to set aside the decree on the ground that notice of hearing had not been served upon her, so as to afford her an opportunity to be present thereat, and that her circumstances had so altered that she could now properly support and care for the children. The court ordered the children discharged from the guardianship of the

board of control. The latter sought a review of the order on certiorari from the district court. The writ was discharged, and relator appeals.

We shall not consider whether, upon the service made, the juvenile court had jurisdiction to deprive the mother of her children forever; for we have reached the conclusion that the appeal may be disposed of by an answer to this question: May the state board of control's guardianship of dependent and neglected children be terminated by the juvenile court during their minority, there being no claim of improper treatment while under the board's control?

Appellant contends that *Armstrong v. State Public School*, 88 Minn. 382, 93 N. W. 8, is decisive of the question. There, in construing the effect of a guardianship of children committed to the state school at Owatonna under chapter 210, Laws 1897, it was said:

"Whether one committed to the care and custody of the school should be released prior to arriving at its majority is a matter resting in the sound discretion of the school board, a department of the executive branch of the government, with the exercise of which the courts have no jurisdiction to interfere or intermeddle in any way."

No other conclusion could have been reached under that statute, which provided that, when the court entered the order committing the child to the school, the parents—

"shall thereafter have no rights over or to the * * * earnings of said child, except in such cases as said board may, as herein provided, restore the child to its parents." Section 6.

The board of that school was made the legal guardian of all children committed to the school—

"which guardianship shall continue during the minority of such children, except in the cases in which, under this act, the guardianship may be canceled by resolution adopted by said board." Section 8.

Exclusive right was given the board in all cases to release the child before majority, except where there had been a legal adoption which worked a release. Section 12.

"Whenever any ward of said school, who is not indentured as herein provided, has become self-supporting, the said board may, at its discretion, so declare the fact by resolution, and thereupon said guardianship shall cease and the child shall thereafter be entitled to its own earnings. Whenever one or both of the parents of any ward of said board, who is not indentured, have become able to support the child and educate it, the child may, by resolution adopted by said board, be restored to its parents." Section 10.

But, we think, a different policy was adopted with the advent of the juvenile courts. In chapter 285, Laws 1905 (Gen.

St. 1913, §§ 7162-7175), such courts, in counties of over 50,000 inhabitants, were given exclusive jurisdiction of dependent, neglected, and delinquent children. The state board of control had only supervisory duties over the institutions which the court might appoint to guardianship of such children. Section 11 (section 7172). That the court committing the child still retained jurisdiction to change or terminate the guardianship is evident from the fact that, if an adoption proceeding was begun in another court than the court which appointed the guardian, 30 days' notice must be given the latter court. Section 8 (section 7169). No power of discharge was vested in the board of control. The board of any institution appointed guardian might parole and recommend a discharge, but the court must act thereon (section 9 [section 7170]); and the court might at any time proceed to inquire into the ability of the parents to support the child, and "enter such order or decree as shall be, according to equity in the premises" (section 10 [section 7171]).

A similar act (chapter 232, Laws 1909 [Gen. St. 1913, §§ 7178-7192]) gave jurisdiction to probate courts, in counties of less than 50,000 inhabitants, over dependent, neglected, and delinquent children. By section 8 (section 7185) thereof any parent of a child put under guardianship may, after the expiration of one year of such guardianship, apply to the probate court which created the same to terminate it—

"and if it appears by clear and convincing evidence the conditions which produced or contributed to the dependency, neglect, or delinquency of such child no longer exist, the child, unless previously adopted, * * * shall be restored to its parents."

The authority of the state board of control was retained as visitatorial merely over guardians appointed. Section 10 (section 7187). No change in these respects was made by the amendments of the act as found in chapter 280, Laws 1913.

The laws relating to juvenile courts and their jurisdiction over dependent, neglected, and delinquent children were codified into chapter 397, Laws 1917, embracing in one act both probate and district courts sitting as juvenile courts. This last act manifests no intention to make any substantial change in the then existing law. In so far as this act gives the court authority to appoint the board of control a guardian, the board occupies the same position as any institution or individual appointed. We fail to find any intimation that to it, or to any guardian is reserved the right to determine when the guardianship shall end, except as it may be done by consenting to an adoption. By express terms the court retains authority to discharge a delinquent child placed under guardianship. Section 13 (Gen. St. Supp.

1917, § 7196—13). And a delinquent child may be committed by the court to "some association that will receive it, embracing in its objects the care of neglected or dependent children." Section 13. If such child be committed to the state training school, it may not be discharged within one year after the commitment without the approval of the court. Section 13. It therefore seems that the court loses control to no appointed guardian. And we think the whole scheme of the legislation with reference to dependent, neglected, and delinquent children is to commit them to the jurisdiction of the juvenile courts until they are legally adopted; and that the authority and power of such courts over their wards is always supreme to that of the guardian to whose custody they have been committed by those courts. That such supreme authority is so vested is indicated by the fact that an adoption may not be had, even with the consent of the guardian, unless made by the court appointing the guardian, or upon 30 days' notice to that court of the hearing, if the adoption proceeding is in any other court.

The relator also calls to its aid chapter 194, Laws 1917 (Gen. St. Supp. 1917, §§ 4053—1 to 4053—7), approved 10 days prior to the approval of chapter 397. This law imposes additional duties upon the board of control in looking after the welfare of defective, illegitimate, dependent, neglected, and delinquent children. True, section 1 (section 4053—1) thereof provides:

"The state board of control shall have powers of legal guardianship over the persons of all children * * * committed by courts of competent jurisdiction to the care of the board, or to institutions under its management. After commitment to its guardianship the board may make such provision for and disposition of the child as necessity and the best interests of the child may from time to time require"

—with the exceptions that no child placed under the guardianship for delinquency may be adopted nor may a child be put in an institution for delinquents without having been first adjudged delinquent by the court. That this act was not intended to place the board of control above the juvenile courts is indicated by section 3 (section 4053—1), making it the duty of the board to co-operate with such courts to promote the enforcement of all laws for the welfare of the children referred to in the act. This act contains no provision that carries a suggestion of an intention to shift the power conferred by said chapter 397 upon juvenile courts from such courts to the guardian appointed by them.

Laws which permit the severance of the tie that binds a parent to a child recognize the sacredness of that tie and extend the hope of reunion. Delinquent children, though committed to guardianship, cannot

be permanently separated from their parents without the latter's consent. We cannot think parents of dependent or neglected children ought to occupy a worse position, so long as the child has not by legal adoption acquired other parents. Chapter 210, Laws 1897, as already noted, expressly conferred on the board of control of the state school the authority to restore such a child. And it is to be presumed that such authority exists either in the courts or the guardian under chapter 397, Laws 1917. We think it is vested in the courts. In the case of a dependent child, section 11 (Gen. St. Supp. 1917, § 7196—11) provides that he shall not be taken from his parents without their consent—that is, committed by the court—unless, after diligent effort to avoid separation, the same shall be found needful in order to prevent serious detriment to the child. That the law aims at giving the child what the natural parents are most likely to render to the best advantage is plain from this provision:

"That whenever it is necessary to provide for him [the child] elsewhere than with his parents his care, custody, and discipline shall approximate as nearly as may be that which ought to be given by his parents; and that in all cases where it can be properly done he shall be placed in an approved family home and become a member by legal adoption or otherwise."

We gather from this that, until a child committed by a juvenile court has acquired other parents by legal adoption, the policy of the law is to hold out the hope to the natural parents that they may again have the child upon proving to the court that conditions have so changed that they can and will properly rear and care for the child. That the court which placed the child under guardianship is the proper authority to determine when it should cease would seem the most natural inference, unless there be some provision to the contrary in the law itself. We find none in chapter 397. On the contrary, there are indications that the committing court retains continued supervision over the child and its property superior to that of the guardian. If such child has property, and any more than the income is necessary for his education, the court, and not the guardian, determines whether any part of the principal may be used for the purpose. Section 25 (section 7196—25).

As the law now stands the jurisdiction of juvenile courts over dependent, neglected, and delinquent children and the relation of such courts to the guardians to whose custody such children are committed is so similar to the jurisdiction conferred upon and exercised by the probate courts in appointing, controlling, and changing or removing guardians of minors and insane persons that we may say that the same rules and principles should govern. It is settled that a

guardian appointed by the probate court is an officer of the court—the agent through whom the court extends the care and protection the ward needs. The guardian's conduct may always be regulated and controlled by the court appointing him. *Cox v. Marvel*, 56 Minn. 358, 57 N. W. 1062. Such being the case, it would seem to follow that the court has also the power to remove or free the ward from the guardian.

This construction of the juvenile court statute appeals to us not only as the one intended by the Legislature, but as the one most likely to achieve the beneficent purpose sought. The court that originally takes jurisdiction of a dependent, neglected, or delinquent child hears and determines his status on evidence. If any change develops after the adjudication which ought to restore the child to his parents the court hears and determines that with knowledge of what the former trial showed. The state board of control, with its varied and multitudinous duties, is not in position to give the time necessary to personally hear and determine on the merits applications for restoration of parental rights, but would likely have to rely on the judgment of agents and subordinates. This would not be a desirable expedient in a matter of such importance both to the child and the parents. We conclude that the court, and not the board of control, has the final word on the question of restoration of a dependent or neglected child to the parents. Of course, the law contemplates that a legal adoption takes the child out of the control of the juvenile court.

We add that there is no intimation in the record that relator has been remiss in its duties in any respect to the children in question. Nor did relator attempt to controvert the mother's claim that she is now fit, able, and willing to properly support, care for, and educate her children.

Order affirmed.

FRUEN CEREAL CO. v. CHENOWETH. (No. 22319.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

1. Appeal and error ⇨1057(2)—Exclusion of testimony to prove fact later conceded not prejudicial.

Excluding testimony to prove a fact which later in the trial was conceded cannot be prejudicial.

2. Appeal and error ⇨1057(2)—Error cannot be predicated on exclusion of question where concession by objector seemingly satisfies examining party.

Nor can error be predicated upon a ruling sustaining an objection to a question where a

concession by the objector answers the question so that the party examining is seemingly satisfied.

3. Materiality of questions.

It is not made to appear that a question asked on rebuttal was material when the objection thereto was sustained.

Appeal from District Court, Hennepin County; Daniel Fish, Judge.

Action by the Fruen Cereal Company against E. J. Chenoweth. Verdict for defendant, and from a denial of a new trial, plaintiff appeals. Affirmed.

Geo. S. Grimes, of Minneapolis, for appellant.

Webber, George & Owen, of Winona, for respondent.

HOLT, J. Action to recover damages against the seller for delivering a carload of wormy flour, instead of the flour alleged to have been bought and paid for. Defendant had a verdict, and plaintiff appeals from the order denying a new trial.

Plaintiff's contention, as alleged in the complaint, was that it purchased the "best patent old spring wheat" flour, and defendant's that the flour delivered was the kind and grade purchased by plaintiff. Plaintiff deals in flour and also operates a mill in Minneapolis. Defendant owns and runs a small flour mill in Wisconsin. A firm of brokers in Minneapolis obtained from defendant samples of the flour he grinds with a view to sell on commission. One of these samples was exhibited to plaintiff by the brokers, and an order, directed to defendant, was given for two carloads of flour of 210 barrels each at \$10.80 per barrel. When the first carload was received, plaintiff notified defendant that the flour was below grade and sample. Defendant came to Minneapolis and sought to adjust the deal. At that time the claim was also made that the flour was infested with worms.

[1, 2] The assignments of error are all upon rulings excluding testimony. The first group of questions, to which objections were sustained, relate to whether or not the carload in question was "best patent wheat flour." When the rulings were made, the order for the purchase had not been offered and it had not appeared that a letter of confirmation, written by plaintiff to defendant, containing the terms of the contract, as claimed by plaintiff, had ever been received by defendant. In fact, no order was ever offered in evidence, and defendant denied the receipt of the letter of confirmation. In that state of the evidence the court deemed it proper not to permit the questions, but to hold them in abeyance until it was seen what would develop. Afterwards defendant expressly admitted that the flour was not of the

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grade known as "patent" flour. So that, were it conceded that the questions were proper when asked, the subsequent admission established the fact sought to be elicited, and no prejudice resulted from the rulings.

The next question sustained was this:

"Is the grade patent or best patent wheat flour a well-known and recognized grade of flour in the trade?"

In the discussion which followed the court stated that he saw no harm in permitting an answer, but then plaintiff's counsel said he proposed to follow the inquiry by showing that the only way one could tell whether a sample was "patent flour" or "straight flour" was by a chemical analysis. At this point defendant conceded and admitted that the flour delivered was not "patent" but "straight" flour, the only grade he makes; and the plaintiff's counsel, seemingly satisfied, dismissed the witness, saying: "If that is conceded, that is all."

[3] Plaintiff lastly complains because, on rebuttal, its manager was not allowed to testify whether a sample of the flour delivered had been submitted to a flour laboratory for examination. No argument as to the materiality of an answer to the question has been presented, and none occurs to us; for, as stated, there was then no dispute as to the grade of that flour. If intended merely as a preliminary question to lay the foundation for the testimony of the next witness called, the one who appears to have made such examination, for the purpose only of impeaching the chemical analysis made by defendant by the suggestion that the sample analyzed by defendant's witness might not have been taken from the flour in question, that purpose should have been disclosed before the ruling was made. The trial court took the purpose to be not rebuttal, but to show, as plaintiff's counsel also stated, that the flour was ground from musty wheat, a matter which plaintiff should have adduced evidence of before the defense opened.

The disputed issues in the case were clearly and concisely submitted to the jury. The remark of the learned trial court, in the early stage of the trial, that the proof indicated a sale by sample, could not have harmed plaintiff, for, when the testimony was all in, it was left to the jury entirely to determine whether or not the sale was by description also. The contention that plaintiff did not have the opportunity to prove damages on the theory of a sale by description appears to us to be of no merit. The only witness on values and damages was plaintiff's manager, who made the deal, and he testified that the price paid, \$10.80 per barrel, was the fair market value of the flour he intended to buy, and that the flour delivered was worth only \$6 per barrel. There was no

offer to show the difference in value between the grade known as "patent" flour and that known as "straight" to which any assignment of error is directed.

The order is affirmed.

STATE ex rel. SPRATT v. SPRATT.
(No. 22541.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

1. Appeal and error $\Leftrightarrow$ 490—Writ initiates independent proceedings which cannot be suspended by stay of proceedings in another action.

A writ of habeas corpus initiates an independent proceeding which cannot be stayed or suspended by a stay of proceedings in another action, although the ultimate rights of the parties may depend on the result of such other action.

2. Appeal and error $\Leftrightarrow$ 485(1)—Judgment $\Leftrightarrow$ 580—Appeal with supersedeas bond does not vacate judgment.

An appeal with a supersedeas bond does not vacate or annul the judgment appealed from, and the matters determined by it remain res judicata until it is reversed.

Appeal from District Court, Hennepin County; E. F. Waite, Judge.

Habeas corpus by the State, on the relation of Ethel Elizabeth Spratt, against Charles N. Spratt. Judgment for relator, and respondent appeals. Affirmed.

Ray H. Kenyon and A. B. Jackson, both of Minneapolis, for appellant.

Geo. T. Simpson, John F. Dahl, and E. S. Bibb, all of Minneapolis, for relator.

TAYLOR, C. The relator sued out a writ of habeas corpus from the district court of Hennepin county to recover the temporary custody of Margaret Spratt, Charles Webster Spratt and Cynthia Spratt, minor children of the relator and of the respondent who were then in the custody of the respondent. The court found that the allegations in the petition for the writ were true and ordered that the children be delivered to the relator—

"to be held in temporary custody in accordance with the amended judgment and decree of this court duly entered on the 22d day of June, 1921, in the action of Ethel Elizabeth Spratt against Charles N. Spratt."

The respondent in the writ appealed from the above order and will hereafter be designated as the appellant.

The matter was submitted to this court on the record. From the return it appears that, in an action in the district court of Hennepin

county brought by the relator against the appellant, a judgment of divorce in favor of the appellant was duly rendered and entered on December 15, 1917; that in and by this judgment the custody of the children above named was confided to the appellant, their father, with certain rights of visitation on the part of the relator, their mother; that after an extended hearing the district court, on June 22, 1921, amended its judgment by providing, among other things, that during the school vacation of the present summer and each school vacation hereafter, until the further order of the court, the relator shall be entitled to, and shall have, the custody and control of the children above named, the appellant to have the custody and control of them during the remainder of the year; that on June 23, 1921, appellant duly appealed to this court from such amended judgment and gave a supersedeas bond to stay proceedings thereunder; and that the writ of habeas corpus was served on appellant on June 23, 1921. While the writ of habeas corpus was apparently served before the appeal had been perfected by filing the supersedeas bond, an order from this court staying proceedings under the judgment was served on the morning of June 23, 1921, and before the service of the writ of habeas corpus, and we shall assume that appellant is correct in his contention that all proceedings under the judgment had been stayed before the habeas corpus proceeding was initiated.

[1] The principal question argued at the hearing was whether this stay of proceedings operated to bar the habeas corpus proceeding. We think this question has already been answered by this court adversely to appellant in *State ex rel. v. McDonald*, 123 Minn. 84, 142 N. W. 1051. In that case it was held, in effect, that a writ of habeas corpus is not a proceeding in any other action, but an independent proceeding in the nature of a new action brought by the relator to enforce rights then existing; and that proceedings under it cannot be suspended by a stay of proceedings in another action although the ultimate rights of the parties may depend upon the result of such other action. The writ requires the court to determine whether the person concerned is illegally held in custody or restrained of his liberty under the facts as they are found to exist at the time the question is presented, and this is a right of which such person cannot be deprived. Following the *McDonald* Case and the cases cited therein, we hold that the relator had the right to prosecute this proceeding notwithstanding the fact that proceedings under the judgment had been stayed.

It is also contended that the appeal with a supersedeas bond operated to annul the judgment appealed from, and to leave the judg-

ment of December 15, 1917, still in force unmodified.

[2] We are unable to sustain this contention. An appeal with a supersedeas bond does not vacate or annul the judgment appealed from, and the matters determined by it remain *res judicata* until it is reversed. 2 Ruling Case Law, 117, § 94, and cases there cited; 3 Corpus Juris, 1316, 1317, and numerous cases cited in notes 37 and 38; *Woolfolk v. Bruns*, 45 Minn. 96, 47 N. W. 460; *Allen v. Robinson*, 17 Minn. 113 (Gil. 90); *Robertson v. Davidson*, 14 Minn. 554 (Gil. 422). See, also, *Briggs v. Shea*, 48 Minn. 219, 50 N. W. 1037.

The judgment of June 22, 1921, still remains in force and determines the rights of the parties so far as the proceeding under this writ of habeas corpus is concerned. Possibly a court might interfere under such a writ if events occurring subsequent to the judgment showed that the welfare of the children required that a different disposition be made of them, but that question is neither presented nor decided here.

We find no other questions requiring special mention. Upon the facts as they appear in the return, the learned district court reached the correct conclusion, and the order appealed from is affirmed.

BURKE v. MAYLAND. (No. 22374.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

Limitation of actions § 21(3)—Physicians and surgeons § 18(4)—Action for malpractice not barred by the two-year statute; complaint held to state cause of action for malpractice.

The complaint states a cause of action for malpractice. Such actions are not barred by the two-year statute of limitations, which applies to actions for an assault, although some of the acts alleged may constitute an assault in law.

Appeal from District Court, Rice County; Arthur B. Childress, Judge.

Action by Lucille Burke against M. L. Mayland. A demurrer to the complaint was overruled, and defendant appeals. Affirmed.

John W. Le Crone, of Faribault, and C. D. O'Brien, of St. Paul, for appellant.

Orr, Stark & Kidder, of St. Paul, for respondent.

TAYLOR, O. Plaintiff brought this action to recover damages from defendant, a physician and surgeon, for alleged malpractice in the performance of a surgical operation upon her and in treating her for her ailments. De-

defendant demurred to the complaint on the ground that the cause, or causes, of action set forth therein accrued more than two years before the beginning of the action and are barred by the statute of limitations. The demurrer was overruled and defendant appealed.

Defendant construes the complaint as stating two causes of action—the first for an assault, and the second also for an assault if it states a cause of action at all—and insists that both are barred by the statute of limitations which bars actions for assault unless brought within two years after the right of action accrued.

We are unable to sustain defendant's contention. Fairly construed we think the complaint states only one cause of action—a cause of action for alleged malpractice. It sets forth the facts in much detail, covering eight printed pages; and while some of the acts alleged would doubtless constitute an assault in law, they are not set forth as independent causes of action, but as being the acts wherein and whereby defendant is alleged to have violated his duty to his patient.

The action as brought rests on the contract of employment. *Whittaker v. Collins*, 34 Minn. 299, 25 N. W. 632, 57 Am. Rep. 55. And the six-year, not the two-year, limitation is the one which applies. *Finch v. Bursheim*, 122 Minn. 152, 142 N. W. 143.

The order appealed from is affirmed.

NEEDLES et ux. v. KEYS et ux. (No. 22365.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

Vendor and purchaser ⇨101—Removal of default authorizing cancellation of contract held to reinstate it.

The vendee made a default, which, by the terms of the contract, authorized the vendor to declare the deferred installments due immediately and to cancel the contract. After declaring the deferred installments due immediately, the vendor instituted the statutory proceeding to cancel the contract. The vendee complied with the conditions in which he had made default within the statutory time, but did not pay the deferred installments. *Held*, that the payment of the deferred installments could not be required in the statutory proceeding, and that the removal of the default which authorized its cancellation reinstated the contract.

Appeal from District Court, Ramsey County; Hascall R. Brill, Judge.

Action by Elsworth A. Needles and wife against William M. Keys and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Cowern & Jesmer and Stephen I. Schmitt, all of St. Paul, for appellants.

Douglas, Kennedy & Kennedy, of St. Paul, for respondents.

TAYLOR, C. In January, 1918, defendants entered into a contract with the owner for the purchase of certain improved real estate in the city of St. Paul by the terms of which, in addition to the initial payment, defendants assumed and agreed to pay two mortgages on the property aggregating the sum of \$10,000 and bearing interest at the rate of 6 per centum per annum payable semiannually, and agreed to pay the taxes on the property before they became delinquent, and agreed to pay the owner the further sum of \$11,000 in semiannual installments of \$750 each. On November 20, 1919, defendants entered into a contract with plaintiffs by which they sold and agreed to convey the property to plaintiffs, and by which plaintiffs, in addition to the initial payment, assumed and agreed to perform all of defendants' remaining obligations under their contract with the owner, and agreed to pay defendants the further sum of \$6,000 in monthly installments of \$50 each, together with interest thereon at the rate of 6 per centum per annum. While this contract included a small strip of ground not included in the first contract, that fact is of no importance in this action. The contract provided that, if plaintiffs failed to make any of the payments which they were required to make by the terms of the contract, then defendants at their election could declare "the whole of said payments" immediately due and payable, and that the contract should, at the option of defendants, "be forfeited, canceled and terminated" by giving to plaintiffs "thirty days' written notice of such cancellation and termination, said notice to be in accordance with the statute in such case made and provided." On November 12, 1920, defendants served on plaintiffs a notice that plaintiffs were in default in failing to pay the installment of \$50 due defendants on October 20, 1920, in failing to pay interest on the mortgages at the time it fell due, in failing to pay the last half of the 1919 taxes before they became delinquent, and in failing to pay improvement assessments against the property, and stating that on account of such defaults defendants had elected to, and did, declare the entire balance of the purchase price going to them, amounting to the sum of \$5,000 and interest thereon, immediately due and payable, and directing plaintiffs to pay the whole thereof at once to defendants or their attorneys. On November 15, 1920, defendants served on plaintiffs a notice specifying the conditions in which plaintiffs had made default, and stating that the contract would "terminate within thirty days after the service of this notice" unless plaintiffs complied with

the conditions of the contract prior thereto. Within the 30 days, plaintiffs made all the payments required to be made by the contract other than those payable to defendants, and also tendered to defendants all past-due installments payable to them, together with interest thereon and the cost of serving the notice, but did not tender the principal sum of \$5,000 which defendants had declared to be due. Defendants refused to accept the tender for the reason that it did not include this principal sum of \$5,000. The question presented is whether plaintiffs were required to pay this principal sum, being the amount of the deferred installments, in order to relieve themselves from their default, it being conceded that they had complied with all other requirements within the prescribed time.

The statute provides:

"When default is made in the conditions of any contract for the conveyance of real estate or any interest therein, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser * * * a notice specifying the conditions in which default has been made, and stating that such contract will terminate thirty days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service. Such notice must be given notwithstanding any provisions in the contract to the contrary. * * * If within the time mentioned the person served complies with such conditions and pays the costs of service, the contract shall be thereby reinstated; but otherwise shall terminate." G. S. 1913, § 8081.

This statute takes away from the vendor the power to cancel the contract arbitrarily for the default of the vendee. It prescribes the only way in which the vendor may, by his own act, terminate the contract and thereby forfeit the rights of the vendee thereunder. The proceeding is in the nature of a strict foreclosure. While the statute must be given full effect, its provisions must be construed in the light of the legislative purpose to afford the vendee an opportunity to save and reinstate his equitable rights by removing the default, and, if the meaning be doubtful, that construction must be adopted which militates against a forfeiture. *Hage v. Benner*, 111 Minn. 365, 127 N. W. 3. The statute provides that, "When default is made in the conditions of any contract * * * whereby the vendor has a right to terminate the same," he may serve a notice specifying the conditions in which default has been made and stating that the contract will terminate 30 days thereafter unless prior thereto the vendee shall comply with

such conditions and pay the costs of service. It further provides that, if the vendee complies with such conditions within the prescribed time and pays the costs of service, "the contract shall be reinstated." These provisions are to be strictly construed for the purpose of avoiding a forfeiture. It is clear therefrom that the vendee may reinstate the contract by performing only those conditions, the nonperformance of which gave the vendor the right to institute the proceeding.

The default which gave this right in the present case was a failure to make certain payments on the due dates fixed in the contract. Without this breach of the conditions of the contract, the vendor would have had no power to terminate it; and the statute gave the vendee the right to reinstate it by making these payments and reimbursing the vendor for the costs incurred. It is true that this same default gave the vendor power to declare the principal sum due and he could doubtless have enforced his claim for such principal sum in a proper proceeding. He had the right to elect whether to proceed in court or under the statute. He elected to proceed under the statute for a strict foreclosure by his own act, and must, therefore, permit the vendee to cure his default on the terms and in the manner specified in the statute.

Conceding that the vendor had the right to declare the deferred installments due and to enforce payment of them in a proper proceeding, we are unable to hold that in this proceeding he could make the payment of such deferred installments one of the conditions with which the vendee must comply in order to reinstate the contract. We think the Legislature did not intend to permit him, by his own act, to add to the conditions which the vendee must perform to cure his default and save his equitable rights. We think that the Legislature intended that the contract should not be forfeited, if, within the prescribed time, the vendee removed such defaults as were made grounds of forfeiture by the terms of the contract itself. And we hold that in proceedings under this statute, the vendor cannot, by exercising an option to declare deferred installments due immediately, require the vendee to pay such deferred installments or forfeit his contract.

We agree with the trial court that the payments and tender made by the plaintiffs preserved and reinstated their rights under the contract, and the judgment appealed from is affirmed.

CARBIC MFG. CO. v. WESTERN EXPRESS CO. (No. 22348.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

1. Carriers $\S$ 32(2)—Provision in bill of lading filed with Commission requiring notice of claims in writing cannot be waived by carrier.

Where a carrier has filed a form of bill of lading for interstate shipments with the Interstate Commerce Commission and such form has been approved by the Commission, a provision therein to the effect that no claim for loss or damage can be enforced unless notice of such claim was given in writing within the time prescribed therein cannot be waived by the carrier.

2. Carriers $\S$ 159(1)—Notice of claim held not sufficient within bill of lading.

An oral notice that the shipment has been lost followed by a "tracer" sent out by the carrier in an attempt to locate it is not a compliance with such provision.

Appeal from District Court, St. Louis County; H. A. Dancer, Judge.

Action by the Carbic Manufacturing Company against the Western Express Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Washburn, Bailey & Mitchell, of Duluth, for appellant.

Fryberger, Fulton, Hoshour & Ziesmer, of Duluth, for respondent.

TAYLOR, O. Plaintiff appeals from a judgment for defendant. Plaintiff sued for the value of 25 carbic lights delivered to defendant at Duluth, Minn., to be transported to Dover, N. J., which were lost in transit and never delivered. The shipment was made under a bill of lading known as the uniform express receipt which provided that, as a condition precedent to recovery, claims for loss or damage "must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, within four months after a reasonable time for delivery has elapsed." This form of receipt had been filed with, and approved by, the Interstate Commerce Commission in connection with defendant's tariff rates.

Only two questions are presented: (1) Can defendant waive the provision of the contract which made the presentation of a claim in writing within the stipulated time a condition precedent to the right to maintain the action? (2) Has plaintiff complied with this provision in substance?

[1] 1. It is conceded that defendant, by its conduct, has waived the requirement in ques-

tion if it had power to waive such a requirement.

The shipment was in interstate commerce. That interstate commerce is now governed exclusively by the federal statutes and "by the common-law principles accepted and enforced by the federal courts" has become too thoroughly established to require the citation of authorities. Consequently we must look to, and follow, the decision of the federal courts in so far as they have determined the questions which arise in respect to such commerce. The case of *A. J. Phillips Co. v. Grand Trunk W. Ry. Co.*, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, did not involve the precise question here presented, but the question whether a carrier could waive a provision of the statute limiting the time within which an action could be brought against it. The court said:

"To permit a railroad company to plead the statute of limitations as against some, and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here."

In *Georgia, F. & A. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, the milling company sued the terminal carrier for a quantity of flour damaged in transit and refused by the consignee. The carrier asserted as a defense that the milling company had failed to file a claim in writing within four months as required by the bill of lading. The court said:

"The provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carriers. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms. * * * The parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. [Citing cases.] We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it."

The court held, however, that the requirement had been complied with in substance in that case.

St. Louis, I. M. & S. Ry. Co. v. Starbird, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. Ed. 917, was a suit for damages to a shipment of peaches in which notice of the claim had not been given in writing within the stipulated time. The court, after considering prior cases and remarking that a notice in writing "puts in permanent form the evidence of an intention to claim damages" and enables the carrier to make such investigation as the case requires, said:

"We find nothing unreasonable in the stipulation concerning notice, and there was no attempt made to comply with it. We therefore think the Supreme Court of Arkansas erred in holding that verbal notice to the dockmaster of the condition of the peaches was a compliance with the terms of the contract."

In *Missouri, K. & T. Ry. Co. v. Ward*, 244 U. S. 383, 37 Sup. Ct. 617, 61 L. Ed. 1213, the initial carrier issued a through bill of lading for a shipment of live stock. A connecting carrier, on receiving the shipment, issued a second bill of lading containing different terms and sought to defend the action on the ground that the shipper had failed to comply with the terms of the second bill of lading. After holding that "the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation," and that the issuance of the second bill of lading was of no effect, the court said:

"The railway companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore, as stated in *Georgia, F. & A. R. Co. v. Blish Mill. Co.*, 241 U. S. 190, 197 [60 L. Ed. 948, 952], the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act. * * * A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

Southern Pacific Co. v. Stewart, 248 U. S. 446, 39 Sup. Ct. 139, 63 L. Ed. 350, was an action to recover damages for injuries to cattle in which the shipper had failed to give a written notice within the prescribed time, but alleged and sought to prove that the carrier had waived this requirement. The trial court submitted the question of waiver to the jury, which found in favor of the shipper. The court said:

"Considering the principles and conclusions approved by our opinions in *St. Louis, I. M. & S. R. Co. v. Starbird*, 243 U. S. 592 [61 L. Ed. 917], and *Erie R. Co. v. Stone*, 244 U. S. 332 [61 L. Ed. 1173], announced since the judgment below, and the cases therein cited, no extended discussion is necessary to show that

upon the facts here disclosed the stipulation between the parties as to notice in writing within ten days of any claim for damages was valid. And we also think those opinions make it clear that the circumstances relied upon by the shipper are inadequate to show a waiver by the carrier of written notice as required by the contract. The trial court erred in giving to the jury the instruction quoted above; and it should have granted the carrier's request for a directed verdict."

Baltimore & O. R. Co. v. Leach, 249 U. S. 217, 39 Sup. Ct. 254, 63 L. Ed. 570, was an action for damages to cattle in which the carrier alleged that the shipper had failed to serve a written notice of claim within the prescribed time. The court said:

"This averment was not denied; but the shipper replied that he promptly advised the railroad's agent at Georgetown of all essential facts and maintained that requirements in respect of written notice to general freight agent had been waived.

"The point involved has been discussed in our recent opinions and we can find nothing which takes this case out of the rule requiring compliance with a provision in a bill of lading like the one above quoted."

In *Texas & P. Ry. Co. v. Leatherwood*, 250 U. S. 478, 39 Sup. Ct. 517, 63 L. Ed. 1096, the initial carrier issued a through bill of lading for a shipment of horses which contained a provision barring any action for damages unless brought within six months. Two of the connecting carriers before accepting the shipment required the shipper to accept and sign new bills of lading. These bills of lading did not contain the above limitation. More than a year thereafter the shipper brought suit against the two carriers who had issued the new bills of lading for injuries to the horses while in transit. The carriers interposed as a defense that the action was barred by the stipulation in the original bill of lading. The court after referring to the ruling in *Missouri, K. & T. R. Co. v. Ward*, *supra*, in respect to a second bill of lading said:

"We held that the second bill of lading was void, since under the Carmack Amendment the several carriers must be treated, not as independent contracting parties, but as one system, and that the connecting lines become in effect mere agents whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier, and that they are prevented by law from varying the terms of that contract. * * * As stated in *Georgia, F. & A. R. Co. v. Blish Mill. Co.*, 241 U. S. 190, 197 [60 L. Ed. 948, 952], the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper the right to ignore them. 'A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.' The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon

all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled."

Erie Ry. Co. v. Shuart, 250 U. S. 465, 39 Sup. Ct. 519, 63 L. Ed. 1088, was a suit for injuries to a shipment of horses in which the shipper had failed to give a written notice as required by the contract. The court said:

"Under our former opinions, the clause requiring presentation of a written claim is clearly valid and controlling as to any liability arising from beginning to end of the transportation contracted for."

In *Olson v. C., B. & Q. Ry. Co.*, 250 Fed. 372, 162 C. C. A. 442, the Circuit Court of Appeals for this circuit has adopted and applied the same rule. And this rule was also recognized by the Circuit Court of Appeals of the Ninth Circuit in *Kidwell v. Oregon Short Line*, 208 Fed. 1, 125 C. C. A. 313.

We think the federal Supreme Court has made it clear that a provision in the bill of lading requiring notice in writing within a stipulated time of claims for loss or damage, as a condition precedent to the right to enforce such claims, cannot be waived by the parties nor by any act or conduct of the carrier. Plaintiff urges that this rule should be applied only where the carrier offers the shipper an election between different rates which give him different rights, but, as we understand the federal decisions, they do not limit the rule to such cases, but apply it in all cases. The rule thus announced is not the rule heretofore followed by this court, as is shown by *Banks v. Pennsylvania Ry. Co.*, 111 Minn. 48, 126 N. W. 410, *Gamble-Robinson Co. v. Northern Pacific Ry. Co.*, 119 Minn. 40, 137 N. W. 19, *Shama v. Chicago, M. & St. P. Ry. Co.*, 128 Minn. 522, 151 N. W. 406, and other cases, but we feel constrained to adopt and follow it as the rule enforced by the federal courts in respect to shipments in interstate commerce. That the courts, generally, have taken this view of the meaning and effect of the federal cases is shown by the numerous decisions which have adopted and applied the rule. The following are examples: *Metz v. Boston & M. Ry. Co.*, 227 Mass. 307, 116 N. E.

475; *Houston Ry. Co. v. Houston Packing Co.* (Tex. Civ. App.) 203 S. W. 1140; *Missouri, K. & T. Ry. Co. v. Lynn*, 62 Okl. 17, 161 Pac. 1058; *Wall v. Northern Pacific Ry. Co.*, 53 Mont. 81, 161 Pac. 518, L. R. A. 1917C, 433; *L. & N. Ry. Co. v. Johnson*, 182 Ky. 418, 206 S. W. 638; *Abell v. A., T. & S. F. Ry. Co.*, 100 Kan. 238, 164 Pac. 269, L. R. A. 1918E, 782; *Dean v. Southern Ry. Co.*, 107 S. C. 25, 91 S. E. 1042; *Bryan v. L. & N. Ry. Co.*, 174 N. O. 177, 93 S. E. 750, L. R. A. 1918A, 938; *Southern Ry. Co. v. Lewis*, 139 Tenn. 37, 201 S. W. 131, L. R. A. 1918O, 976; *Cudahy Packing Co. v. A., T. & S. F. Ry. Co.*, 198 Mo. App. 520, 201 S. W. 623.

[2] 2. Plaintiff contends, but apparently without any great degree of confidence, that it had complied with the requirement of the contract in substance. This contention rests on the fact that a little less than five months after making the shipment plaintiff telephoned to defendant's office at Duluth that the shipment had been lost and requested that a "tracer" be sent out, and the further fact that defendant prepared a "tracer" describing the shipment and sent it to the connecting carrier to whom the shipment had been delivered, and also sent a copy of it to plaintiff. Conceding that the notice by telephone was within four months after a reasonable time for delivery, and also conceding that it was sufficient in substance, which is doubtful, it was oral only, and the cases above cited establish beyond question that an oral notice is not sufficient where the contract requires a notice in writing. Plaintiff urges that the tracer sent out by defendant was in writing and in connection with the oral notice should be given effect as a claim for the loss. This tracer was not made or presented by plaintiff, and did not purport to assert or acknowledge a claim for compensation on the part of any one. It was made and sent out by the carrier in an attempt to locate the shipment, and cannot be construed as in substance a compliance with the requirement that a party claiming compensation for a loss must make a claim therefor in writing within the prescribed time. *Cudahy Packing Co. v. A., T. & S. F. Ry. Co.*, 198 Mo. App. 520, 201 S. W. 623.

Our conclusions accord with those of the learned trial court, and its judgment is affirmed.

WELSH v. WELSH. (No. 22325.)

(Supreme Court of Minnesota. July 22, 1921.)

(Syllabus by the Court.)

Husband and wife $\S$ 29(6, 9).—When antenuptial contracts will be sustained stated; husband has burden of showing absence of fraud or concealment where no provision made for wife; antenuptial contract, releasing wife's right, set aside.

Antenuptial contracts are sustained when they are free from fraud, violative of no statute, are equitably and fairly made, and are fair and reasonable in their terms. The entire absence of provision for the wife imposes upon the husband the burden of showing that there was no fraud or concealment and that the prospective wife knew the extent, character and value of the prospective husband's property and the nature and extent of her rights as wife and widow. By antenuptial contract involved in this case, the prospective wife, a woman without means, surrendered all marital property rights and received nothing in return. The evidence on the part of the husband did not rebut the presumption arising and the decision of the trial court setting aside such contract is sustained.

Appeal from District Court, Redwood County; I. M. Olson, Judge.

Action by Mary E. Welsh against Walter A. Welsh. Judgment for plaintiff, and defendant appeals. Affirmed.

Alexander Seifert and Erickson & Loomis, all of Springfield, for appellant.

Albert H. Enersen, of Lamberton, for respondent.

HALLAM, J. Plaintiff brought this action against her husband to set aside an antenuptial contract. The trial court decided in her favor, and defendant appeals.

Prior to April, 1916, plaintiff lived in Rhode Island. She was about 43 years of age, and had been married, was living apart from her husband, and secured a divorce soon thereafter. She had two children, a son about 14 and a daughter about 20. Defendant was a man about 50, unmarried, and living on a farm with his mother who was old and needed care. He advertised in a matrimonial paper for a housekeeper. Plaintiff answered. Correspondence followed, in which there was a suggestion of marriage if upon further acquaintance the same should be found agreeable. As a result of the correspondence, plaintiff, accompanied by her son, came to Minnesota in April, 1916, to act as housekeeper for defendant and his mother, and she acted in that capacity until March 15, 1917. Shortly after plaintiff came to Minnesota, the question of marriage was talked over between them and it was agreed that they should marry at some future time. In

June, 1916, defendant procured a marriage license but no marriage was then performed. About March 14, 1917, plaintiff received a telegram informing her that her daughter was seriously ill in Rhode Island and asking plaintiff to come to her. Plaintiff applied to defendant for an advance of money. Defendant refused to advance the money unless they were first married and they went to Springfield and were married and thereupon defendant advanced plaintiff \$26 for expenses of her trip. Before the marriage they went to an attorney and defendant procured the attorney to prepare an antenuptial contract which was there signed. The contract was read to plaintiff and she understood its contents. No misrepresentations were made to her and she had a general knowledge of the amount of defendant's property. She signed the contract voluntarily and under no compulsion or excitement except the mental anxiety over her daughter. Defendant owned property which was then worth about \$10,000 and has since increased in value.

By the terms of the antenuptial agreement, plaintiff renounced all interest in the property which defendant possessed or might thereafter possess, released all dower interest in any lands of defendant and all rights which the law otherwise would give her, including right of inheritance, personal property selection, and all provision for her maintenance which she might be entitled to under the law after defendant's death. Plaintiff had no property and has none at this time. The contract in terms provided that the marriage was the sole consideration for the agreement.

On these facts the court found that the contract was inequitable and unjust to plaintiff, that it lacked mutuality and consideration of any kind except the engagement to marry, that because of such lack of equity and consideration, a court of equity should refuse to enforce it and adjudged that the contract be cancelled and annulled.

This court has been liberal in sustaining antenuptial contracts. The substance of the decisions has been that such contracts are to be sustained if they are free from fraud, violative of no statute, are equitably and fairly made and are fair and reasonable in their terms. *Desnoyer v. Jordan*, 27 Minn. 295, 7 N. W. 140; *Hosford v. Rowe*, 41 Minn. 245, 42 N. W. 1018; *Appleby v. Appleby*, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590, 117 Am. St. Rep. 709, 10 Ann. Cas. 563; *Slingerland v. Slingerland*, 115 Minn. 270, 132 N. W. 326; *In re Estate of Friedrich Malchow*, deceased, 143 Minn. 53, 172 N. W. 915. See, also, *Pavlicek v. Roessler*, 222 Ill. 83, 78 N. E. 11; *In re Deller*, 141 Wis. 255, 124 N. W. 278, 25 L. R. A. (N. S.) 751; *Kennedy v. Kennedy*, 150 Ind. 636, 50 N. E. 756. In some of these cases cited, it was said

that marriage alone is a sufficient consideration to support such a contract. In all of them, some substantial provision was made for the complaining spouse. In some the complaining spouse had independent means.

In view of the fact that defendant had no children or dependents other than his aged mother and that plaintiff had no property and was giving up her life to defendant, the contract was not fair or reasonable. Some decisions have held this alone sufficient to avoid such a contract, *Mowser v. Mowser*, 87 Mo. 437, and see the decisions of this court, above cited. But there is something more to this case. The entire absence of provision for plaintiff has been held in the cases cited and in cases from other jurisdictions, *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551; *Tilton v. Tilton*, 130 Ky. 281, 113 S. W. 134, 132 Am. St. Rep. 359; 21 Cyc. 1250, to impose upon the husband the burden of showing, if he would sustain the contract, that there was no fraud or concealment and that the prospective wife knew the extent, character and value of the prospective husband's property and the nature and extent of her rights as his wife and widow. *Slingerland v. Slingerland*, supra. The evidence is not before us. We have only the judgment of the court. The judgment embodies the findings and these negative fraud in the nature of misrepresentations, but nothing more. It is found that plaintiff had a general knowledge as to the amount of property possessed by defendant. This is not usually regarded as sufficiently specific to sustain such an unequal agreement. See *Slingerland v. Slingerland*, supra; *Warner v. Warner*, 235 Ill. 448, 465, 85 N. E. 630. Also there is an entire absence of finding that plaintiff was at all advised as to the nature and extent of her rights as his wife and widow. When we take all these facts in conjunction with the pressure of anxiety of plaintiff over the illness of her daughter and her desire to secure funds necessary to enable her to go to her daughter, really the impelling cause of the execution of both antenuptial and marriage contracts at that time, it seems to us clear that defendant has not made the proof necessary to sustain a surrender of all marital property rights, and that the judgment of the trial court should be sustained.

BROWN, O. J. I concur in the result on the ground that the facts found by the trial court justify the conclusion of unfair and coercive conduct on the part of defendant in procuring plaintiff to sign the agreement amounting to duress of a character to void the transaction. I do not concur in the view that such contracts may be set aside on the naked ground that they are unfair and inequitable.

NORTHERN WELDING CO. et al. v. JORDAN et al. (Nos. 22222, 22223.)

(Supreme Court of Minnesota. July 22, 1921.)

(Syllabus by the Court.)

1. Contracts §143—Indemnity §9(1)—Indemnity contract not limited by special reference to particular claims; rules of construction inapplicable, where language unequivocal.

A contract which in plain terms obligates one party to save another harmless from any and all claims is not limited by an especial reference to particular claims. Where language is unequivocal, rules of construction have no application.

2. Indemnity §9(1)—When indemnity contract may apply to subsequent breaches stated.

A contract to indemnify against claims on account of contracts, not intended to indemnify against subsequent breaches generally, may apply to subsequent breaches arising out of acts of an agent under a contract previously made authorizing him to perform such acts.

3. Indemnity §9(1)—Duty of indemnified party to violate contract to mitigate damages stated.

Whether it was the duty of the party indemnified to violate the contracts with its agents in order to mitigate damages is to be determined by the test whether a reasonably prudent and diligent person would take such a course.

4. Indemnity §9(2)—Indemnitor liable for reasonable expense of defense.

Where an indemnitor is under obligation to defend against a claim and defense is tendered and refused, the indemnitor is liable for the reasonable expense of the defense.

Appeal from District Court, Hennepin County; Wm. E. Hale, Judge.

Action by the Northern Welding Company and another against L. E. Jordan and others. Judgment for plaintiffs, and all the defendants appeal; defendant Jordan appealing separately from an order denying new trial. Affirmed.

George S. Grimes, of Minneapolis, for appellants.

Kingman, Cross, Morley & Cant, of Minneapolis (McDowell & Fosseen, of Minneapolis, of counsel), for respondents.

HALLAM, J. On April 9, 1913, E. B. Teeple was doing business at Minneapolis under the name of Vulcan Process Company, and on that day sold to the Lewistown Iron Works of Lewistown, Fergus county, Mont., a Vulcan welding apparatus and equipment and by the contract of sale agreed—

"to protect the Lewistown Iron Works for the county of Fergus, Mont., on our apparatus that we shall sell him, and guarantee not to place any other apparatus in said county without their consent."

In June, 1913, defendant Jordan acquired a partnership interest in the business of the Vulcan Company. In July, 1913, the Vulcan Process Company was incorporated and took over all the property and assumed all debts, liabilities, and obligations of Teeple and of the partnership. Teeple and defendant Jordan were directors and officers and actively engaged in the management of the corporation.

In February, 1914, the corporation, through its jobbers, sold a Vulcan welding apparatus and equipment to Herbert McHardie, a blacksmith in Fergus county, Mont. In April, 1915, the Lewistown Company sued the corporation for damages for breach of its contract because of the sale to McHardie. In January, 1916, it recovered a verdict for \$4,200.

In 1915, Teeple retired and Jordan became the active manager of the corporation. In January, 1916, defendants H. A. and J. C. Hallum and Burrows purchased stock in the corporation and in March, 1916, defendants were the owners of practically all the stock of the corporation. In March, 1916, defendants sold their stock to the Northern Welding Company. This company had for some time been manufacturing the product, the Vulcan Company selling it. A contract was entered into between the Northern Welding Company, party of the first part, the Vulcan Process Company, party of the second part, and defendants, parties of the third part. The contract contained this stipulation:

"Third parties hereby agree also that in further consideration of the covenants herein contained, they will at all times assume full liability for and save first and second parties harmless from any and all claims or damage suits on account of any contract or agreements made by or for second party, or by any of its agents, officers or employes, for second party, prior to the date hereof (especial reference being had to a disputed account for twenty-one hundred and sixty dollars (\$2,160.00) with the Presto-O-Lite Company of Indianapolis, Indiana, a verdict for forty-two hundred dollars (\$4,200.00) secured by Lewistown Iron Works of Lewistown, Montana, against second party, and certain claims made by the Canadian Government for certain duties in reference to goods sold to the Auto-Lite Gas Company of Winnipeg, by second party)."

In June, 1916, the verdict of \$4,200 in favor of the Lewistown Iron Works was set aside and a new trial granted. In July, 1916, the Lewistown Iron Works brought a second action against the Vulcan Company for seven other breaches of the same contract, arising out of sales of apparatus to seven other concerns in Fergus county, on dates as follows:

June 1, 1915; June 5, 1915; August 1, 1915; January 15, 1916; May 15, 1916; June 15, 1916; June 20, 1916.

This action was consolidated with the first one and a verdict recovered for \$4,600. Judgment was entered and the judgment paid.

In March, 1917, the Lewistown Iron Works commenced a third action against the Vulcan Process Company for five violations of the contract of April, 1913, resulting from sales on the following dates: October 7, 1916; November, 1916; December 1, 1916; December 5, 1916; January 30, 1917. Judgment was given for plaintiff for \$1,885.82, and this was paid.

The trial court held defendants liable under their agreement of March 8, 1916, for the amount of both judgments and for attorney's fees and disbursements in the last-mentioned action. All defendants appeal, defendant Jordan appealing separately.

[1] 1. Defendants contend that the contract of defendant obligated them to pay only the claims enumerated in the contract. We do not so construe the contract. The contract is plain in its terms and obligates defendants to save the other parties harmless from any and all claims or damage suits on account of contracts or agreements theretofore made. The "especial reference" to three claims was unnecessary, but it did not limit the clear and unequivocal language that preceded it. *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *Murphy v. City of New York*, 190 N. Y. 413, 83 N. E. 39; *Dunbar v. Dunbar*, 71 Mass. (5 Gray) 103. The language is so clear and unequivocal that rules of construction, such as the rule of ejusdem generis, resorted to as an aid in case of doubt, have no application. See *National Bank v. Ripley*, 161 Mo. 126, 132, 61 S. W. 587; *English v. Shelby*, 116 Ark. 212, 172 S. W. 817; *In re Orwig's Estate*, 185 Iowa, 913, 167 N. W. 654. The result is that the fact that the \$4,200 verdict was set aside is unimportant.

[2] 2. Three of the claims for damages in the consolidated action arose out of breaches of contract occurring after the agreement of March 8, 1916. This contract was not intended as an indemnity against subsequent breaches generally. But these subsequent breaches arose by reason of sales made by agents under contract and authority which had been given them previous to March 8, 1916. Under such circumstances, we think they were covered by defendant's contract. This also applies to the claims upon which the judgment in the third action was obtained, except that the last sale was made by an agent previously authorized, but after the expiration of his agency contract. This fact was not called to the attention of the trial court and defendant should not now be permitted to raise the point. Had it been seasonably raised, a proper adjustment of damages might have been made.

[3] 3. Defendants contend that the damages would have been less had the corporation violated its contract with its agents by refusing to fill orders made by the agents in Fergus county, and that the corporation should have taken this course in order to minimize the damages. We do not think the court should hold as a matter of law that the corporation was obliged to take this course. The court found that the manager of the corporation, during the period of these later sales, had no knowledge of the Teeple contract, or its assumption by the corporation, or of the pending litigation in respect thereto, and that defendants never advised him that sales were not to be made in Fergus county. The fact or assumption by the corporation was disputed and it was wholly uncertain what damage, if any, would ensue from sales in Fergus county.

It was the duty of the corporation to use prudent and reasonable care and diligence to minimize its damages. No particular course can be mapped out as the proper one unless it can be shown that such course would be the only one which a reasonably prudent and diligent person would pursue. *Cargill v. Thompson*, 57 Minn. 534, 547, 59 N. W. 638; *Chicago, R. I. & P. Ry. Co. v. Floyd*, 171 S. W. 918; *Southern Ry. Co. v. Cunningham*, 128 Ga. 90, 50 S. E. 979; 1 *Sutherland on Damages*, § 90. We cannot say as a matter of law that a reasonably prudent and diligent person would pursue the course contended for by defendants.

[4] 4. We think plaintiffs were entitled to recover the attorney's fees incurred in the last Lewistown Iron Works lawsuit. Defendants were tendered the defense of this suit. They were under obligation to defend it, and they should be held liable for this reasonable expense of the defense.

Order affirmed.

OHMAN v. LEE. (No. 22166.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

1. Corporations §127—Corporation, on learning of assignment of stock, may transfer on records without surrender thereof or request from purchaser.

Where the holder of capital stock sells, assigns and delivers it to another, and in the assignment, authorizes the corporation to transfer the stock to the purchaser on its records, the corporation, on learning of such assignment, may make such transfer on its records without a surrender of the stock or a request from the purchaser.

¹ Reported in full in the *Southwestern Reporter*; reported as a memorandum decision without opinion in 115 Ark. 607.

2. Corporations §244(5)—Purchase of stock constitutes authority to transfer of record.

By purchasing the stock the purchaser gave authority to transfer it to him of record.

3. Corporations §127—Statutes and by-laws as to transfer of stock may be waived by corporation.

The provisions of the statutes and of the by-laws regulating the transfer of stock are for the benefit of the corporation and may be waived by the corporation.

4. Corporations §139—Stubs in stockbook held evidence of transfers therein noted.

Where the corporation recorded the transfer of stock on the stubs from which the certificates were detached and kept no other record thereof, such stubs constituted the transfer book of the corporation and were evidence of the transfers noted thereon.

5. Corporations §139—Stock transfers on records presumed properly made.

Transfers appearing on the records are presumed to have been properly made, and as there is nothing to impeach the record of the transfer of the stock in controversy to defendant, he was a registered stockholder and liable to creditors as such.

6. Corporations §244(5)—Purchaser of capital stock exercising stockholder's rights liable as such, though stock not transferred on records.

Where the purchaser of capital stock thereafter exercises the rights of a stockholder and is recognized as such by the corporation, he thereby acquires the rights and becomes subject to the liabilities of a stockholder, although his stock may not have been transferred to him on the records.

Appeal from District Court, Goodhue County; Albert Johnson, Judge.

Action by J. N. Ohman, as receiver of the Thor Laundry & Specialty Company, against Oliver J. Lee. Judgment for defendant, and plaintiff appeals. Reversed.

Joss, Ohman & Fryberger, of Minneapolis, for appellant.

A. J. Rockne, of Zumbrota, for respondent.

TAYLOR, C. An execution against the Thor Laundry & Specialty Company having been returned unsatisfied, proceedings were instituted by creditors which resulted in the appointment of plaintiff as receiver of the company, and in an assessment against all the stockholders of the company of 100 per centum of the par value of their stock. Plaintiff as such receiver brought this action against defendant to recover the amount of the assessment upon 600 shares of the stock, of the par value of \$6,000, of which defendant was alleged to be the owner. In his answer, defendant denied that he was, or ever had been, the owner of any of the capital stock of the company.

That plaintiff is entitled to collect the

amount of the assessment from all stockholders was established at the trial and is not disputed. The controversy is whether defendant is liable as a stockholder.

That defendant, on April 3, 1915, purchased 400 shares of the capital stock of the company of the par value of \$4,000, represented by certificates numbered 6, 7, 8, and 9 for 100 shares each, from Ole J. Olsen, and that Olsen by written assignment indorsed thereon duly transferred such certificates and the stock represented thereby to defendant, and authorized G. R. Howes, secretary of the company, to make the transfer thereof on the books of the company, and that Olsen delivered such certificates and assignments to defendant who has held and retained them ever since, is found as a fact by the court and stands undisputed on this appeal. But the court also found that this stock had never been transferred to defendant on the books of the company and that defendant never became a registered stockholder of the company; and apparently on this ground held that defendant was not liable for the assessment and rendered judgment in his favor. Defendant seeks to sustain the judgment on the ground that he was not a registered stockholder and that only registered stockholders are liable for such assessments.

[4] If defendant was a registered stockholder he is clearly liable for the assessment. The stock certificates were bound in book form. When a certificate was issued, it was detached from the stub and entries were made in a blank form on the stub showing the number of the certificate, the number of shares, to whom issued, and the date of issue. The stub also contained a blank form in which to note transfers, and when stock was transferred entries were made in this form showing from and to whom the stock was transferred, the date of transfer, the number of the original certificate, the number of original shares therein, and the number of shares transferred. This was the only record of transfers of stock kept by the company, and, while it does not contain all the information required by the statutes to be kept in the stock book, it is, nevertheless, the transfer book of the company, and is evidence of the facts properly entered therein. *Holland v. Duluth, I. M. & D. Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 139 N. W. 606, 43 L. R. A. (N. S.) 706.

[2] The stubs of the certificates in question show that the certificates were issued to Ole J. Olsen January 30, 1915, and were transferred from Olsen to defendant April 3, 1915. Defendant claims that this transfer was ineffective for the reason that it was made without his knowledge, and that he had never surrendered the original certificates to the company and had never asked for or received new ones. All that appears in reference to

these transfers is the fact that the entries were made by Howes who was secretary of the company at that time, and that they were not made at the instance of defendant or with his knowledge. Defendant seems to assume that they could be lawfully made only at his instance. In this he is in error. While it is true that a person cannot be made a stockholder without his consent, the purchase of the stock by defendant of itself gave authority to make the transfer without any further act on his part. *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721. Olsen had the right to have the stock transferred on the books, for he was responsible to the company and its creditors for all liabilities which might accrue against the stock prior to such transfer. The by-laws provide that the transfer of stock—

“shall be made by indorsement on the certificate and surrender of the same to the company, and new certificates shall be issued to the person entitled thereto.”

[1, 3, 5] Except under special circumstances which did not exist in this case, the company could not be compelled to transfer stock without the surrender, or at least the presentation, of the old certificates, but this requirement was for the benefit of the company and could be waived by the company. *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721; *Prince Inv. Co. v. St. Paul & S. C. L. Co.*, 68 Minn. 121, 70 N. W. 1079. If the company, after learning of the sale from Olsen to defendant, saw fit, either at the instance of Olsen or of its own volition, to accept defendant as a stockholder, it had the right to enter the transfer on its records, even against the objection of defendant. *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721. The circumstances under which these transfers were made do not appear; we merely know that they were entered of record by the officer charged with the duty of keeping the records and of making such entries. Neither this officer nor Olsen were called as witnesses. Transfers appearing on the records are presumed to have been properly made until the contrary is shown. *Bartlett v. Stephens*, 137 Minn. 213, 163 N. W. 288. There is nothing to impeach this record and the fact that it was made without the surrender of the old certificates or the issuance of new ones is immaterial. *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721. It follows that defendant was a registered stockholder and that the finding to the contrary cannot be sustained.

[6] Furthermore the fact that defendant is a stockholder has been continuously recognized, both by himself and by the company, ever since he purchased the stock. At or about that time he was elected a director but resigned a few months later because he was unable to attend the meetings. He at

tended the next annual stockholders' meeting and was listed at that meeting as entitled to vote stock in the amount of \$4,000. At this meeting he was again elected a director. Thereafter he attended a part of the directors' meetings and gave a written waiver of notice of others which he was unable to attend. He carried on an extended correspondence with the secretary and manager of the company concerning the management of its business affairs in which he was referred to as one of the heavy stockholders. He gave the secretary a written proxy to vote his stock in the amount of \$4,000 at a stockholders' meeting which he was unable to attend. The facts are ample to show that he recognized himself as a stockholder, and that the company had accepted him as such.

It has been held from an early date that the statutes regulating the transfer of capital stock were intended solely for the benefit of the corporation; and that the owner could sell and transfer his shares at will subject only to the right of the corporation, if it so elected, to treat him, instead of the purchaser, as owner of the stock and liable for all obligations growing out of such ownership, until the transfer was entered of record. In *Lund v. Wheaton Koller Mill Co.*, 50 Minn. 36, 52 N. W. 268, 36 Am. St. Rep. 623, the court said that this rule had then been applied so long that they felt constrained to continue it under the doctrine of *stare decisis*. As a corollary to this rule, it is recognized that the corporation may waive the requirements of the statutes and of the by-laws in respect to the transfer of stock, and may accept the purchaser as a stockholder although his stock has not been transferred to him on the records. If the purchaser exercises a stockholder's rights and thereby assumes the status of a stockholder, and the corporation recognizes him as such by acquiescing therein, he becomes entitled to the rights and subject to the liabilities of a stockholder as effectively as if his stock had been transferred to him on the records with all the prescribed formalities. *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721.

It follows from what we have said that we are unable to sustain either of defendant's propositions. The record shows that he was in fact a registered stockholder. It also shows that, even if he were not a registered stockholder, he had assumed the status of a stockholder and had been recognized as such by the corporation and had thereby acquired the rights and become subject to the liabilities of a stockholder.

The claim that defendant was the owner of any stock other than the 400 shares represented by the stock certificates numbered 6, 7, 8 and 9 was abandoned at the trial.

The judgment is reversed.

STATE ex rel. CHICAGO, B. & Q. R. CO. et al. v. PROBATE COURT IN AND FOR HENNEPIN COUNTY et al. (No. 22328.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

1. Executors and administrators §20(6) — One sued by administrator cannot object to appointment of administrator unless void on face of record.

One against whom an administrator asserts a right of action has no standing in the probate court to object to the administrator whom the court has appointed unless the appointment is void on the face of the record.

2. Death §35—Executors and administrators §11—Action maintainable for death of non-resident beyond state; claim for death of nonresident asset.

An action may be maintained in this state to recover on a claim for wrongful death of a nonresident of the state, suffered out of the state. An administrator may be appointed in this state where the only asset is such a death claim.

3. Courts §514—Appointment of foreign administrator held not to affect jurisdiction of probate court in this state.

The fact that an administrator has been appointed in another state and an action on the death claim commenced there does not go to the jurisdiction of the probate court of this state.

Certiorari from District Court, Hennepin County; W. C. Leary, Judge.

Action by the Wells Dickey Trust Company, special administrator of the estate of Conrad Sohl, against the Chicago, Burlington & Quincy Railroad Company and others, to recover for wrongful death. A petition by defendants to the probate court for an order revoking and annulling special letters of administration and vacating all proceedings on the ground of want of jurisdiction was denied, and defendants bring certiorari. Affirmed.

Stringer & Seymour and Barrows, Stewart & Metcalf, all of St. Paul, for appellants.

Tautges & Wilder and J. H. Sapiro, all of Minneapolis, for respondents.

HALLAM, J. Conrad Sohl was a resident of Saunders county, Neb. On March 28, 1920, he was killed in Nebraska in a collision between a train and a gasoline speeder. It is claimed both relators are liable in damages for his death under the federal Employers' Liability Act of April 22, 1908 (U. S. Comp. St. §§ 8657-8665). Kate Sohl, the widow of deceased, made application to the probate court of Hennepin county asking for the appointment of a special administrator of the estate of deceased. The petition alleged

that petitioner was then of Hennepin county; that deceased died a resident of Saunders county, Neb., leaving no personal property there, and that the property of deceased consisted in part of a claim for wrongful death against both relators, and asked that the Wells Dickey Trust Company be appointed special administrator. Thereupon the probate court made an order appointing said company as special administrator and special letters of administration were issued accordingly.

The special administrator commenced suit against relators to recover damages for the death of Sohl. Thereupon relators petitioned the probate court for an order revoking and annulling the special letters of administration and vacating all proceedings in that court on the ground that the probate court had no jurisdiction in the premises. The probate court denied the petition and certiorari is brought to review this determination.

The facts on which the claim of relators is based are in substance as follows: Sohl was a resident of Nebraska; the accident occurred in Nebraska and Sohl died there; it is claimed that his dependents live there, though the record in the probate court of Hennepin county recites that the widow is "of said county." An administrator was appointed by a Nebraska court, and said administrator, before the commencement of proceedings in this state, brought action in Nebraska on said death claim against the relator Rock Island Railway Company. Said action was removed to the federal court of that district and is there pending.

[1] 1. Respondent challenges the right of relators to question the regularity of the appointment of the administrator in this state. It is doubtless true that a mere debtor of an estate or one against whom an administrator asserts a right of action has no concern with the personnel of the administrator and has no standing in court to object to the administrator whom the court has appointed. In *re Hardy*, 35 Minn. 193, 28 N. W. 219. We think it also true that such a person has no right to review the probate court's determination of jurisdictional facts. His only concern is that he may be assured that when he makes payment, that payment will discharge the debt paid, and that, if sued, the determination of the suit will be an adjudication final and binding. Unless the proceeding in which the administrator is appointed is void

on the face of the record, he is so protected. *Fridley v. Farmers & M. Savings Bank*, 136 Minn. 333, 162 N. W. 454, L. R. A. 1917E, 544. Payment to an administrator whose appointment is on its face void, affords him no protection, and when such an administrator brings suit against him, we are of the opinion that he may, either in the probate court or in the court in which the suit is brought, have the void appointment judicially declared void. This is inferable from the principles stated in *Bombolis v. Minneapolis & St. L. Ry. Co.*, 128 Minn. 112, 150 N. W. 385; *Fridley v. Farmers & M. Savings Bank*, supra. See, also, *Reynolds v. Cotton Mills Co.*, 177 N. C. 412, 99 S. E. 240, 5 A. L. R. 284; *Jeffersonville Ry. Co. v. Swayne's Administrator*, 26 Ind. 477. The decision in *Re Hardy*, supra, should not be construed as committing the court to a contrary doctrine.

[2] 2. The appointment of this administrator was not void on its face. On the contrary the record of the probate court is perfectly regular. An action may be maintained in this state to recover on a claim for wrongful death of a nonresident of this state suffered out of the state. This was held in *State ex rel. Bossung v. District Court*, 140 Minn. 494, 168 N. W. 589, 1 A. L. R. 145, where the action was brought by a foreign administrator. If such an action may be maintained by a foreign administrator it seems quite clear that an administrator might be appointed in this state. The existence of a cause of action which may be sued on in this state is sufficient showing of assets to give the Minnesota probate court jurisdiction to appoint an administrator to prosecute the action. *Morris v. Chicago, Rock Island & Pac. Ry. Co.*, 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39; *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Castiglano v. Great Northern Ry. Co.*, 129 Minn. 279, 152 N. W. 413; *Hutchins v. St. Paul, Mpls. & Manitoba Ry. Co.*, 44 Minn. 5, 46 N. W. 79; *Brown's Adm. v. Louisville & Nashville Ry. Co.*, 97 Ky. 228, 30 S. W. 639.

[3] 3. The fact that another administrator has been appointed in another state and another action commenced there does not go to the jurisdiction of the probate court. It does not seem to us to have any decisive bearing on the case. There can be but one recovery.

Order affirmed.

WYMAN, PARTRIDGE & CO. v. BIBLE.
(No. 22411.)

(Supreme Court of Minnesota. July 22, 1921.)

*(Syllabus by the Court.)***1 Guaranty ¶7(2)—Acceptance of offer of guaranty may precede execution thereof.**

An agreement to accept an offer of guaranty is necessary to complete a valid contract, but the agreement to accept may precede the execution of the guaranty by the guarantor, and when it does, no further notice to the guarantor of acceptance by the guarantee is necessary.

2 Guaranty ¶70(1) — Guaranty "against loss" is of collection and creditor must exhaust remedy against principal.

A guaranty "against loss" is a guaranty of collection, and before resort can be had to the guarantor on such a guaranty, the creditor must exhaust his remedy against the principal.

3. Guaranty ¶92(1) — Whether goods purchased 19 months after guaranty were included therein held for jury.

Whether the guaranty involved in this case covered purchases of goods made 19 months after the guaranty was given was, under the circumstances of the case, a question for the jury.

Appeal from District Court, Benton County; John A. Roeser, Judge.

Action by Wyman, Partridge & Co. against Peter Bible, Sr. Judgment for defendant, a motion for judgment notwithstanding the verdict was denied, and from the judgment, plaintiff appeals. Affirmed.

Dodge & Webber and K. L. Hjort, all of Minneapolis, for appellant.

Morgan J. Flaherty, of Foley, for respondent.

HALLAM, J. Plaintiff is a wholesale dealer in dry goods. In the summer of 1916 Peter Bible, Jr., was planning to open a store at Foley and ordered goods to the amount of \$4,360, to be shipped October 1st. On July 26th plaintiff wrote Peter, Jr., stating, "We understood that your father was to be a partner with you, but we see that your goods were purchased in your name," and asking that his father "acknowledge the fact that he is a partner, or else favor us with a guaranty for which purpose we are inclosing one of our guaranty forms." Peter, Jr., took the guaranty to defendant, his father, told him plaintiff wanted the guaranty before shipping the goods. Defendant signed the guaranty by mark and Peter, Jr., mailed it to plaintiff and plaintiff shipped the goods.

The guaranty was in form as follows:

"For value received I hereby guarantee to save you from loss on account of merchandise

sold, or to be sold, by you to Peter Bible, Jr., of Foley, Minnesota."

This order of goods was later paid for in full. Peter, Jr., bought goods on account from time to time, in all about \$7,600 worth, up to August, 1917, when the account was settled by his giving a note which was paid. After that Peter, Jr., was not accorded credit, but made some small purchases for cash until February, 1918, when he purchased on credit a bill of goods amounting to \$212.38. On this purchase there is an unpaid balance of \$87.78, to recover which this action was brought. The jury found for defendant. Plaintiff moved for judgment notwithstanding the verdict, but not for a new trial. The motion was denied and from the judgment entered plaintiff appeals.

Since plaintiff moved only for judgment notwithstanding the verdict, the only question on appeal is whether the evidence is conclusive against the verdict. National Cash Register Co. v. Merrigan, 181 N. W. 585. Errors in rulings on the trial, or in the charge, furnish no ground for judgment notwithstanding the verdict.

A determination of the question whether the evidence is conclusive against the verdict involves a consideration of the nature of this guaranty and of the rights of the parties under it.

[1] 1. No notice of acceptance of the guaranty was required. In general it may be said that an agreement to accept an offer of guaranty of future indebtedness is the material assent necessary to complete a valid contract between the guarantee and the guarantor. Winnebago Paper Mills v. Travis, 58 Minn. 480, 58 N. W. 36; Northern National Bank v. Douglas, 135 Minn. 81, 160 N. W. 193; Burns v. Poole, 106 Minn. 69, 118 N. W. 156. But the agreement to accept may precede the execution of the contract by the guarantor and when an instrument of guaranty is executed and delivered, not as an offer of guaranty, but as an acceptance of a proposition coming from the guarantee, no further notice to the guarantor of acceptance by the guarantee is necessary. Lehigh Coal & Iron Co. v. Scallen, 61 Minn. 63, 63 N. W. 245. See, also, Watkins Medical Co. v. McCall, 116 Minn. 389, 133 N. W. 966; Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 171 N. W. 924. This is just such a case. Plaintiff made the proposition to take the guaranty of defendant. When defendant executed and delivered the guaranty the proposition was accepted and the contract was complete.

[2] 2. The guaranty is a guaranty of collection, not of payment. A guaranty "against loss" is a guaranty against loss from failure to collect. See 20 Cyc. 1447.

Before resort can be had to the guarantor

on such a guaranty, the creditor must exhaust his remedy against the principal, that is, he must bring suit against him, prosecute it to judgment and return of execution, unless it is made to appear that the principal is hopelessly insolvent. *Brackett v. Rich*, 23 Minn. 485, 23 Am. Rep. 703; *Crane v. Wheeler*, 48 Minn. 207, 50 N. W. 1033. There is no evidence that plaintiff proceeded against the principal in this case, nor that the principal was hopelessly insolvent. There is evidence that he was forced into involuntary bankruptcy in 1918, but no showing as to the condition of his estate, nor as to whether he was discharged from his debts, nor as to his present financial condition.

[3] 3. Perhaps the most decisive question in the case is whether the guaranty continued and covered items of goods sold in 1918. We are of the opinion that under the evidence in this case that question was one of fact for the jury. The language of the guaranty is not decisive. The broadest language in a continuing guaranty is construed as limited to a time which is reasonable, taking into consideration, not merely the language of the guaranty, but all the circumstances of the case. *Lehigh Coal & Iron Co. v. Scallen*, 61 Minn. 63, 63 N. W. 245. When no time is fixed and there is nothing in the agreement indicating a continuance of the undertaking, the presumption is in favor of a limited liability as to time. *Twohy v. McMurran*, 57 Minn. 242, 59 N. W. 301. See, also, *Birdsall v. Heacock*, 32 Ohio St. 177, 30 Am. Rep. 572; *Finnucan v. Feigenspan*, 81 Conn. 378, 71 Atl. 497. In this case the demand for the guaranty and the giving of the guaranty were prompted by the large initial sale in the summer of 1916. Nothing was said in the correspondence as to other purchases. The words "sold or to be sold" in the contract do not necessarily imply a continuing transaction. The original sale had not yet been concluded. The account was virtually closed in 1917 and remained closed for more than six months when it was again opened in February, 1917. Clearly there is evidence to sustain a finding that these 1917 sales were not within the contemplation of the contract of guaranty.

Judgment affirmed.

HART v. HARDING et al. (No. 21389.)
(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser ⇨176—When property sold in gross, purchaser not entitled to abatement, in absence of fraudulent representations as to quantity.

When a vendor sells real estate that is described in gross for a gross sum and the prop-

erty is subsequently discovered to be slightly less in quantity than that described in the deed, the purchaser is not entitled to an abatement in the purchase price, unless it appears that fraudulent representations were made by the vendor, as to quantity, that induced the vendee to purchase. *Gustin v. Robinson's Estate*, 105 Neb. 1, 178 N. W. 840.

2. Vendor and purchaser ⇨65(2), 343(2)—Sale held by the acre; vendee held entitled to recover deficiency.

Where a vendor induces a vendee to enter into a contract of purchase of a tract of land by the following written representation therein: "This farm contains 280 acres and is sold as 280 acres," and "party of the second part agrees to pay \$150 per acre,"—and thereafter vendor receives from vendee the sum of \$42,000 and executes a warranty deed to said premises without reference to acreage, except "according to the government survey," vendor prior to the transaction having exhibited to vendee a plat showing the acreage claimed by him according to government survey, which was relied upon by vendee without independent investigation, and where it was afterwards discovered that the actual boundaries of the tract were considerably within those shown by the government survey by reason of encroachment of fences and adverse possession in others, whereby there was a deficiency of 11.71 acres in the tract, held, the sale was by the acre and the vendee is entitled in equity to recover for such deficiency.

3. Accord and satisfaction ⇨26(3)—Evidence held not to show accord and satisfaction as to deficiency in quantity of land sold.

Evidence examined, and held not to show a previous accord and satisfaction between the parties.

Appeal from District Court, Lancaster County; Morning, Judge.

Action by Robert J. Hart against William A. Harding and others, with cross-action by defendants. From the judgment, defendant Herbert W. Davis appeals, and defendant Joseph O'Grady appeals from the judgment in favor of William A. Bahr against him. Affirmed in part, and reversed in part.

R. O. Williams, of Lincoln, for plaintiff.
Fawcett & Mockett, of Lincoln, for appellant.

Chas. E. Matson, A. W. Richardson, B. F. Good, Paul F. Good, Geo. A. Adams, Lincoln Frost, Boehmer & Boehmer, John J. Ledwith, and T. R. P. Stocker, all of Lincoln, for appellees and cross-appellees and cross-appellants.

Heard before MORRISSEY, C. J., FLANSBURG and ROSE, JJ., and BEGLEY and LESLIE, District Judges.

BEGLEY, District Judge. The appellant, Herbert W. Davis, being the owner, in November, 1916, conveyed by a deed of general warranty to cross-appellant, Joseph O'Grady,

(184 N.W.)

the following described real estate situated in Lancaster county, state of Nebraska, to wit: The northeast quarter and the east half of the northwest quarter and the northeast quarter of the southwest quarter of section 6 in township 8 north of range 7 east of the sixth principal meridian, excepting the A. & N. Railway right of way across said premises.

On December 15, 1917, O'Grady, by warranty deed, conveyed said premises to the defendant and appellee, William A. Bahr, and, after describing the land the same as conveyed to him by Davis, added: "According to the government survey thereof and subject to the railroad right of way." On May 28, 1918, Bahr, by contract, sold said premises to the defendant Harding, agreeing to give warranty deed on March 1, 1919. On June 25, 1918, Harding contracted to sell the land to the plaintiff, Robert J. Hart, agreeing to give warranty deed therefor on March 1, 1919. Shortly before March 1, 1919, it was discovered for the first time by Bahr, Harding and Hart that the boundary fences and trees along the west side of the east half of the northwest quarter and along the west side of the northeast quarter of the southwest quarter, and also the boundary fence along the south side of the last above described tract, were not on the government survey line. By agreement the land was surveyed by the county surveyor, and the survey showed that there was a shortage of 11.71 acres between the land located within the boundary lines and fences and the land as contained within the government survey, and that this 11.71 acres was in the possession or occupancy of the adjoining owners, defendants Tillman, Baker, and the Keels, who claimed said acreage by adverse possession for more than ten years, and claimed that the said fences had been established and maintained where they then stood for many years. It being thus found that Bahr could not place Harding in possession of the disputed acreage amounting to 11.71 acres, and that Harding could not place Hart in possession thereof, this action was begun some time before March 1, 1919, by Robert J. Hart against William A. Harding et al., defendants. Harding, by cross-petition, claimed damages from William A. Bahr on account of this shortage of acreage, and Bahr, by cross-petition, claimed damages from his grantor, Joseph O'Grady, and on account of the claimed shortage in his transfer O'Grady, by cross-petition, brought into the suit Herbert W. Davis. Tillman, Baker and the Keels were brought into the suit as defendants, and each claimed to be the owner of certain parts of the 11.71 acres by adverse possession. The differences existing between Hart, Harding and Bahr were settled and compromised before suit, and the court so found and dismissed them from the case. The court found in favor of

defendants Tillman, Baker and the Keels upon the issue of adverse possession of the 11.71 acres in controversy, giving Tillman 8.114 acres, Baker 2.57 acres, and the Keels about 1 acre. On the issues between defendants William A. Bahr and Joseph O'Grady, the court found in favor of Bahr, and that Bahr had been damaged by reason of failure of warranty in the said deed on account of adverse possession of the 11.71 acres in the sum of \$1,961.42, for which, together with \$100 counsel fees, judgment was awarded in favor of Bahr. On the issue joined between defendant O'Grady and defendant Davis, the court found in favor of O'Grady in the sum of \$1,459.06, plus an attorney fee of \$100, and divided the costs between the parties; one-third to the defendant O'Grady; one-third to defendant Davis; and the remainder to various other parties. Herbert W. Davis brings the case to this court by appeal and asks for a reversal of the judgment obtained by Joseph O'Grady. Joseph O'Grady, the cross-appellant, is asking for a reversal of the judgment obtained by appellee, William A. Bahr, against him. No complaint is made of the findings of the trial court in favor of Tillman, Baker and the Keels on the issue of adverse possession of the 11.71 acres in controversy, but the action has narrowed down to a controversy between O'Grady and Davis and an issue between Bahr and O'Grady, for damages for breach of covenant of seisin for failing to deliver possession of the 11.71 acres alleged to be due under the deeds of general warranty.

The question for decision is: Can O'Grady and Bahr recover from their respective grantors on account of the breach of covenant in their respective deeds? To determine this question it is necessary to find whether the sale relied upon was intended to be in gross or by the acre, or, if in gross, whether the estimated number of acres was in fact the controlling inducement and whether the price, though a gross sum, was based upon the supposed area and measured by it. The deed from Davis to O'Grady provided:

"Herbert W. Davis and Sarah C. Davis, husband and wife (grantors), of the county of King, and state of Washington, for and in consideration of the sum of twenty-nine thousand two hundred and fifty dollars in hand paid, do hereby grant, bargain, sell, convey and confirm unto Joseph O'Grady, grantee, of the county of Richardson, and state of Nebraska, the following described real estate situated in Lancaster county, and state of Nebraska, to wit: Northeast quarter (N. E. $\frac{1}{4}$) and east half of the northwest quarter (E. $\frac{1}{2}$ N. W. $\frac{1}{4}$) and the northeast quarter of the southwest quarter (N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$), all in section six (6) township eight (8) north, range seven (7) east of the 6th principal meridian, excepting the A. & N. Railway right of way across the premises described."

[1] The deed further contained the usual covenants of seisin and general warranties. It will be noticed that in this deed there was no representation whatever as to the quantity of the land; it being a conveyance in gross. The lines of the conveyed tract were marked by fences and trees, and had been recognized by adjoining proprietors for the period of limitation as being on the true line. Before the purchase O'Grady examined and inspected the land, saw the fences dividing subdivisions and the monuments along the same, and purchased the lands within the existing and established lines, relying upon the west boundary as established by said division fences and monuments as being the west boundary line thereof. In such case he is not entitled to an abatement of the purchase price. His action comes clearly within the rule laid down in *Gustin v. Robinson's Estate*, 105 Neb. 1, 178 N. W. 840:

"When a vendor sells real estate that is described in gross for a gross sum, and the property is subsequently discovered to be slightly less in quantity than that described in the deed, the purchaser is not entitled to an abatement in the purchase price, unless it appears that fraudulent representations were made by the vendor as to quantity that induced the vendee to purchase."

[2] Appellee Bahr contends that his cause of action arises out of a different state of facts, in that the sale by O'Grady to him was intended to be by the acre. It appears from the evidence that, after O'Grady and Bahr had entered into a written contract for sale of this land, some doubt arose in the mind of Bahr as to the number of acres contained therein, and Bahr then went to W. T. Fenton, who was a part owner with O'Grady, though not of record, and expressed his doubts to Fenton, who assured him that, with the right of way out, it would still leave 280 acres, and thereupon the parties entered into a new contract of sale, which provided:

"This indenture, made this 2d day of October, A. D. 1917, between W. T. Fenton, party of the first part, and W. A. Bahr, party of the second part, witnesseth: That the party of the first part has this day sold to the party of the second part the following described property, to wit: The northeast quarter (N. E. $\frac{1}{4}$) and the east half of the northwest quarter (E. $\frac{1}{2}$ N. W. $\frac{1}{4}$) and the northeast quarter of the southwest quarter (N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$) of section six containing 280 acres, except the railway right of way. This farm contains 280 acres and is sold as 280 acres of section 6, town 8, range 7, in Lancaster county, Nebraska, together with all appurtenances thereto belonging and now thereon, for which the party of the second party agrees to pay the sum of one hundred fifty (\$150) dollars per acre."

Afterward it was discovered by Bahr, at the time of examining the abstract in the fall of 1918, and before anything whatever was

known of the claims of Tillman, Baker and the Keels, that according to the abstract the tract fell short some four acres of 280 acres, after deducting the right of way; whereupon negotiations on this matter were had by B. F. Good, attorney for Bahr, on the one hand, and W. T. Fenton, and Bruce Fullerton, his attorney, on the other. The plat was produced and it was ascertained that the tract, according to the government survey, contained 286.97 acres, and that the right of way took out 10.181 acres, leaving a net acreage in the tract, according to the government survey, of 276.16 acres, or a shortage of 3.84 acres less than the 280 acres contracted to be sold. Bahr insisted upon a deduction of four acres at \$150 an acre, which was shown to have been taken by the railway right of way, and this was objected to by Fenton, but through the efforts of the attorneys it was finally settled by deducting two acres and the payment of \$300 by Fenton to Bahr. Thereafter O'Grady and wife executed and delivered to Bahr a warranty deed to said premises with the usual covenants of seisin and general warranties, with the following description:

"Know all men by these presents that Joseph O'Grady and Mamie R. O'Grady, husband and wife, of the county of Richardson and state of Nebraska, for and in consideration of the sum of forty-two thousand and no/100 dollars, in hand paid, do hereby grant, bargain, sell, convey and confirm unto William A. Bahr, of the county of Cass and state of Nebraska, the following described real estate situated in Lancaster county, and state of Nebraska, to wit: Northeast one-fourth (N. E. $\frac{1}{4}$) and the east half of the northwest one-fourth (E. $\frac{1}{2}$ N. W. $\frac{1}{4}$) and the northeast one-fourth of the southwest one-fourth (N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$), all in section six (6), township eight (8) range seven (7) in said county, according to the government survey, and subject to the railroad right of way, possession to be given on March 1, 1918."

[3] O'Grady contends that the settlement between the parties and the payment by him of the sum of \$300 to Bahr was a full settlement and accord and satisfaction of any representation as to acreage, and that, the deed having been given without reference to the acreage, the sale should be considered as a sale in gross. An accord and satisfaction is only a settlement as to the matters contemplated by the agreement. 1 C. J. 523, § 2. At the time of the controversy, no knowledge being had by either party as to the location of the boundary fences and the same not being a subject of dispute, it cannot be held to have been included in the settlement. The only matter adjudicated was the acreage in the right of way, which was left open for settlement in the original contract. There was no change regarding the price per acre nor any waiver of the original contract, both parties accepted the government survey line

as correct and relied upon the number of acres shown therein.

There is no question but what under the contract of sale the land was represented as 280 acres and sold as 280 acres at an agreed price of \$150 an acre. Bahr was induced to purchase the land upon this representation and paid therefor the sum of \$150 an acre. While the deed does not refer to the acreage, yet it incorporates the government survey, which furnishes a true description of the property to be conveyed, and the contract can be resorted to for the purpose of finding the real intent and understanding of the parties.

In *Caughron v. Stinespring*, 132 Tenn. 636, 179 S. W. 152, L. R. A. 1916C, 403, the court said:

"If a sale is by the acre and there is a deficiency, then the purchaser can recover for such deficiency at the agreed price per acre. For where the price is by the acre, if there is a misrepresentation made by the vendor and relied on by the vendee as to acreage, producing a loss, such misrepresentation, whether intended so or not, has all the essential elements of legal fraud or mistake. It is not absolutely essential in order to recover for misrepresentation as to the quantity of land conveyed that the acreage should be stated in the deed, but this may be shown by extrinsic evidence. Likewise the amount of the consideration may be shown by parol testimony. The deed is only the execution of the contract, and the real contract and understanding between the parties in this respect will govern on the question."

In *McComb v. Gikeson*, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944, it was said:

"Whether it be a contract in gross or for a specific quantity depends of course upon the intention of the contracting parties, to be gathered from the terms of the contract and all the facts and circumstances connected with it, but in the interpretation of such contracts the courts, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre, wherever it does not clearly appear that the land was sold by the tract and not by the acre."

In *Epes v. Saunders*, 100 Va. 99, 63 S. E. 428, 132 Am. St. Rep. 904, the court held:

"If parties enter into an agreement for the payment of a gross sum for a tract of land, upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre, and not a sale in gross, unless the contract plainly indicates a sale in gross, and this presumption can only be overcome by clear and cogent proof."

In *Hays v. Hays*, 126 Ind. 92, 25 N. E. 600, 11 L. R. A. 376, it is held:

"Even where the sale has been in gross, and not by the acre, if it appear that an estimated number of acres was, in fact, the controlling inducement and that the price, though a gross sum, was based upon the supposed area and measured by it, equity will interfere to grant

relief, and rescind the contract on the ground of gross mistake."

For the reasons stated, the judgment of the district court is reversed and the cause dismissed as to the appellant, Herbert W. Davis, and is affirmed as to the appellee, Wm. A. Bahr, and against cross-appellant, Joseph O'Grady.

Affirmed in part and reversed in part.

STATE ex rel. McCORMICK et al. v. BOWER et al. (No. 21526.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

Elections §259—Mandamus §74(4)—Duties of canvassing boards purely ministerial; writ will not lie to compel county board to reconvene as canvassing board and go behind returns.

It is the settled law of this state that the duties of canvassing boards in canvassing the returns of an election are purely ministerial. They perform the act of tabulating the votes of the different precincts as returned to them, and have no power to hear evidence or determine any question as to the validity of the election or the votes cast, or to change such returns. Held, therefore, that mandamus will not lie to compel a county board to reconvene as a canvassing board and to go behind the returns of a special school bond election, held pursuant to section 6832, Rev. St. 1913, and to reject therefrom illegal votes cast against said proposition and declare the same carried.

Appeal from District Court, Deuel County; Grimes, Judge.

Mandamus by the State, on the relation of J. G. McCormick and others, against Oron B. Bower and others. Judgment for defendants, on demurrer, and relators appeal. Affirmed.

H. R. Busse, of Chappell, Chas. C. Larsen, of Hastings, and Beeler, Crosby & Baskins, of North Platte, for appellants.

Halligan, Beatty & Halligan, of North Platte, and G. E. Junge, of Big Spring, for appellees.

Heard before MORRISSEY, C. J., and FLANSBURG and ROSE, JJ., and BEGLEY and LESLIE, District Judges.

BEGLEY, District Judge. Action in mandamus instituted by relators, who are the regents of Deuel County high school district of Deuel county, Nebraska, against the respondents, who are the county commissioners of Deuel county, Nebraska, to compel said county commissioners to reconvene as a canvassing board and to go behind the returns of a special school bond election held in Deu-

el county, Nebraska, and to reject therefrom 99 illegal votes alleged to have been cast against said proposition, and to declare the same carried.

The relators in their petition allege that on May 18, 1919, the respondents, pursuant to a legal petition filed requesting the same, called a special election of the electors of said county having the qualifications prescribed in section 6833, Rev. St. 1913, as amended, submitting to such electors the question of issuing bonds in the amount of \$100,000 for the purpose of purchasing a site for a county high school, erecting suitable buildings thereon, and for levying a tax for payment of the principal and interest; that on July 8, 1919, an election was held pursuant to legal notice as required by law; that on May 12, 1919, the school board of school district No. 19 of Deuel county, Nebraska, filed a certificate in the office of the county clerk setting forth that said school district was maintaining, and would maintain for the ensuing year, a twelve-grade high school, and that thereby the electors of said school district No. 19 became disqualified from voting upon said proposition, but nevertheless, they were permitted to vote and did cast 99 votes against said proposition; that the board of county commissioners met at the courthouse in Deuel county, Nebraska, on July 28, 1919, resolved itself into a canvassing board and canvassed the returns; that two legal electors appeared before the board and filed a petition protesting against the counting of 99 illegal votes cast by the electors of school district No. 19 and demanded that they be excluded from the count, but, notwithstanding, they were counted by the board, and said board declared that there had been cast 563 votes for said proposition and 442 votes against the same, and that said proposition had not received 60 per cent. of the total votes cast, and declared the same defeated; whereas in truth and fact there were cast in favor of said proposition 563 legal votes and against the same 343 legal votes, and that the proposition to issue the bonds was carried by a majority of more than 60 per cent. of the legal votes cast at said election. The relators then allege that there is no remedy provided by law in which to obtain the relief asked for, which is that the county board of Deuel county, Nebraska, be required to reconvene as a canvassing board for the purpose of canvassing the returns of said special election; that it be compelled to deduct 99 illegal votes cast and returned by the election board of Big Spring precinct against said proposition, and that said board be compelled to enter upon the election records of Deuel county, Nebraska, that there were cast at said special election a total of 906 legal votes; that there were cast in favor of issuing said bonds and in favor of levying a tax to pay same 563 legal votes, and that there were cast against the same 343 legal votes, and that the legal votes

so cast in favor of said proposition are more than 60 per cent. of all the legal votes cast at said special election, and that said board of county commissioners be compelled to carry out officially the expressed will of the legal and qualified electors of the county high school district of Deuel county, Nebraska, and issue the bonds.

The respondents filed a demurrer to the petition, on the ground that relators had no legal capacity to sue, and that the petition fails to state facts sufficient to constitute a cause of action. The demurrer was sustained, respondents electing to stand upon the demurrer, the action was dismissed, and the matter was appealed to this court.

Section 6823, Rev. St. 1913, as amended by chapter 70, Laws 1919, gives the board of regents general control and supervisory powers over high school districts and is sufficient to permit the relators here to maintain this action.

The contention that the petition fails to state facts sufficient to constitute a cause of action against respondents is based on the fact that the district court has no power by mandamus to compel boards of canvassers to go behind the returns as made by the election officers and reject illegal votes. It is the settled law of this state that the duties of canvassing boards in canvassing the returns of an election are purely ministerial. They perform the act of tabulating the votes of the different precincts as returned to them and have no power to hear evidence or determine any question as to the validity of the election or the votes cast, or to change such returns. *State v. Ramsey*, 8 Neb. 286; *State v. Hill*, 10 Neb. 58, 4 N. W. 514; *State v. Stearns*, 11 Neb. 104, 7 N. W. 743; *State v. Peacock*, 15 Neb. 442, 19 N. W. 685; *State v. Hill*, 20 Neb. 119, 29 N. W. 258; *State v. Wilson*, 24 Neb. 139, 38 N. W. 31; *State v. McFadden*, 46 Neb. 668, 65 N. W. 800; *State v. Van Camp*, 36 Neb. 91, 54 N. W. 113; *State v. Roper*, 46 Neb. 724, 730, 61 N. W. 753, 65 N. W. 802.

The relators contend that this leaves them without a remedy, and that the law in some way ought to furnish them a remedy for the wrong committed against them. If this be true, it is the fault of the Legislature, and not the fault of the respondents as a board of canvassers, nor the courts. In *State v. Minor*, 105 Neb. —, 180 N. W. 84, the court said:

"It has been said often enough that in the division of the powers of government the judiciary shall not usurp the function of the legislature. To do so would be judicial legislation, an insidious judicial offense and one which may in time, if indulged, imperil the perpetuity of our institutions."

The order of the district court sustaining the demurrer is therefore correct, and is Affirmed.

UNION NAT. BANK OF BELOIT, KAN., v.
MOOMAW. (No. 21412.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Bills and notes $\S$ 452(2)—Maker of notes to corporation for capital stock delivered held estopped to deny ownership by corporation.

In a suit by the indorsee of promissory notes given to a corporation in payment for shares of its capital stock for which the maker of the notes subscribed in writing, when the stock has been issued and delivered by the corporation in accordance with the subscription contract, the maker of the notes is estopped to deny their ownership by the corporation.

2. Corporation $\S$ 414(5)—Notes held admissible without proof of authority of treasurer of payee to execute indorsement.

Where promissory notes payable to the order of an insurance company are indorsed in the name of the corporation by its treasurer and by him and its president and its secretary sold to a bank, which credits the proceeds thereof to the insurance company, it is not error for the court in a suit by the bank against the maker to admit the notes in evidence without proof that the by-laws of the insurance company authorized the treasurer to execute the indorsement.

3. Bills and notes $\S$ 497(5), 537(6)—When burden on plaintiff to show that it is a bona fide holder stated; on conflicting evidence, bona fides for jury.

In an action by a bank, an indorsee of promissory notes, against the maker, where defendant pleads and the evidence tends to show fraud in the inception of the notes, the burden is on plaintiff to show that it is a bona fide holder, and, where from the evidence reasonable minds may reach different conclusions, the question is for the jury.

4. Witnesses $\S$ 268(2)—Wide latitude allowed in cross-examination of indorsee's cashier to show bona fides.

Where in a suit by a bank, the indorsee of promissory notes, the burden is on plaintiff to show that it is bona fide holder, much latitude is allowed in the cross-examination of its cashier, he being the officer who acted for plaintiff in the purchase of the notes and the witness by whom plaintiff seeks to prove the bona fides of the transaction, and it is error for the trial court so to restrict the examination as to prevent a full disclosure of the knowledge of the witness as to matters material to the inquiry.

Appeal from District Court, Scotts Bluff County; Hobart, Judge.

Action by the Union National Bank of Beloit, Kan., against A. Moomaw. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Morrow & Morrow, of Scottsbluff, for appellant.

Wright, Mothersead & York, of Scottsbluff, and C. L. Kagey, of Beloit, Kan., for appellee.

Heard before MORRISSEY, C. J., and DAY, DEAN and LETTON, JJ.

MORRISSEY, C. J. Defendant appeals from a judgment entered in the district court for Scotts Bluff county.

Action was brought by plaintiff as the holder of two promissory notes in the sum of \$1,000 each, given by defendant to the Globe Life Insurance Company of Salina, Kansas. One note bears date of November 9, 1917, and the other November 17, 1917. The issues as to each note are the same. After setting out a copy of each note the petition alleges:

"That before maturity of the said note and in due course of business plaintiff purchased said note from the said Globe Life Insurance Company for a valuable consideration, and said Globe Life Insurance Company duly indorsed and assigned said note, and this plaintiff became, and ever since has been and is now, the owner of said note and is entitled to the payment thereof."

The answer admitted the execution and delivery of the notes to the insurance company, but denied all other allegations in the petition. It specifically denied that the insurance company indorsed or assigned the notes to the plaintiff, but averred that one W. S. Hayslip, who was treasurer of the company, and who had made the indorsement, had no authority to indorse the name of the company on the note, and alleged that the indorsement was not the indorsement of the insurance company. It also alleged that the company received no consideration for the note. It alleges that by false and fraudulent representations defendant was induced to execute the notes for shares of capital stock in the insurance company, pleading at length a state of facts which would constitute a defense to the notes if they were in the hands of the original payee, and constituting a defense provided plaintiff did not become the owner and holder in due course. At the close of the evidence the court directed a verdict for plaintiff.

[1, 2] As grounds of error defendant alleges that the court erred in permitting the introduction of the notes in evidence. The basis of the assignment is found in the contention that, although the notes were made payable to the Globe Life Insurance Company, they were in fact the property of one Felix Broeker, president of the company, and that the company was not authorized by its charter to indorse commercial paper for the benefit of other parties; that the treasurer of the corporation had no authority to make the indorsement, and therefore the notes were inadmissible in evidence until plaintiff first proved that the treasurer was

expressly authorized by the by-laws or by resolution of the board of directors to make the indorsements. In support of the first contention, it is claimed that the capital stock of the insurance company, for which these notes were given, had first been sold by the company to Broeker, and he had employed a selling agency to make the sale to plaintiff and others, and that the stock actually issued was not the treasury stock of the corporation but the stock of the individual, Broeker. The proof appears to show that Broeker had taken over a large block of stock under a contract with his own company and given his notes therefor, but the certificates of stock were still held by the company and on receipt of defendant's notes certificates of the proper denomination were issued to defendant. Defendant had signed a written subscription for stock of the insurance company; he had executed his notes payable to the order of that company; his subscription and his notes reached the company, and the company issued the stock. It is hard to perceive on what theory he may now be heard to say that these notes were not the property of the company. True, it is said in defendant's brief that there is no record in the office of the insurance company that it ever issued any stock to defendant or that it ever received the notes. On the other hand, the record before the court as a whole seems to confess the issuance of the stock, and the proof shows that the notes were in the hands of the company officers and by them delivered to plaintiff. The officers of the insurance company may have misappropriated the funds, but that would not necessarily affect the ownership of the notes. As to the sufficiency of the indorsement, even if conceded that the treasurer of the corporation was merely the servant of the board of directors, and that ordinarily he is the mere custodian of the property and funds and without power to execute commercial paper or bind the corporation by his indorsement, it will be noted that in the instant case, while the indorsement was signed by the treasurer, the transfer of the notes was made by him in conjunction with the president and secretary of the corporation, and the proceeds of the notes were deposited to the credit of the corporation. To require one purchasing commercial paper from a corporation to investigate in every instance, its charter, to ascertain the power conferred upon the officers with whom the business is transacted, might seriously disturb commercial business. It will not be disputed that if the corporation was the owner of the notes it might be proper for its officers to indorse and sell them in the ordinary course of its business, and, where the proof shows that the officers of the corporation who usually and ordinarily handle and negotiate its commercial paper write the name of the corporation on the back of the note, and, for a valid consideration mov-

ing from the purchaser to the corporation, deliver the note to the purchaser, the indorsement will be held sufficient. We therefore conclude that the court did not err in permitting the introduction of the notes in evidence.

[3] We must now consider the question: Did plaintiff become a holder in good faith in the usual course of business, for value, and without notice of fraud in the inception of the notes? Under the pleadings and the proof made by defendant, the burden was upon plaintiff to prove the affirmative of this question. The alleged purchase of the notes was made through its cashier, Mr. Mergen, who testified to a state of facts which might be sufficient to support the instruction of the court to the jury to return a verdict for plaintiff. But, where doubt is cast upon the truth of the story and there is a dispute on any of the material issues, the trial court is not free to direct a verdict, but must submit the disputed questions of fact to the consideration of the jury.

Prior to the bringing of this suit the insurance company had become a bankrupt, and a great mass of documents, purporting to include the minutes of stockholders and board of directors' meeting, as well as reports made by official examiners, is included in the record. From these reports and documents it appears that only a short time before the notes in suit were executed, Mr. Mergen was treasurer and director of the insurance company and associated with Mr. Broeker in the management of the company. By questions propounded to Mr. Mergen on cross-examination, when he had testified in rebuttal, defendant sought to show that at the time the insurance company was incorporated and for some time thereafter Mr. Broeker, its president, had no money, property or business of consequence; that shortly after the sale of stock in the insurance company in considerable amounts Broeker acquired a chain of drug stores involving the expenditure of a large amount of capital; that he also acquired the controlling interest in the Felix Broeker Investment Company, requiring capital of over \$100,000; that he further acquired large interests in a real estate company and a bank; that during this time and until these notes were taken by plaintiff Broeker was using in his own business the funds of the life insurance company; and that the witness Mergen and the plaintiff bank knew of these speculations by Broeker prior to the purchase of the notes in suit. Objections were made to the questions propounded, as incompetent, irrelevant and immaterial, and the objections were sustained by the court. Defendant's offer to make the proof by the cross-examination of the witness was also excluded on like objection of plaintiff's counsel.

[4] It is argued that, the witness being a representative of the plaintiff and an in-

interested party, it was error to restrict his cross-examination or to deny defendant the benefit of the offered testimony, as it would tend to show the good faith of plaintiff in taking the notes and affect his credibility. Did the court err in so restricting the cross-examination? The burden was on plaintiff, after facts tending to show fraud were developed, to show that these notes were taken in good faith, and, if by the cross-examination of the witness it could be developed that he knew that the president of the company was violating his duties as an officer of the company and using its funds for his private speculations, it might be material as bearing upon his own good faith and honest intentions at the time he claims to have purchased the notes as cashier of plaintiff bank. We cannot overlook the fact that he had just recently retired from the board of directors and resigned as treasurer of the insurance company. The record shows that the insurance company had not been honestly managed. It is difficult to believe that this witness was without knowledge of that fact, and if by reason of his former official connection with the company, his business dealings with its officers, and his knowledge of their dishonest practices, he had reason to believe that the notes had been fraudulently procured, and that the officers of the company were dishonest men and were selling the notes, not for the benefit of the company, but to carry out their own private speculations, this would be a circumstance tending to show a lack of good faith in the purchase of the notes. In this connection it may be well also to point out that, although the witness Mergen testified that the bank paid a valuable consideration for the notes in suit, crediting the insurance company with the proceeds, and that later the money was withdrawn from the plaintiff bank by the insurance company, an examiner for the insurance department of the state of Kansas testified at length as to his examination of the insurance company's books and said that they failed to show that the credit given to the insurance company as testified to by the witness was ever credited to the notes in suit on the books of the insurance company. The mere failure of the officers of the insurance company to make the entry on their books does not directly contradict the claim of plaintiff that the transaction was in good faith, but it is a circumstance which, in view of the relations shown to exist between plaintiff's cashier and the men who were manipulating the affairs of the insurance company, the jury might consider in weighing the testimony of the witness and in a determination of the bona fides of the transaction.

That the representations made by the sales agents who procured the notes were false, fraudulent and calculated to deceive defendant needs no elucidation. Defendant posi-

tively testifies that he relied on their representations and that they were the moving cause for the execution of the notes. If this is denied, the question is for the jury.

The judgment is reversed and the cause remanded.

Reversed.

ROBBINS v. STATE. (No. 21771.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Rape $\S$ 54(3) — Prosecutrix's testimony may be corroborated by circumstantial evidence.

In a prosecution charging rape, other direct testimony than that of the prosecutrix, as to the particular act which constitutes the offense, is not essential to make a corroboration of her story, but corroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and as will identify the accused as the party guilty of the crime. It may consist of circumstantial evidence. The conduct and demeanor of the accused may furnish such corroboration.

2. Criminal law $\S$ 829(12) — Refusal of instruction on matter covered by one given not error.

Instructions examined, and held, no error in the refusal to give an instruction, since it was sufficiently covered by an instruction given by the court upon its own motion.

(Additional Syllabus by Editorial Staff.)

3. Rape $\S$ 36, 54(3)—Mere opportunity of mature man and nine year old girl held not to raise a presumption of intercourse, nor corroborate prosecutrix.

That a mature man and a nine year old girl had slept in the same room or in the same bed would not raise any presumption of intercourse, or even be corroborative of such a charge made by the girl without some evidence of an incriminating character other than the mere opportunity to commit the crime.

4. Rape $\S$ 57(1)—Evidence in prosecution for statutory rape held to justify submitting issue whether a crime had been committed.

In a prosecution for statutory rape, where prosecutrix was but nine years old, her testimony, together with a showing of her physical condition and the testimony of the examining physician, held to justify submitting to the jury the question whether or not a crime had been committed.

5. Rape $\S$ 54(3)—Evidence held sufficient to corroborate prosecutrix's testimony.

In a prosecution for statutory rape, record evidence held sufficient to furnish the necessary corroboration of prosecutrix's testimony.

Error to District Court, Douglas County; Estelle, Judge.

Edward V. Robbins was convicted of statutory rape, and he brings error. Affirmed.

Clifford L. Rein, of Lincoln, for plaintiff in error.

Clarence A. Davis, Atty. Gen., for the State.

Heard before MORRISSEY, C. J., and DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

FLANSBURG, J. This was a criminal prosecution charging statutory rape. Defendant was convicted and appeals.

The principal contention is that the testimony of the prosecuting witness is not sufficiently corroborated. The prosecuting witness was a girl, 9 years of age, who lived with her parents and small brothers on a farm near Carroll, Iowa. The defendant, a man 64 years of age, and a friend of the family, had been temporarily living at this home. He was previously employed as a conductor for a freight elevator at Armour's, in South Omaha, and prior to that time had been buying and dealing in horses. On March 8, 1920, he told the mother of the girl that he would like to take the girl to Omaha for a few days, to show her the city and buy her some clothes. He stated that he had a married niece living there, with whom he would provide that the girl should stay. The girl's testimony is that defendant took her to Omaha, and after going to a picture show, took her to his rooms, instead of to the home of his niece, and that, on that night and on the following night, he slept with and had intercourse with her. On the second day that they were in Omaha they went to visit the defendant's niece, but the girl was not left there for the night. Defendant's testimony is that on both nights the girl insisted that she stay with him and refused to go to his niece's home. That such was the fact, the girl flatly denies. The defendant purchased for her a dress and hat and shoes; and on the third night, at about 10 p. m., immediately after entering the defendant's rooms, they were arrested. The day after the arrest the girl was subjected to a physical examination by a physician, whose testimony shows that her hymen had been recently ruptured; that her parts were bruised, congested and swollen. The defendant immediately upon his arrest, and also at the trial, stated that he had not abused the girl, and that he had not slept in the same bed with her, but had thrown a mattress upon the floor, along the side of the bed, and slept on that. The officers who entered the room and made the arrest, and to whom the defendant immediately related that he had slept on the floor, testified that there was no mattress on the floor, and that they saw none in the room, except that up-

on the bed. The defendant further testified that two months prior, and also two days prior, to his taking the girl to Omaha, he had come upon and seen her with her 16 year old brother in the act of intercourse in the barn on the farm in Iowa, but that he had said nothing to either of them about it, and had not reported it to their parents. When, however, the girl was with him at night in his room at Omaha, he said that she had talked to him of these acts and had stated that her brother was "constantly after her," and that he had then scolded her about it. The girl, on the other hand, positively denies that she had committed such acts, or that she had had any such conversation with defendant.

[3] The mere fact, standing alone, that a mature man and a 9 year old girl, a mere infant, incapable of making sexual appeal to any man who was not shown to be abnormal had slept in the same room or in the same bed together, would not, in the light of no incriminating circumstances, raise any presumption of fact that intercourse had taken place, or even be corroborative of a charge, made by the girl, that such an act had been committed upon her. It is necessary that there be some evidence of an incriminating character, more than such mere opportunity to commit the crime, which, aside from the statements of the prosecuting witness, must point to its commission and to the identity of the accused as the person who has committed it.

[4] There was, no doubt, sufficient evidence to submit to the jury the question of whether or not a crime had been committed. The testimony of the girl that she had been abused, together with a showing of her physical condition and the testimony of the physician who examined her, was enough to justify the submission of that question to the jury, but the question here presented is whether or not there is sufficient evidence, apart from the story of the girl and apart from that evidence, which goes alone to the proof of the corpus delicti, which will point to the defendant as the guilty party.

[1] Other direct testimony than that of the prosecutrix, as to the particular act which constitutes the offense, is not essential to make a corroboration of her story, but corroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and will identify the accused as the party guilty of the crime. It may consist of circumstantial evidence. *Nabower v. State*, 182 N. W. 493; *Kotouc v. State*, 104 Neb. 580, 178 N. W. 174; *Day v. State*, 102 Neb. 707, 169 N. W. 261; *Hammond v. State*, 39 Neb. 252, 58 N. W. 92.

The conduct and demeanor of the accused may furnish corroboration. The accused here procured the company of this little girl to Omaha, under the representation that she

would be placed in the keeping of his married niece; this representation proved to be false. When arrested with the girl, he explained that he slept upon the floor on a mattress beside her bed; but there is direct evidence, other than the testimony of the prosecuting witness, to show that that statement was also false. It is, at least, an unreasonable story. If the accused thought of this girl only as an infant, there was no occasion for him to sleep upon the floor. If, from his viewpoint, it was an occasion when he should not sleep with her, then it was also improper for him to have the girl sleeping in his room. He testified that he had seen the girl at two different times in the act of intercourse with her brother. If that story was true, and he considered her a girl who was being and could be subjected to that abuse, it is a matter of some incriminating aspect that he should fail to reprimand her, or disclose the fact to her parents, and should himself immediately take her to Omaha and keep her at his sleeping quarters for two successive nights, being able to, and when he had represented that he would, leave her with his niece. If his story that he had previously seen the girl in the act of intercourse was thought by the jury to be untrue, then the story could only have been used with the purpose of serving as a shield to himself and of furnishing an explanation of the physical condition of the girl by placing the blame upon another. Furthermore, the testimony of the physician shows that at the time that the physical examination was made it appeared that the girl had been recently abused. For the full period of four days previous to this examination, the accused appears to have been the only man who could have had opportunity to commit the act.

[5] We believe there is sufficient in the record to furnish the necessary corroboration. Dawson v. State, 96 Neb. 777, 148 N. W. 957; Fager v. State, 23 Neb. 332, 35 N. W. 195.

The defendant testified that he was impotent and that no evidence was introduced in dispute of that fact. His story, in the manner of its telling, would not inspire belief. He stated he had been injured by a locomotive engine leaving the track, and by being kicked by a horse. The details of these accidents, or the nature of the injuries sustained, are not explained, and no medical testimony was introduced. The testimony of the prosecuting witness and the corroborating circumstances, however, indicate that defendant was not impotent, and that he committed the crime charged. The issue of fact was for the jury.

[2] Defendant further complains that the court refused to give a requested instruction on corroboration, which pointed out specifically that the prosecuting witness could not by her own statements corroborate herself.

Though it would have been quite proper and, perhaps, advisable to have given the requested instruction, we find no error in the court's refusal to give it, since the matter of corroboration was covered by instructions given. The court instructed, in substance, that there must be testimony on behalf of the state corroborating the testimony of the prosecuting witness, and that in such corroboration, though it was not necessary to furnish, by other witnesses, direct proof that the act was committed, it would be sufficient to show by them such surrounding facts and circumstances as would support her testimony as to the principal fact, and lead to the inference of defendant's guilt.

The judgment of the lower court is therefore

Affirmed.

STOCKMEN'S STATE BANK v. FISHER. (No. 21733.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Bills and notes ~~§~~343—A bank purchasing with full knowledge that the note was given to pay insurance premium prior to delivery of policy held not a bona fide holder.

Where the statute provides that "it shall be unlawful for any company or agent thereof to hypothecate, sell or dispose of a promissory note, received in payment for any part of a premium on a policy of insurance applied for under the provisions of this chapter, prior to the delivery of the policy to the applicant" (Rev. St. 1913, § 8291), and it appears from the testimony that the applicant for insurance executed and delivered his note to the agent for the insurance company for the premium therefor, which agent almost immediately, and before the policy of insurance had been delivered to the applicant, sold and transferred said note to the plaintiff bank, with full knowledge on the part of said bank of the purpose for which said note had been given, and that the policy, for the premium on which said note had been given, had not been delivered to the maker of said note, *held*, that plaintiff was not a bona fide holder of said note and could not recover thereon.

2. Cases cited and distinguished.

The cases of Citizens' State Bank v. Nore, 67 Neb. 69, 93 N. W. 180, 60 L. R. A. 737, 2 Ann. Cas. 604, and Bank of College View v. Nelson, No. 21453, 183 N. W. 100, referred to in the opinion, commented upon, and distinguished.

Appeal from District Court, Dawson County; Grimes, Judge.

Action by the Stockmen's State Bank against H. G. Fisher. Judgment for plaintiff, and the defendant appeals. Judgment reversed.

John H. Linderman and W. A. Stewart,
both of Lexington, for appellant.

Geo. C. Gillan, of Lexington, for appellee.

Heard before MORRISSEY, C. J., and
FLANSBURG and ROSE, JJ., and DICK-
SON and TROUP, District Judges.

TROUP, District Judge. This is an action upon a promissory note for \$165.75, which plaintiff alleges was executed and delivered to one T. A. McCrystal on April 30, 1919, due September 1, 1919, and by McCrystal sold and transferred to the plaintiff, in due course, for a valuable consideration, and without notice of any defense to the same. The note not having been paid by the defendant when due, plaintiff prays judgment for the amount of said note and interest.

[1] The defendant, answering, denies that plaintiff is the owner of the note in suit, and denies that he is indebted to the plaintiff in any sum whatever, but alleges that the note in question was given by the defendant to one T. A. McCrystal, as the agent of a certain hail insurance company, and in payment of a premium on a policy of insurance to be issued by said company to the defendant against damage by hail; that on the same day on which said note was given said McCrystal sold and delivered the same to the plaintiffs that at the time of the sale and delivery of said note by McCrystal to the plaintiff the said policy of insurance had not been delivered to the defendant, all of which the plaintiff well knew at the time it purchased said note; that at the time defendant made application for said insurance he informed McCrystal that he already had a certain amount of insurance on his crops, whereupon McCrystal expressed some doubt as to whether further insurance could be contracted for, but that he would receive defendant's application subject to the acceptance of the same by the company; that the defendant was never informed by any one that said application had ever been accepted until after the crops professed to be protected by said insurance had been harvested and said note became due; that said defendant never received a policy for said insurance at any time; that the attempted transfer of said note was unlawful and in violation of the statute of this state, and the defendant invokes said statute as a complete defense to this suit. The reply of plaintiff denies all new matter pleaded in the answer. On a trial of the case to the court, without a jury, the court found for the plaintiff and awarded judgment for the full amount of said note, with interest and costs. A motion for a new trial having been made and overruled, the defendant appeals.

The statute referred to in defendant's answer is as follows:

"It shall be unlawful for any company or agent thereof to hypothecate, sell or dispose of a promissory note, received in payment for any part of a premium on a policy of insurance applied for under the provisions of this chapter, prior to the delivery of the policy to the applicant." Rev. St. 1913, § 3291.

The undisputed evidence shows that on April 30, 1919, on solicitation therefor by one McCrystal, an agent for a certain hail insurance company, the defendant gave to McCrystal an application for a certain amount of hail insurance upon defendant's growing crops, upon which some insurance already existed; that, because of some doubt expressed as to whether the insurance company would accept the application for the increased insurance, McCrystal stated to the defendant that he would receive the application subject to the company's acceptance of the same; that at the same time the defendant executed and delivered to McCrystal the note in suit; that on the same day, or the day following the giving of the note and application to McCrystal, and before the application had been accepted by the insurance company, or a policy of insurance delivered to the defendant, McCrystal sold and disposed of defendant's note to the plaintiff herein.

Under these undisputed facts, the act of McCrystal in selling and disposing of this note to the plaintiff was a direct and positive violation of the statute above quoted, and constituted the transaction an utterly illegal and void one, so far, at least, as McCrystal is concerned. We assume that this much must be and probably is conceded by the plaintiff. So that the only question left in dispute, and the only one for us to determine, is, did the plaintiff purchase and receive the transfer of said note from McCrystal under such conditions and circumstances as will entitle it to recover thereon?

There are some other facts practically undisputed which apply to the plaintiff's participation in the selling and purchasing of this note. These are that the plaintiff knew, before and at the time it purchased this note from McCrystal, that the policy of insurance, the premium for which this note was given, had not been delivered to the defendant, for plaintiff bought it either on the very day or the day following its execution and delivery by the defendant to McCrystal. In the very nature of things Ralston, the president, of the plaintiff bank, and who represented the bank in this transaction, knew that it was a practical impossibility for the policy to have been executed and delivered to the defendant before that time. Besides, there is conclusive evidence that Ralston had actual knowledge of and understood the fact that the policy had neither been issued nor delivered to anybody at the time he purchased this note, for he testified

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that he was familiar with the business of writing hall insurance, and, had, himself, much experience as a solicitor, and knew that a hall insurance company would not send a policy to the insured until the cash for the premium had been received by it, and that one of the reasons he purchased the note was to furnish to McCrystal the cash to send this company in payment for this and other policies.

Under these facts and circumstances, therefore, can plaintiff claim it took the note free of its infirmity and recover thereon regardless of the situation? If it did and can, then it was folly to have written this provision into the statutes, for to sanction such a transaction would defeat the sole and only purpose and object of the statute, namely, to prevent irresponsible insurance companies and their agents from realizing on the obligations of applicants for insurance before delivery of the policies, and without giving them the protection contracted for.

It is said the statute does not inveigh against the purchaser of a note thus hypothesized, but against the seller only. It is true the statute does not, in express terms, make the act of purchasing a note, under the circumstances stated, unlawful. Nevertheless, plaintiff, in taking the part it did in the transaction, certainly violated the spirit of the law. As said in the defendant's brief, there could be no seller without a purchaser, so that when plaintiff purchased said note he knew McCrystal, the holder thereof, had no lawful right to sell it, and that it was a direct violation of the written statute for him to do so. With full knowledge of this fact, plaintiff actively aided and abetted McCrystal in the commission of the unlawful act, and without whose aid the unlawful act could not have been committed. In our opinion such an act on the part of the plaintiff is an assault upon the law, as well as upon good morals, whether a particular statute made it so or not, which this court will not sanction nor encourage by aiding the one so offending to recover on an alleged cause of action based solely upon the unlawful transaction.

"The maxims 'Ex turpi causa non oritur actio' and 'Ex dolo malo non oritur actio,' founded as they are on sound morals, have for a long time been applied by courts in the practical administration of justice. Under the doctrine expressed in these maxims it has been said that no court will allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. The rule rests upon the broad ground that no court will allow itself to be used when its judgment will consummate an act forbidden by law. * * * The general rule that no action can be based on an illegal contract is therefore not open to question." 6 R. C. L. 816, § 215.

In *Rudolf v. Winters*, 7 Neb. 125, it is said:

"Whenever a claim is bottomed on an immoral or illegal transaction, no right whatever can be founded upon such contract which the law will sanction or the courts maintain."

[2] The plaintiff cites the case of *Citizens' State Bank v. Nore*, 67 Neb. 69, 93 N. W. 160, 60 L. R. A. 737, 2 Ann. Cas. 604, as authority for the contention that plaintiff has the right to recover on the note in suit. We think the case is not in point. The bank, in the case cited, had no knowledge of any infirmity in the note purchased. In the opinion it is said:

"Brett [the seller of the note] was a stranger in the town and the cashier had seen him only once before, but there is no evidence that the cashier or any of plaintiff in error's officers or agents had any knowledge or notice of the purpose for which the note was given."

And, therefore, the court held the purchaser to be a bona fide holder. In the case at bar, however, the plaintiff bank had full and complete knowledge of the infirmity of the note purchased, and therefore was not a bona fide holder, neither was it an innocent purchaser under the Negotiable Instruments Act. Rev. St. 1913, § 5374.

It may, perhaps, be proper here to call attention to the case of *Bank of College View v. Nelson*, No. 21453, 183 N. W. 100. In that case this court held, through Rose, J., delivering the opinion:

"As a general rule, courts will not refuse to enforce a bank's contract for the loan of money, or disallow damages for a breach thereof, merely because the amount lent exceeds 20 per cent. of the capital and surplus, notwithstanding a statute penalizing the banks for exceeding that limit."

In the body of the opinion it is said:

"In limiting the amount of an individual loan to 20 per cent. of the capital and surplus and in directing punishment for exceeding that limit, the statute established a rule for the government of the bank."

The statute in the case referred to was not enacted for the particular purpose of protecting the borrower, but as "a rule for the government of the bank." Here, in our opinion, lies an important distinction between the case referred to and the one at bar. The statute in the case at bar was evidently enacted for the express purpose of protecting the maker of a note, executed under the circumstances indicated, who had no part in its unlawful transfer, yet who may be grossly defrauded by such transfer except as he is protected by the statute.

We think the court erred in rendering a judgment for the plaintiff, and the same is reversed.

ECHOLS v. MUTUAL LIFE INS. CO. OF NEW YORK. (No. 21279.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Insurance $\S$ 141(2)—Insurer may waive provisions that policy shall not become binding unless first premium paid or that no agent has power to modify the contract.

Provisions in a contract of life insurance to the effect that the policy does not become a binding contract of insurance unless and until the first premium is paid, and that no agent of the company, or other person, has power on behalf of the company to modify the contract of insurance or to extend the time of paying any premium, are for the benefit of the company and may be waived by it.

2. Insurance $\S$ 141(2)—Giving note held payment of first premium as between insured and insurer.

In such case, where a rule of the company permits the agent to take a note of the insured payable to himself for the first premium, the agent being held responsible to the company for the net premium, the agent becomes the debtor, and when he delivers the policy to the insured under an agreement to extend the time of paying the premium and to take the note of the insured for such premium, but no note is given for the reason that the agent had no blank forms with him at the time, and it was agreed that the agent would see insured in a few days and get the note, and the agent left the city two days thereafter without procuring the note, and before his return the insured died, such transaction will be deemed a payment of the premium as between the insured and the company.

3. Insurance $\S$ 141(2)—Agreement by agent for extension of time of payment of first premium held waiver of conditions of contract.

In such case, an agreement by the agent to extend the time of paying the premium will be regarded as a waiver by the company of the conditions of the contract of insurance respecting time of paying the premium, and the limitations of the power of the agents to extend the time of such payment.

4. Insurance $\S$ 95—Notice to general agent held notice to insurer.

Notice to a general agent of a life insurance company, having authority to solicit insurance, to make out and forward applications, to deliver the assured's policies when returned, and to collect and transmit premiums, will operate as notice to the company, and it will be bound by acts then done by him in respect to the business he is transacting.

5. Insurance $\S$ 665(2)—Evidence sustaining finding that insured was in good health at delivery of policy.

Evidence examined, and held to sustain the findings of the trial court.

Appeal from District Court, Dodge County; Button, Judge.

Action by Ula W. Echols against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Montgomery, Hall & Young, of Omaha, for appellant.

Courtright, Sidner, Lee & Jones, of Fremont, for appellee.

Heard before MORRISSEY, C. J., and DAY, DEAN, and LETTON, JJ.

DAY, J. The plaintiff recovered a judgment against the defendant upon a life insurance policy in which she was named as beneficiary. By stipulation of the parties, a jury was waived, and trial was had to the court. Defendant appeals.

It was pleaded as a defense that the first premium was never paid, and also that the policy was never delivered to and received by the insured during his continuance in good health; that these requirements were conditions precedent to the contract of insurance becoming binding and effective, and that therefore the policy never became a binding contract. The reply pleaded a waiver of the conditions of the contract requiring the first premium to be paid before the policy became effective, and alleged that credit was extended to the insured for the payment of the first premium, and that within the time of the extended credit full payment of the premium was tendered and refused. The reply also denied the allegations of the answer, and alleged that at the time the policy was delivered to and received by the insured he was in good health. A brief reference to the facts will serve to make clear the precise points in controversy.

The record shows that on October 30, 1918, Philip K. Echols, the insured, who lived at Cheyenne, Wyoming, made application to the defendant company through its local soliciting agent, Theodore Thulemeyer, for a life insurance policy in the sum of \$5,000, requesting therein that his wife, Ula W. Echols, be named as beneficiary. At the time the application was made, it was agreed between Thulemeyer and the insured that, if the company accepted the risk and issued the policy, insured should have 60 or 90 days in which to pay the first premium of \$125.25, and that a note was to be given therefor. The application was made upon one of the printed forms provided by the company, and contained a recital that the insured understood the stipulations contained therein, which, in so far as they have any application to the present issues, are as follows:

"The proposed policy shall not take effect unless and until the first premium shall have been paid during my continuance in good health, and unless also the policy shall have been delivered to and received by me during my continuance in good health."

And further:

"I agree that no agent or other person except the president, vice-president, a second vice-president, a secretary, or the treasurer of the company has power on behalf of the company to make, modify or discharge any contract of insurance, to extend the time for paying a premium, to waive any lapse or forfeiture, or any of the company's rights or requirements."

The policy also contained a stipulation in substantially the same language as the clause last above quoted. The application and the medical examination were forwarded to the home office of the company in the city of New York, and in due course of business the application was accepted and a policy issued thereon. On November 6, 1918, the policy was mailed by the home office to its Denver, Colorado, agency for the purpose of delivery.

It appears that the company maintains a general agency at Denver, which has general charge of the business of the company originating in the states of Colorado and Wyoming. This Denver agency was in charge of O. C. Watson, who is styled "manager," and who had authority to appoint soliciting agents, collect premiums, deliver policies, and in fact conduct a branch office of the company's business within the states mentioned. The Denver agency, however, did not pass upon applications for insurance or issue policies.

On November 13, 1918, the policy was received at the Denver agency, and by it, on the same day, mailed to Thulemeyer at Cheyenne for delivery and settlement. Owing to the absence of Thulemeyer from Cheyenne, he did not receive the policy until Saturday, November 16, at which time, at about 4 o'clock p. m., he met Echols by appointment at Thulemeyer's room, and delivered the policy. On that occasion it was agreed that an extension of time for the payment of the premium was to be given until January 2, 1919. As to what occurred at that time, Thulemeyer's testimony is as follows:

"I handed him the policy, and he asked me something about the settlement, and I asked him when it would suit him best to pay for the policy, and he told me it would suit him best if he could pay for it immediately after the first of the year, and I agreed to that with the understanding that he was to give me a note, of course, which he would have done then, but I had no notes in my room, and I told him that I would fix it up with him in a few days. He asked me then if that would be all right, and I told him, sure, it would be."

On the day the policy was delivered to the insured, Thulemeyer wrote to the Denver agency that he had delivered the policy, and asked Watson whether he could handle his note. Whether he referred to his own note or Echols' note is not entirely clear. On

November 18 Watson replied to Thulemeyer as follows:

"With reference to policy No. 2534687, Echols, which you have delivered, please send note to me and I will advance the net premium right away."

Thulemeyer again left Cheyenne on Monday, November 18, and was absent when in the due course of mail Watson's letter should have been received. In the meantime, and before the letter was delivered to Thulemeyer, Echols died, on November 24, from a sudden attack of influenza, without having given the note for the premium. It appears that Thulemeyer and Echols were personal friends, and that Watson also was acquainted with Echols. After Echols' death, but within the time of the extended credit for the payment of the premium, payment of the premium was tendered and refused.

It also appears, although upon this point there is a little confusion in the testimony, that a rule of the company permitted its agents to accept a note in payment of the first premium. In such case, however, the note was to be taken in the name of the agent, was to be his property, and the agent was required to remit the net premium to the company. The purpose of such a rule was no doubt to enable the agents to extend credit to persons of known financial responsibility in cases where they were willing to advance to the company the net premium.

[1-3] It is quite obvious that the stipulations in the application and policy, which have heretofore been quoted, and which form the basis of the defenses pleaded, are for the benefit of the company and can be waived by it, and such waiver may be shown by conduct on the part of the company which indicates an intention to do so. It is manifest that the rule of the company permitting its agents to accept notes in their own names for the first premium, they becoming responsible to the company for the net premium, is entirely inconsistent with the provisions of the contract that the policy shall not take effect until the first premium shall have been paid, and also inconsistent with the provisions that no agent or other person except certain designated officers shall have power on behalf of the company to extend the time for paying the premium. Under such circumstances, the court will construe the action of the company in its most favorable light to the insured, with the view of sustaining rather than defeating the contract. It is clear that the insured believed at the time the policy was delivered to him that he had a valid and effective contract of insurance, and it is equally clear that Thulemeyer intended that the policy should be effective, and that he was to advance the net premium to the company. If a note had been given by the insured to

Thulemeyer for the premium, and he had remitted the net premium to the company, it would seem that the transaction would have been within the express authority of the agent. Does the fact that no note was actually given by the insured, and the net premium was not actually sent to the company by the agent, change the situation? Under the circumstances shown here, we think not. As between Thulemeyer and the insured, the parties had agreed that a note was to be given. The amount was fixed, and the time of payment made definite. The policy was delivered with that understanding. The only reason a note was not given at the time was because the agent did not have a blank form with him. In this situation the agent said that he would see the insured in a few days and fix up the note. On the following Monday the agent was called out of the city, and before his return Echols' death occurred. The delivery to and acceptance by the insured of the policy would be a sufficient consideration to support the promise to pay the premium to Thulemeyer. The note would be merely evidence of Echols' obligation to pay and could only have been for the protection of Thulemeyer individually. This he could waive, and he did so by delivering the policy to Echols and extending the time of payment of the premium, with the assurance that it would be all right. When, therefore, Thulemeyer delivered the policy under the agreement to extend the time of payment, he himself became liable to the company for the net premium. He recognized that and wrote the letter to Watson to arrange for the payment. Watson wrote to send the note and he would advance the net premium. In doing this, Watson was acting within the general scope of his authority as manager, and his act must be regarded as binding on the company. Watson and Thulemeyer both considered the policy effective, and that the net premium was to be paid to the company by Thulemeyer. In permitting Thulemeyer to become responsible for the net premium, the company assumed no risk of failure of payment, for it was shown that considerable sums as commissions were coming to Thulemeyer from time to time on policies previously secured by him. Under these facts we hold that the provisions of this insurance contract, that the policy does not become effective unless and until the first premium is paid, and that no agent of the company except certain designated officers has power to extend the time of paying any premium, are for the benefit of the company, and may be waived by it. And where by a rule of the company its agents are permitted to accept the note of the insured for the first premium, by taking the note in their own names, and themselves becoming responsible to the company for the net premium, and where the agents of the

company authorized to deliver policies and collect premiums deliver the policy to the insured under an agreement to extend the time of paying the premium, and to take the note of the insured for the same, but no note is given for the reason that the agent had no blank notes with him at the time, and it was further agreed that the agent would see the insured in a few days and get the note, and the agent left the city two days thereafter without procuring the note, and before his return the insured died, such transactions will be considered a waiver of the provisions of the contract of insurance, and as between the insured and the company will be deemed a payment of the premium.

[4] In addition, it will be observed that Watson was the general manager of the company's business in the states of Colorado and Wyoming, and that he had been notified by Thulemeyer that the policy had been delivered without the payment of the premium, and, inferentially at least, that an extension of time for paying the premium had been granted to the insured. This notice to Watson was in legal effect notice to the company as to what had been done. It is a general principle of agency that knowledge to the agent is knowledge to the principal, in so far as such knowledge pertains to matters within the scope of the agent's powers. Watson knew that the policy had been delivered without restriction; that the premium had not been paid; that an extension of time for paying the premium had been given; and that Thulemeyer had become liable for the net premium; and yet he made no objection or protest. On the contrary, he acquiesced and approved of what had been done, and lent his aid to Thulemeyer to raise the amount of the net premium for remittance to the company. Watson's knowledge will be treated as the knowledge of the company, and his act the act of the company. After the company's agents had induced the insured to believe that he was protected by his policy, the company is estopped, after the death of the insured, to claim that the policy never became effective because the first premium had not been paid.

The principle here involved was considered in *German Ins. Co. v. Shader*, 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918, in an opinion by Commissioner Pound, and it was held:

"Provisions in a policy of insurance that the risk shall not attach unless the premium has been actually paid are waived in case the policy is delivered upon an agreement to extend credit, and the insurer does not take advantage of said provisions, but treats the policy as in force."

And, in discussing the proposition, the court said:

"The general rule that an insurance company cannot take advantage of conditions in a policy

whereby such policy is to be void by reason of circumstances existing at the time the policy issued, in case the facts were known to its agent at the time, has been recognized universally. More recently insurance companies have sought to avoid the consequence of this well-established rule by provisions to the effect that the conditions of the policy could be waived only by written indorsement, and by clauses in which agents are forbidden to waive any of the conditions of the policy in any other manner. Notwithstanding provisions of this type, an overwhelming majority of the state courts have continued to apply the rule that an insurance company cannot set up that a policy issued by its agent with knowledge of the facts was void when it was issued, by reason of facts which he well knew. Including our own court, the courts of some twenty-seven states, at least, have, upon one ground or another, adhered to this doctrine in the face of these provisions as to waiver."

As bearing generally upon the questions discussed, see *Washburn v. United States Casualty Co.*, 108 Me. 429, 81 Atl. 575; *Berliner v. Travelers Ins. Co.*, 121 Cal. 451, 53 Pac. 922; *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 38 Pac. 113, 40 Am. St. Rep. 96; *Home Ins. Co. v. Gilman, Ex'r*, 112 Ind. 7, 13 N. E. 118; *Bush v. Insurance Co.*, 85 Mo. App. 155.

[5] Appellant contends that the insured was not in good health at the time of the delivery of the policy to him on November 16, 1918. We have examined the record, and find there is some conflict as to the precise time the insured became ill, but there is ample evidence in the record to support the finding made by the trial judge that the insured was in good health at the time of the delivery of the policy, and his finding of fact upon conflicting evidence is entitled to the same weight as the finding of a jury would be given, and, under the familiar rule in force in this state, will not be disturbed unless clearly wrong.

In view of the liberal allowance made to plaintiff's attorneys in the trial court, an attorney's fee of only \$100 is allowed in this court.

The judgment of the district court is affirmed.

**STATE v. FARMERS' STATE BANK OF
DECATUR et al. (IAMS, Intervener).**
(No. 21725.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

Appeal and error ⇨ 1097(1)—A question determined will not ordinarily be re-examined on a second appeal.

A question once determined in the appellate court will not ordinarily be re-examined there on a second appeal in the same case.

Appeal from District Court, Burt County; Goss, Judge.

Proceeding by the State of Nebraska against the Farmers' State Bank of Decatur and others, in which the bank was declared insolvent and placed in receiver's hands, and in which an intervention petition was filed by Frank Iams, upon his death prosecuted by Charles Iams, as administrator, and the Oakland State Bank, in behalf of itself and others, intervened. The court found that the bank guaranty funds and the claim of Iams were of equal rank, and on that basis prorated the funds in the receiver's hands and the State and the Oakland State Bank appeal. Affirmed.

See, also, 101 Neb. 210, 162 N. W. 637, 101 Neb. 285, 163 N. W. 318, 101 Neb. 778, 165 N. W. 145, 103 Neb. 194, 170 N. W. 901.

The Attorney General and J. A. Singhaus, of Tekamah, for appellants.

John L. Webster, of Omaha, for appellee.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

PER CURIAM. This is a controversy over the distribution of the funds in the hands of the receiver of the insolvent Farmers' State Bank of Decatur, Nebraska. It failed when it was indebted, among others, to Frank Iams in the sum of \$12,000. He filed his claim as a depositor and demanded payment out of the bank guaranty funds, but he was held to be a general creditor and not a depositor within the meaning of the state banking law. Payment out of the bank guaranty funds was not allowed. *Iams v. Farmers' State Bank*, 101 Neb. 778, 165 N. W. 145. Later Iams intervened in the proceeding to wind up the affairs of the insolvent bank and demanded payment out of the funds derived from the assets in the hands of the receiver. The state of Nebraska, for the protection of the bank guaranty funds, and the Oakland State Bank, in behalf of itself and all other banks that contributed to the bank guaranty funds, pleaded that the funds in the hands of the receiver of the insolvent bank were insufficient to reimburse the bank guaranty funds paid to depositors and that the bank guaranty funds were entitled to a preference over the claim of Iams, a general creditor. A fuller statement of the facts will be found in *State v. Farmers' State Bank*, 103 Neb. 194, 170 N. W. 901. The trial court found that the bank guaranty funds and the claim of Iams were of equal rank, and on that basis prorated the funds in the hands of the receiver of the insolvent bank. The state of Nebraska and the Oakland State Bank have appealed.

Are the bank guaranty funds, out of which the depositors of the insolvent bank were

paid, entitled to priority over the claim of lams in the distribution of the funds in the hands of the receiver? This is the question presented by the appeal. In denying the preference in favor of the bank guaranty funds the trial court followed a ruling of this court on a former appeal in the same case. *State v. Farmers' State Bank*, 103 Neb. 194, 170 N. W. 901.

While this court's ruling on the former appeal, which the trial court followed after the cause had been remanded for further proceedings, appears to be erroneous when here and now read in connection with the statute construed, it is the law of this case. A question once determined in the appellate court will not ordinarily be re-examined there on a second appeal in the same case.

Affirmed.

BRINGEN v. WOLF et al. (No. 21595.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

Fraud — 31, 64(1)—Remedies for fraudulently inducing purchase of property enumerated; renewal of note for price not a waiver of fraud as a matter of law.

A person who has been induced by fraud to purchase property, when he discovers the fraud, may, at his election, rescind the contract and recover back all that he has parted with thereon; or, when the contract of sale has been executed, in whole or in part, before the discovery of the fraud, he may affirm the contract and maintain an action for his damages resulting from the antecedent fraud, or, when sued for the purchase price, he may plead said damages by way of recoupment. The question of waiver is a question of intention, and this right of action for deceit will not be held to have been waived unless the intention of its possessor to make such waiver clearly appears. Obtaining an extension of time and the renewal of a note given for the purchase price of said property is not a waiver of such right of action as a matter of law.

Appeal from District Court, Boone County; Button, Judge.

Action by Ole C. Bringen against Max Wolf and Julius Wolf, partners doing business in the state of Nebraska, under the firm name of Wolf Bros. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

J. S. Armstrong and V. E. Garten, both of Albion, and Albert & Wagner, of Columbus, for appellant.

F. D. Williams, of Albion, for appellees.

Heard before LETTON, DAY, and DEAN, JJ., and CLEMENTS and MORNING, District Judges.

CLEMENTS, District Judge. This is an action for damages alleged to have been sustained by plaintiff in consequence of the sale of cattle, infected by a disease known as "pink-eye," to plaintiff by defendants, who, it is alleged, had knowledge of the condition of the cattle, but represented to the plaintiff that they were all right and sound. At the close of the evidence, on motion of defendants, the court instructed the jury to return a verdict for defendants, which was done and a judgment for defendants was entered thereon. From said judgment, the plaintiff appealed.

By admissions and undisputed evidence it is established that on Saturday, the 1st day of May, 1915, the defendants sold to plaintiff 39 head of yearling cattle, then in the stockyards at Albion, Nebraska, for \$36 a head, and plaintiff gave defendants his promissory note for the purchase price thereof, payable in six months and secured by chattel mortgage on said stock. The sale was completed on the following Monday by the defendants delivering said cattle to plaintiff at his pasture situated about ten miles from Albion. When said note became due, on November 1, 1915, plaintiff gave a renewal note therefor, due in six months, with some additional security, and defendants retained both the original and renewal notes. When the renewal note became due and payment was requested, plaintiff, for the first time, notified defendants that said cattle were diseased when he bought them and demanded a reduction in the amount of the note for that reason. This was refused and, under pressure, plaintiff paid the note in full.

While the evidence is conflicting, there is sufficient, if believed, to show that, at the time of said sale, the defendants represented to the plaintiff that said cattle were all right; that he relied on said representation in purchasing the cattle; that the cattle were not all right, as some of them were afflicted with a disease commonly known as "pink-eye"; that plaintiff did not know that they had any disease until after they had been delivered and placed in his pasture and commingled with plaintiff's other cattle therein; that he first discovered that they were diseased the next day after they were so delivered; that three of the cattle so purchased of defendants died from said disease, many others, including cattle which plaintiff owned before said purchase and with which cattle they had been commingled, became infected with said disease and plaintiff sustained damages in consequence thereof. Plaintiff testified that at the time the sale was made it was agreed that he should have a year's time, and that the renewal of the original note was made in pursuance of that agreement. Defendants

deny this, and say that they extended the time of payment at plaintiff's request.

In its peremptory instruction to the jury the court said:

"Gentlemen of the jury. The court holds that when the plaintiff gave the renewal note he had knowledge that the cattle had the pink-eye, and thereby waived any fraud in the original contract. You are, therefore, directed to return a verdict for the defendants."

It will be noted that this instruction is based wholly on the proposition that the giving of the renewal note constituted a waiver of the alleged fraud as a matter of law. No other basis for said instruction or reason for giving it is suggested by the court or is urged by counsel for defendants, and the determination of this case rests wholly on whether said proposition correctly states the law.

It is a well-established and familiar rule that one who has been induced by fraud to purchase and agree to pay for property has, at his election, one of two remedies. (1) He may rescind the contract and recover back whatever he has parted with thereon. (2) He may affirm the agreement and maintain an action for damages resulting from the deceit, or, when sued by the vendor to recover the price for which the property was sold, may plead such damages by way of recoupment. *Pollock v. Smith*, 49 Neb. 864, 69 N. W. 312; *Kaup v. Schinstock*, 88 Neb. 95, 129 N. W. 184. That this is a general rule which applies in all cases where the contract has been fully executed before the discovery of the fraud is held by practically all authorities. By the weight of authority, said rule is not applicable in a case where the fraud is discovered while the contract is wholly executory. The reason given for this limitation of the general rule is that, where a person discovers the fraud when he is still wholly at liberty to save himself from its effects, what he thereafter does to his own injury is self-inflicted, and one may not recover damages which resulted from his own acts instead of the act of the other party to the contract. *Bean v. Bickley*, 187 Iowa, 689, 174 N. W. 683, and authorities cited.

There is, however, a sharp conflict in the authorities as to whether said general rule is applicable in a case where, at the time of the discovery of the fraud, the contract has been executed in part and a part is still executory. Some authorities seem to hold that, where the injured party discovers the fraud before the contract has been fully executed and continues to carry it out, he thereby condones the fraud and may not maintain an action for deceit. The principal case holding this doctrine is *Ponder v. Altura Farms Co.*, 57 Colo. 519, 143 Pac. 570, which is cited and quoted from in defendants' brief. In the

opinion several cases are cited as supporting said proposition. Some of them, as well as some cited in defendants' brief, are not authority therefor, as the contracts under consideration therein were wholly executory when the fraud was discovered.

The other rule is that, if the contract be executed in whole or in part before the fraud is discovered, the purchaser need not rescind, but may, at his election, affirm the contract, retain the property, and also bring his action for damages on account of the deceit; in other words, that the general rule above stated applies in cases where the contract has been executed in part only. This is the doctrine announced and followed in *Bean v. Bickley*, supra, and *Koch v. Rhodes*, 57 Mont. 447, 188 Pac. 933. In the opinions in said cases the authorities supporting or bearing upon both of the foregoing rules are collated, discussed and analyzed.

The question as to which of the foregoing conflicting rules shall obtain in Nebraska does not appear to have been heretofore determined by this court and we are therefore at liberty to choose the one which appears to us to be right; and, after due consideration, we have concluded that the latter one is supported by the weight of authority and is more consonant with reason and justice. We therefore hold that the general rule above stated applies where the contract is partly executed before the discovery of the fraud as well as where it is wholly executed.

In the instant case, the sale was completed, the purchase price settled for by the giving of a promissory note, and the cattle were delivered and commingled with other stock before plaintiff discovered that they were diseased. All that remained to be done was the paying of the note, and, under the foregoing rule, the plaintiff had the right to affirm the contract and sue for the damages resulting from defendants' alleged deceit. Counsel's contention that this right was waived by obtaining an extension of time and giving a renewal note, although supported by some of the authorities cited, is, we think, without merit. It would seem that in the cases cited the distinction between the effect of rescission and that of affirmance is not properly recognized. Where one denies the validity of a contract, rescinds, he cannot maintain that position if he seeks and obtains a change in its terms advantageous to himself, for this would be inconsistent with his position that there is no contract; but when, on discovering the fraud, he elects to affirm the contract, it becomes his duty to carry out its provisions, and there is no inconsistency in asking a betterment of the terms of the contract which, by his affirmance, he admits is valid. *Bean v. Bickley*, supra.

An independent right of action for damag-

es, sustained as the result of defendants' fraud, accrued to plaintiff as soon as he discovered same and elected not to rescind. Waiver depends upon intention, and it cannot be held that plaintiff has released or waived said right of action unless his intention to do so clearly appears; and the obtaining an extension of time and giving the renewal note, while it may be evidence of an intention to waive, is not a waiver as a matter of law.

It follows that the action of the trial court in directing a verdict for the defendants was error for which its judgment should be reversed; and said judgment is therefore reversed and remanded for further proceedings.

Reversed.

**NOVAK v. LA FAYETTE LIFE INS. CO.,
LA FAYETTE, IND. (No. 21603.)**

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Insurance §349(1)—Where policy was void upon failure to pay premiums, and there is no estoppel or waiver, contract will be enforced as made.

A provision in a life insurance policy, providing that it should become null and void upon failure to pay premiums when due, is not illegal, and where there is default in the payment of premiums, and no act or circumstance constituting a waiver or estoppel on the part of the company, preventing it from insisting upon a forfeiture, the contract will be enforced as it was made.

2. Insurance §668(8)—Whether note was taken as unconditional payment of premium due on policy held question of fact.

Whether or not a note given for a renewal premium is taken as an absolute and unconditional payment of the premium, or whether the note is given, not as payment, but for the purpose of extending the time of payment, is a question of fact to be determined by the provisions of the note and the attending circumstances.

3. Insurance §145(3)—Default in payment of note given for premium held to work forfeiture.

Where the policy provides for such a forfeiture, and the insured executes and delivers to the company a note to cover a renewal premium, which note recites that, if not paid at maturity, the insurance policy shall become null and void without act on the part of the company, and the company issues a receipt for the note, reciting that the policy shall continue in force until the maturity of the note, it is quite clear that the note was not given as an unconditional payment of the renewal premium, but as an extension of time for the payment of the premium, and a default in the payment of the note will work a forfeiture of the policy.

4. Insurance §392(10)—Retention of premium note without action held not to prevent forfeiture.

A mere retention of the note by the company after its maturity, with no affirmative acts on the part of the company signifying an intention to enforce payment, does not result in either a waiver or an estoppel that will prevent the company from insisting upon a forfeiture.

5. Insurance §392(10)—Insurer held not estopped from declaring forfeiture of policy for nonpayment of premium note.

A notice to the insured that such a premium note has become due and is not paid, and an offer to allow for an arrangement for him to pay it and avoid forfeiture, without any other act on the part of the company displaying an attitude to compel its payment or to insist upon the right to enforce it, are insufficient to estop the company from claiming a forfeiture of the policy by reason of the previous default.

Appeal from District Court, Douglas County; Leslie, Judge.

Action by Lydia Novak against the La Fayette Life Insurance Company, La Fayette, Ind. From a judgment for defendant, plaintiff appeals. Affirmed.

Weaver & Giller, of Omaha, for appellant. Baldrige & Saxton, of Omaha, for appellee.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETCHER, and ROSE, JJ.

FLANSBURG, J. This was an action to recover on a life insurance policy. The lower court found that the policy had become forfeited by reason of the failure of the insured to pay a premium note at its maturity, and took the case from the jury. Judgment was entered accordingly, and from this judgment the plaintiff appeals.

The policy provided that—

"Failure to pay any renewal premium when due shall render this policy null and void * * * without action on the part of the company."

The first year's premium on the policy had been paid and the second premium became due on October 15, 1914, and on that date, October 15, the insured executed and delivered to the company a nonnegotiable renewal premium note, which contained this provision:

"This note is given for premium on policy * * * issued by the payee hereof, and if not paid at maturity said policy shall, without notice or affirmative act on the part of the company or any of its officers or agents, be null and void."

The note was payable on April 15, following. Coincident with the execution and delivery of the note, a receipt was issued by

the insurance company, reciting the receipt of one note—

"due and payable at the company's home office April 15, 1915, for which policy, * * * issued by the La Fayette Life Insurance Company, is continued in force until the maturity of the note. Upon payment of said note on or before maturity the company's regular premium receipt will be forwarded."

Insured died on September 14, after the maturity of the note, and without the note having been paid by any one.

[1] A provision in a life insurance policy, providing that it shall become null and void upon failure to pay premiums when due, is not illegal, and where there is default in payment of premiums, and no act or circumstance, constituting a waiver or estoppel on the part of the company, preventing it from insisting upon a forfeiture, the contract will be enforced as it was made. *Dressler v. Commonwealth Life Ins. Co.*, 105 Neb. —, 181 N. W. 543.

[2] Plaintiff, however, contends that an acceptance of the note by the company constitutes an absolute payment of the renewal premium contracted for by the policy of insurance, and that the provision in the note that the policy should become forfeited upon a failure to make payment at maturity is ineffective, and does not constitute a part of the insurance contract. Whether or not such a note is taken as an absolute and unconditional payment of a premium, or whether the note is given, not as payment, but for the purpose of extending the time of payment, is a question of fact. From the terms and provisions of the note and the recital of the receipt given in exchange for it, there can be no question but that the company did not accept the note as an unconditional payment of the premium, and that an extension of time for the payment of the premium, only, was intended. In legal effect, we do not see that that arrangement differs from a mere written agreement extending the time within which the renewal premium might be paid and saving to the company its rights of a self-operative forfeiture in case the extension agreement should not be complied with.

The case of *Sharpe v. New York Life Ins. Co.*, 5 Neb. (Unoff.) 278, 98 N. W. 66, is very similar to the case at bar. There the court held, under similar circumstances, where a note was given for the purpose of extending time for the payment of a premium and contained a provision continuing the agreement for forfeiture in case the note should not be paid at maturity, that the default in payment at maturity would work a forfeiture of the policy. Where the policy and note both contain such provisions for forfeiture in case of failure of the insured to pay the premium when due, default in payment works an automatic forfeiture of the insurance. *Houston v. Farmers' & Merchants'*

Ins. Co., 64 Neb. 138, 89 N. W. 635; *Farmers' & Merchants' Mutual Life Ass'n v. Mason*, 65 Ind. App. 66, 116 N. E. 852; 25 Cyc. 826.

[3, 4] Plaintiff claims that the insurance company has waived the forfeiture. It is urged that the company did not return the note at its maturity, and that, by its mere retention of the note, it has shown a disposition to enforce it, and, having taken such position, is estopped to deny that the policy is still in force. There are no affirmative acts, however, on the part of the company signifying an intention to enforce payment of the note. It has asserted no rights upon the note. The return of the note has never been demanded by the insured. The mere retention of the note, under such circumstances, was no indication of an attitude on the part of the company that the policy was still in force, or that the forfeiture had been waived, or that the company would attempt a collection of the premium by an enforcement of the payment of the note. A mere retention of the note alone would not result in either a waiver or an estoppel. *Sharpe v. New York Life Ins. Co.*, supra; *Farmers' & Merchants' Mutual Life Ass'n v. Mason*, supra; *Pendleton v. Knickerbocker Life Ins. Co.* (C. C.) 5 Fed. 238.

[5] The plaintiff's principal contention, however, is based upon a letter which, it is claimed, was written by the insurance company to the insured after the maturity of the note, and is dated April 21, 1915. The introduction of this letter in evidence is seriously contested by the defendant, on the ground that there was an insufficient showing that the letter was ever mailed by the company or received by the insured. But, aside from that question, we see nothing in the letter which constitutes a waiver of the forfeiture. The purported letter, addressed to insured, was as follows:

"We find that you have not made payment of your note accepted as an extension of time for part of the premium under the above-numbered policy. The total amount due is shown by the following statement. * * * If you cannot pay this amount at this time, it will be your privilege to make a partial payment of \$21.92, which is the accrued interest to date, and a payment of \$20 on the principal of the note, and the balance may be extended for another ninety days or until July 15th. We trust that we shall hear from you by return mail and for your convenience please find inclosed a stamped envelope."

This letter was no more than an offer to reinstate the policy on condition that the insured should make an immediate cash payment of a portion of the premium, and arrange for payment of the balance within 90 days, or by July 15. This offer was not accepted. It was no more than a notice to the insured of the condition of his default, and of an offer to allow him to avoid its effects.

Such a letter, certainly, would not mislead the insured into the belief that his policy would be continued, regardless of whether or not he should comply with the conditions set forth in the letter of the company. Furthermore, this could not, in any event, have been construed as a waiver by the company or an extension of time for payment of the premium beyond July 15, which date was the final limit for extension of time, as set forth in the letter itself. A notice to the insured that his premium note has become due and is not paid, and an offer to allow for an arrangement to pay it and avoid a forfeiture, without any other act on the part of the company displaying an attitude to compel its payment or to insist upon the right to enforce it, are insufficient to estop the company from claiming a forfeiture of the policy by reason of the previous default, and no affirmative action on its part is necessary to bring about such a forfeiture, under the circumstances that we have set forth.

In the following cases it has been held that a mere request on the part of the insurance company for the payment of a premium note which is past due is not sufficient to show that the company has waived its rights to enforce the forfeiture. *Aetna Life Ins. Co. v. Ragsdale*, 85 Va. 579, 29 S. E. 328; *National Life Ass'n v. Brown*, 103 Ga. 382, 29 S. E. 927; *Sullivan v. Connecticut Indemnity Ass'n*, 101 Ga. 809, 29 S. E. 41. Though it has been held in *Inter-Southern Life Ins. Co. v. Duff*, 184 Ky. 227, 211 S. W. 738, that, where an insurance company makes an unconditional demand for payment of such a note, it will be held to have waived the forfeiture provided by the company, we do not see in the letter here before us any unconditional demand for the payment of the note, or any attitude on the part of the company inconsistent with its right to assert a forfeiture of the policy in case its offer should not have been accepted.

For these reasons, we are of opinion that the judgment of the lower court is correct, and it is

Affirmed.

WENDT v. WENDT. (No. 21658.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Husband and wife **§325**—Verdict for plaintiff for alienation of husband's affections will not be disturbed, where proof clearly shows defendant guilty.

Where, in an action for the alienation of the affections of a husband, the proof clearly and satisfactorily shows that defendant's acts and conduct in the premises were not only intended to effect an alienation, but actually did

accomplish that result, a verdict in favor of plaintiff will not be disturbed.

2. Husband and wife **§335**—Instruction that defendant would be liable if with ultimate intention and ulterior purpose of alienating the affections of plaintiff's husband she accomplished the alienation held proper.

In an action for the alienation of the affections of a husband it is not error for the court to instruct the jury that, if the evidence shows that the defendant was "the willing recipient of the complaints" made by the husband to defendant against his wife, "with the ultimate intention and ulterior purpose of alienating his affections," and that she, the defendant herein, "thereby caused him to abandon her, and deprived her of his affections, aid, comfort and society, she would be liable in this case."

Appeal from District Court, Cuming County; Allen, Judge.

Suit by Mildred Wendt against Rose B. Wendt. Judgment for plaintiff, and the defendant appeals. Affirmed.

A. R. Oleson, of Wisner, and F. D. Hunker, of West Point, for appellant.

Zacek & Nicholson, of Wisner, for appellee.

Heard before LETTON, DEAN, DAY, JJ., and GOOD and RAPER, District Judges.

DEAN, J. Mildred Wendt sued to recover damages from defendant for the alienation of the affections of her former husband. She recovered a verdict and judgment thereon of \$3,000, and defendant appealed.

Plaintiff and Arthur W. Wendt were married January 4, 1917, and lived together about a year and a half. Some time in May, 1918, marital differences arose between them that grew out of the misconduct of defendant, as alleged, whom plaintiff charges with having alienated the affections of her husband. She avers that defendant constantly and persistently forced her attentions and blandishments upon him, and that as a direct result of such attentions her former husband in July, 1918, deserted her and went to live with defendant and subsequently obtained a divorce from plaintiff. Within four months thereafter defendant and her husband were married at Council Bluffs, Iowa, and within about six months defendant gave birth to a child. Plaintiff alleges that she tried by various means to induce her husband to return to her, and that upon his refusal she became greatly provoked. For this deprivation of the society and comfort of her former husband she prayed for \$10,000 damages.

Mr. Wendt applied for the divorce in question and his then wife, plaintiff herein, filed a cross-petition. The court found against her on her cross-petition and granted the decree to her husband on the grounds of extreme cruelty. The court, however, award-

ed the custody of their infant child, Arthur W. Wendt, Jr., to the plaintiff herein. In her petition in the present case plaintiff admits that—

"In her constant endeavor to retain the affections of her then husband against the design of the defendant on his affections, * * * the plaintiff did at certain times, while in the heat of passion, assault her then husband and use strong language toward him in her efforts to counteract" defendant's design.

She alleges that the unseemly conduct of defendant, in the premises, so aggravated her that it threw her into a fit of passion from time to time and that it was while in this abnormal condition that she attacked her husband.

The defendant's answer herein avers that Wendt abandoned plaintiff because of her extreme cruelty, and denies that defendant alienated the affections of plaintiff's husband, and charges that she lost her husband's affection by her cruel treatment of him. With respect to the wedded life of plaintiff and Wendt it may be said that, except as to a few digressions, it ran smoothly so long as they lived together. Their child, Arthur W. Wendt, Jr., was born February 21, 1918. About March 22, 1918, they bought a home in West Point; both husband and wife contributing to the payment of the purchase price. Wendt, with some assistance from plaintiff's father, bought a garage and there engaged in the automobile business.

The testimony tends to show that the defendant and plaintiff's then husband met some time in May, 1918, and that in that month defendant remarked to plaintiff, in a significant manner, that Mr. Wendt was a very attractive person. This was the first intimation that she had of the defendant's designs upon her husband. She charges that defendant thereafter constantly sought the society of her husband. In July, 1918, she discovered a coolness in her husband's treatment of her, and avers that he then began to stay out late at night; that his automobile was frequently seen parked in front of defendant's home in the evenings, and that subsequently defendant and Wendt met frequently at the post office and had clandestine meetings elsewhere. She testified that they were frequently seen riding together; that plaintiff became concerned about her husband's late hours and his conduct generally, and when she found out the real situation she was naturally embittered toward defendant and her husband and became angry and upbraided him for his insincerity; that when her husband finally left her she constantly endeavored by various means to win him back to his home; that, notwithstanding she was always repulsed by him, she went frequently to his place of business and entreated him to return. She conceded

that when he refused to do so she made violent attacks upon him and spoke to him in an abusive manner; that the cruelty upon which the divorce decree was based consisted in the attacks that she made upon him while she was so distraught with grief over his conduct and the conduct of defendant that she could not control herself. The material evidence of plaintiff, with respect to defendant's conduct, was corroborated by six or more witnesses who lived in the immediate vicinity.

[1] Defendant cites authorities going to show that in this class of cases there is no ground for action unless it clearly appears that the defendant has done something to win the affections of the enamored spouse. Even so; the law cited is not applicable to the facts before us. Without going into tiresome details it sufficiently appears that defendant's conduct was such that it would naturally attract the attention and the admiration of a vain, vacillating and insincere person. On this point the evidence amply supports the verdict.

That plaintiff was indiscreet in the strong arm methods she employed in her attempt to win again the affection of her erring husband, and that seem to savor of the stone age, appears, not only in the proofs, but is admitted in the allegations of her petition as well. The evidence, however, was submitted to a jury of the neighborhood, and, under fair instructions, they found for her and against defendant. There is proof tending to show that defendant exercised subtle contrivances, wiles, and blandishments to win plaintiff's husband away from her. That she thereby succeeded in doing so is well established.

[2] Complaint is made respecting some of the court's rulings on the admission and the rejection of evidence, and also with respect to certain observations that were made by the trial judge on the evidence while the case was being tried. Reversible error does not appear in the assignments. Certain of the instructions are also complained of. The instruction of which the most complaint is made correctly informs the jury that, if the evidence shows that defendant was "the willing recipient of the complaints" made by the husband to defendant against his wife, "with the ultimate intention and ulterior purpose of alienating his affections," and that she, the defendant herein, "thereby caused him to abandon her, and deprive her of his affections, aid, comfort and society, she would be liable in this case."

Other assignments of alleged error are pointed out that we do not find it necessary to discuss. The record presents an aggravated situation in which a measure of justice has been meted out. Reversible error does not appear. The judgment is therefore in all things affirmed.

THOMPSON v. STATE. (No. 21790.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

Indictment and Information $\S$ 189(8)—On trial for murder committed while attempting to rob, an instruction that jury could convict of second degree murder or manslaughter is error.

An information charging defendant with a homicide committed in the perpetration of or attempt to perpetrate a robbery, under section 8581, Rev. St. 1913, charges only murder in the first degree, and it is error for the trial court to instruct the jury that they may find defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter.

Error to District Court, Stanton County; Allen, Judge.

Harry Thompson was convicted of manslaughter, and he brings error. Reversed.

G. A. Eberly and John A. Ehrhardt, both of Stanton, for plaintiff in error.

Clarence A. Davis, Atty. Gen., and Mason Wheeler, Asst. Atty. Gen., for the State.

Heard before MORRISSEY, C. J., and DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

MORRISSEY, C. J. Defendant Thompson prosecutes error from a conviction for manslaughter in the district court for Stanton county.

The information filed contained several counts, but, on motion of defendant to require the state to elect on which count the prosecution should proceed, the state elected to stand upon count 2, which charged defendant with the murder of Dayton T. Chambers while defendant was attempting to perpetrate a robbery. The brief makes a number of assignments of error, but they are all directed to the one point, namely, the sufficiency of the information to sustain the verdict. It is claimed that the information charged defendant with the crime of murder in the first degree only; that it did not contain a charge of manslaughter, and therefore the court erred in submitting that charge to the jury.

By way of argument it is said: No man can rightfully be convicted of an offense, even though the court has jurisdiction over his person and has a general jurisdiction of crimes, unless he is charged with the crime of which he is convicted. We are cited to the rule heretofore announced in *Morgan v. State*, 51 Neb. 672, 71 N. W. 788, and *Rhea v. State*, 63 Neb. 461, 88 N. W. 789.

In *Morgan v. State*, supra, defendant was charged with murder while attempting to commit rape, and the court held that it was

proper to instruct that murder in the second degree and manslaughter were not included in that count of the information.

In *Rhea v. State*, supra, the information charged murder committed in the perpetration or attempted perpetration of a robbery, and the court re-examined *Morgan v. State*, supra, adhered to the rule there announced, and said:

"Homicide committed in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary is by section 3 of the Criminal Code declared murder in the first degree. The turpitude of the act is, in the exceptional cases mentioned in the statute, made to supply the place of deliberate and premeditated malice, while a purpose to kill is conclusively presumed from the intention which is the essence of the enumerated felonies."

The issue raised appears to be settled by the two cases heretofore cited. Under the rule the death penalty has twice been inflicted. Since its announcement several sessions of the Legislature have been held, but the lawmakers have not seen fit to change it. We are bound by the rule announced, and the judgment is Reversed.

FOX v. STATE. (No. 21407.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Rape $\S$ 51(1)—Evidence held sufficient to sustain verdict.

The evidence examined, and held to sustain the verdict.

2. Rape $\S$ 4—Fact that prosecutrix had just been ravished by another member of defendant's party would not render her unchaste within the statute.

Where, on the trial of one charged with rape upon a girl over the age of 15 years and under the age of 18 years, the evidence shows that defendant was one of a party making the assault, and that before the commission of the act charged against defendant prosecutrix had been ravished by another member of the party, it is proper for the court to instruct the jury that the intercourse had by prosecutrix with the first assailant did not render her unchaste within the meaning of the statute.

(Additional Syllabus by Editorial Staff.)

3. Criminal law $\S$ 1183—Rape $\S$ 64—Sentence held excessive and reduced to four years.

Upon a conviction of rape, where defendant was young, of previous good character, and was not one of the moving spirits nor leader in the organization of the party committing the assault, held, that the case fell within the provisions of Rev. St. 1913, $\S$ 9179, permitting reduction of the sentence by the Supreme Court

where it appears excessive, so that it will be reduced to four years.

Error to District Court, Douglas County; Redick, Judge.

Stanley Fox was convicted of rape, and he brings error. Affirmed, and sentence reduced.

Jamieson & O'Sullivan and J. Southard, all of So. Omaha, for plaintiff in error.

Clarence A. Davis, Atty. Gen., and C. L. Dort, Asst. Atty. Gen., for the State.

Heard before MORRISSEY, C. J., and DAY, DEAN, FLANSBURG, and ROSE, JJ.

MORRISSEY, C. J. Defendant prosecutes error from a conviction of the crime of rape in the district court for Douglas county.

On the evening of September 13, 1919, defendant, a boy 19 or 20 years of age, and three other boys and two girls went "joy-riding" in the city of Omaha. After driving about the city for a short time they drove to the edge of the city onto a street little used, and there the boys assaulted the girls.

After presenting fourteen assignments of error, the brief recapitulates and reduces the number to six, which it says is a sufficient "statement of the record necessary to present these errors." These six assignments may be summed up in the statement that the evidence is insufficient in law to sustain the verdict, and that it is especially lacking in corroborating evidence of the principal fact charged, and testified to by the prosecutrix.

[1] The boys were well acquainted, one with the other, but prior to that evening none of them had met either of the girls. While two of the boys were riding in the automobile they accosted the girls, who had shortly before left a school entertainment, and invited them to ride. The invitation was accepted. Subsequently defendant and another boy joined the party. The girls were indiscreet in accepting an invitation from young men whom they did not know, but they were only 17 years of age, had lived in a city but a short time, and lacked the knowledge of the world that years will bring them. The record shows that they were virtuous girls, and there was nothing in their appearance or conduct to invite the assaults that were later made upon them.

Shortly before the assault defendant and another boy got out of the car, which proceeded for a short distance, when it was stopped. One of the party explained that the supply of gasoline was exhausted. The girls, evidently feeling that their companions had criminal designs, alighted from the car. One girl attempted to walk home, but she was immediately followed and assaulted by one of the party. Prosecutrix undertook to

crank the car, when she was assaulted and ravished by the boy who had been driving. Presently defendant, who, as heretofore stated, had left the car some time before, came up and, according to the testimony of prosecutrix, had forcible intercourse with her. Defendant claims to have only caressed her, and denies having had sexual intercourse. At the preliminary hearing on cross-examination, prosecutrix testified that defendant did not have intercourse with her, but on the main trial she testified that he had, but said the act was not completed because some one in the party called out that a man was coming on horseback, and defendant desisted.

The entire party later got into the car to return to the city, but at the first opportunity prosecutrix left the car, fled from her assailants, and the assault was reported to the police authorities forthwith. The story of prosecutrix is fully corroborated by her girl companion, except only as to what occurred during the few moments they were separated. The physical condition of prosecutrix, as described by a physician who examined her shortly after the assault occurred, also corroborates her. The evidence is sufficient to sustain the verdict.

[2] In addition to the assignment heretofore mentioned, it is urged that, because the proof shows prosecutrix was first ravished by one of defendant's companions, she was not, therefore, previously chaste within the meaning of the statute, and that it was error to give instruction No. 6, which told the jury that, "in order to sustain a conviction in this case, the evidence must show beyond a reasonable doubt, among other things, that the female with whom sexual intercourse is alleged to have been had was, prior to that intercourse, sexually pure," but also told the jury that it was sufficient if the state had established the chastity of the prosecuting witness previous to the night of the transaction described in the evidence, and that the fact that prosecutrix shortly before the assault alleged to have been made by defendant had been assaulted and ravished by his companion would not render her unchaste within the meaning of the statute.

In *Bailey v. State*, 57 Neb. 706, 78 N. W. 284, 73 Am. St. Rep. 540, the rule is announced that a woman not "previously unchaste" within the meaning of the statute is one who has never had unlawful sexual intercourse prior to the intercourse with which defendant stands charged. There, however, the court was considering a record which showed that the prosecuting witness had permitted defendant to have unlawful intercourse with her in another state prior to the time charged in the information. In the discussion the court correctly stated the purpose of the statute to be the protection of the virtuous

maidens of the state. A statute which would permit a party of men to assault a maiden and have intercourse with her forcibly and against her will, and then permit the acquittal of defendant because he was not the first of the party to have such intercourse, would fall short of the object so well stated by the author of the opinion in *Bailey v. State*, supra. Where a prior act of intercourse was had with prosecutrix, forcibly and against her will, she was thereby debauched in a physical, but not in a moral, sense and and was still chaste within the meaning of the statute. The instruction of the court was proper under the evidence.

[3] Defendant is young and appears to have been industrious and well-behaved prior to the commission of the crime of which he has been convicted. He was not one of the moving spirits in the organization of the party nor one of the leaders in the assault. While the crime is a heinous one, it is easy to believe that he yielded to the evil influence of his companions, rather than to inherent criminal tendencies. The case seems to fall within the provisions of section 9179, Rev. St. 1913. The term of penal servitude is reduced to four years, and, as thus modified, the judgment of the district court is affirmed.

Affirmed; sentence reduced.

FORD v. STATE. (No. 21829.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

Witnesses $\S$ 345(4)—May not be cross-examined as to plea of guilty in another case to affect credibility, since such is not a "conviction" under the statute.

It is incompetent in a criminal case, for the purpose of affecting the credibility of a witness, to ask him on cross-examination if he is not the defendant in a criminal action and has entered a plea of guilty in that case, as the entry of a plea of guilty without judgment or sentence is not a conviction within the meaning of section 7906, Rev. St. 1913.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Convicted—Conviction.]

Error to District Court, Chase County; Eldred, Judge.

Ora Ford was convicted of larceny, and he brings error. Reversed and remanded.

C. W. Meeker, of Imperial, and Stewart, Perry & Stewart, of Lincoln, for plaintiff in error.

Clarence A. Davis, Atty. Gen., and Jackson B. Chase, Asst. Atty. Gen., for the State.

Heard before MORRISSEY, C. J., FLANSBURG and ROSE, JJ., and BEGLEY and LESLIE, District Judges.

BEGLEY, District Judge. Plaintiff in error was convicted upon an information charging him and George Ford with having unlawfully and feloniously stolen and carried away a load of wheat consisting of about 29 bushels, of the value of \$73, the property of Glenn Maddux and Wilfred Maddux. He was sentenced to the penitentiary under the provisions of the indeterminate sentence law of the state. He prosecuted error to this court, and assigns a number of errors, but only one need be considered.

The real controversy in this case is over the identity of a load of wheat. The evidence of the state shows that Ora Ford, plaintiff in error, and George Ford are minor sons of Thomas Ford, and aged 18 and 12, years, respectively, and that they resided at the home of their father in Chase county, Nebraska. Glenn Maddux and Wilfred Maddux resided about 10 miles distant and were the owners of a quantity of wheat stored in a bin upon their premises; that on May 26, 1920, they discovered a quantity of wheat missing and further discovered wagon tracks leading from the bin; that they followed these tracks to the home of Thomas Ford, where they found Thomas Ford's wagon missing, and Wilfred Maddux then proceeded to the village of Madrid, Nebraska, where he found that Ora Ford and George Ford had just marketed a load of wheat consisting of 31 bushels and had received therefor the sum of \$73.16. Plaintiff in error, when confronted by Wilfred Maddux, admitted the wheat belonged to Maddux, turned over to him the sum of \$85.65, and offered to make settlement for the remainder.

The defendants attempted to show that the load of wheat was the property of Thomas Ford; that it was part of two loads purchased by him for seeding purposes in the year 1919, and that this load represented the remainder left in the bin from said purchase, and that on May 25, 1920, he and certain members of his family loaded this wheat upon the wagon, and under his direction it was hauled to Madrid on May 26 by his sons, George and Ora Ford. Ora Ford claimed he made confession falsely, under threats of arrest. Evidence was offered by members of the Ford family accounting for the whereabouts of the plaintiff in error and his brother George during the evening and night of May 25, 1920, and also by the testimony of one Ernest Knotwell. Knotwell testified that he came to the Ford home about 8 o'clock p. m., May 25, 1920, and remained there until 8 o'clock the following morning; that plaintiff in error and his brother George were there all evening, as well as the other

members of the family, and that a load of wheat stood near the granary; that the next morning the plaintiff in error and his brother George started to Madrid with the same; that he had seen the wheat in the bin previous to this date. On cross-examination, over the objections of defendant's counsel, he was asked:

"Q. You are the same C. E. Knotwell that is a defendant in a criminal action here in this court? A. Yes, sir. Q. You entered a plea of guilty in that case, did you not? A. Yes, sir."

The admission of this evidence was error. It does not show conviction of a crime, but merely an arrest and plea of guilty thereto. In *Marion v. State*, 16 Neb. 350, 20 N. W. 290, it was held:

"When, in a prosecution for murder, the defendant, on his trial, becomes a witness in his own behalf, it is incompetent on cross-examination, for the purpose of affecting his credibility as a witness, to ask him if he had not pleaded guilty to a penitentiary offense in another state; the entry of a plea of guilty, without judgment or sentence, not being a conviction within the meaning of section 338 of the Civil Code of Nebraska."

Section 7906, Rev. St. 1913, provides:

"A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof."

It has been frequently held by this court that a witness may not be interrogated as to his previous conviction of a crime below the grade of a felony. *Young Men's Christian Ass'n of Lincoln v. Rawlings*, 60 Neb. 377, 83 N. W. 175; *Leo v. State*, 63 Neb. 723, 89 N. W. 303; *Reed v. State*, 68 Neb. 184, 92 N. W. 321; *Keating v. State*, 67 Neb. 560, 93 N. W. 980; *Johns v. State*, 88 Neb. 145, 129 N. W. 247. The matter is thoroughly discussed and the method of propounding questions relating to a previous conviction set forth in *Leo v. State*, supra. The questions here, as in that case, can hardly be regarded as for any other purpose than to engender into the minds of the jury the belief that the witness was addicted to criminal acts. They are wholly collateral to the matters at issue and a noncompliance with the statutory provisions and prejudicial to the rights of the defendant. Knotwell was the only witness, aside from the members of the Ford family, who testified as to the whereabouts of the defendants, and as to the fact of the ownership of the wheat, and it cannot be denied that his testimony, if believed, was a powerful factor in their defense.

The case should, therefore, be reversed and remanded for further proceedings for error in admission of this evidence.

Reversed and remanded.

CRAVER et al. v. McPHERSON.
(No. 21449.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

Bills and notes $\S$ 92(1)—Note held supported by consideration.

The petition, the substance of which is set out in the opinion, held to state a cause of action.

Appeal from District Court, Douglas County; Estelle, Judge.

Action by Bessie Craver and others against Thomas B. McPherson. From judgment of dismissal, plaintiffs appeal. Reversed and remanded.

Morsman, Maxwell & Haggart, of Omaha, for appellants.

Benj. S. Baker, of Omaha, for appellee.

Heard before MORRISSEY, C. J., and DAY, DEAN, and LETTON, JJ.

DAY, J. This action is based upon a promissory note given by defendant to one Kate McGinness, together with a contemporaneous memorandum signed by the payee. The case was called for trial, a jury impaneled, a witness sworn, whereupon defendant objected to the introduction of any testimony, for the reason that the petition did not state a cause of action. The objection was sustained, and the case dismissed. The plaintiff appeals.

The only question presented by the record is the sufficiency of the petition to state a cause of action. The objection of the defendant to the introduction of any testimony upon the ground that the petition failed to state a cause of action is equivalent to a demurrer to the petition and must be tested by the same rules. The petition is in the usual form, and such portions only will be set out as appears to be necessary to understand the precise question presented by the defendant's objection.

It is alleged that on November 27, 1908, the defendant executed and delivered to Kate McGinness his promissory note as follows: "\$37,000. Omaha, Neb., November 27, 1908.

"One year after date, for value received I promise to pay to the order of Mrs. Kate McGinness, at the Union Stock Yards National Bank, South Omaha, Nebraska, thirty-seven thousand dollars, with interest at the rate of 6 per cent. per annum from date until paid.

"Thos. B. McPherson."

At the time of the execution of the note, and as a part of the same transaction, Kate McGinness executed and delivered to the defendant a writing, which was accepted by the defendant, as follows:

"Omaha, Nebraska, Nov. 27, 1908.

"Whereas, Thos. B. McPherson has acted as agent for many years for my late husband, Daniel McGinness, and after his death for me, in the loaning of certain money for us and in our behalf;

"Whereas, he is now holding for me notes as hereinafter described;

"Whereas, he has executed his own note of even date herewith for thirty-seven thousand dollars (\$37,000) payable to me, pledging as collateral the notes above referred to, to wit:

"Walker Manufacturing Co., \$18,171.98 and int. due Nov. 14, 1909.

"A. A. Spaugh, \$9,386.16 and int. due Dec. 7, 1909.

"Prime and Tower, \$12,000.00 and int. due Jan. 26, 1912.

"Whereas, the note for thirty-seven thousand dollars is really not his personal obligation and is only given to protect me from loss upon the notes he has taken for my account:

"Now, therefore, in consideration of the premises, I hereby agree to hold his note for thirty-seven thousand dollars, and not to transfer or dispose of it without his consent in writing.

"I further agree that the collateral notes referred to shall be held by him; and he is hereby empowered to collect, renew or extend them, and to substitute for them other collateral at his discretion.

"I also agree to exhaust my collateral, whatever it may be, before demanding payment from him of any part of this obligation, or attempting to collect any part of his personal note, unless there should be a loss in the collateral referred to, in which case, he shall be liable for such deficiency.

"Provided, however, that he shall pay me, annually, interest at the rate of six per cent. upon the whole or such part of the principal as may be unpaid from time to time.

"Witness my hand day and date first above written. [Signed] Kate McGinness."

The petition further alleges in detail the death of Kate McGinness on December 10, 1910, and the administration of her estate establishing that the plaintiffs herein are the residuary legatees under her will. Other facts are alleged showing the right of the plaintiffs herein to institute the suit. It is alleged that interest had been paid by the defendant up to November 27, 1911; that \$12,000 on the principal of the note was paid January 27, 1912; that the said payment of \$12,000 was the proceeds of the collateral note of Prime and Tower; that on November 27, 1908, the defendant substituted as collateral security the note of one W. J. McLaughlin, payable to the order of the defendant, in place and stead of the note of

the Walker Manufacturing Company for \$18,171.98, and the note of A. A. Spaugh for \$9,386.16, and that the Walker Manufacturing Company and A. A. Spaugh notes were thereupon taken by the defendant as his personal property. The petition further alleges that suit was brought by the executor of Kate McGinness against W. J. McLaughlin upon the note above described, and judgment was duly rendered thereon on November 30, 1915, for the sum of \$37,894.12; that execution was duly issued upon the judgment, and that the same was returned wholly unsatisfied; that no part of the judgment has been collected, and that McLaughlin is insolvent. The petition further alleges that the defendant has been absent from the state of Nebraska for more than three years immediately preceding the commencement of this suit; that there is due and owing the plaintiffs from the defendant on the \$37,000 note the sum of \$25,000 with interest at 6 per cent. per annum from November 27, 1911, for which, together with costs of suit, the plaintiffs pray judgment.

It is argued on behalf of the defendant that there is no consideration to support his promise. We find ourselves unable to assent to this proposition. Without entering into an extended analysis of the petition, it seems clear that there was a detriment, or disadvantage, or forbearance, or suspension of a right on the part of Mrs. McGinness in permitting the defendant to continue to hold the collateral which he was holding on her account, and in permitting him to collect, renew or extend such collateral, and to substitute other collateral therefor at his discretion. In taking the \$37,000 note she suspended at least for one year her right to call in the securities held for her by the defendant, and in agreeing to hold the \$37,000 note and not to dispose of it without the defendant's consent. It also appears that there was a benefit and advantage to the defendant in being permitted to hold the collateral, and to collect, renew and extend the same, and to appropriate to his own use all interest accruing thereon in excess of the 6 per cent. which he was to pay to Mrs. McGinness.

In our view, the petition states a cause of action, and the district court was in error in dismissing the case.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

Reversed.

BURTON v. LINCOLN TRACTION CO.
(No. 21701.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Negligence §136(10)—Question for jury on conflicting evidence.

"Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different conclusions as to these questions from the facts established." *City of Omaha v. Houlihan*, 72 Neb. 326, 100 N. W. 415.

2. Street railroads §117(8)—Negligence, contributory negligence and proximate cause held for jury.

Evidence in the case at bar examined, and held, the same required the application of the rule above quoted.

Appeal from District Court, Lancaster County; Stewart, Judge.

Action by Daniel H. Burton against the Lincoln Traction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hall, Baird & Williams, of Lincoln, for appellant.

H. N. Mattley, of Lincoln, for appellee.

Heard before MORRISSEY, C. J., FLANSBURG and ROSE, JJ., and DICKSON and TROUP, District Judges.

TROUP, District Judge. The plaintiff, Daniel H. Burton, brings this action against the defendant, Lincoln Traction Company, to recover damages for personal injuries to himself alleged to have been sustained through the negligence of the defendant company by a collision of one of the defendant's street cars with plaintiff's team and wagon at the intersection of Twenty-Seventh and W streets in the city of Lincoln.

The negligence charged against the defendant is that just before and at the time the accident happened, it was running its car at an unreasonable and reckless rate of speed, and that it was negligent in the operation of said car in that it failed to keep the same under proper control as it approached the intersection where the accident occurred, and although the plaintiff, before and at the time he entered upon said intersection, was in plain view of the defendant's motor-man operating said car, he negligently failed to reduce its speed or give plaintiff timely warning of the approach of said car, thus colliding with plaintiff's wagon and injuring the plaintiff.

The defendant, answering, denies the aver-

ments of negligence attributed to the defendant, and alleges that the injuries received by the plaintiff were due to the negligence of the plaintiff in attempting to cross the defendant's track in front of the defendant's moving car under such circumstances that it was impossible for the operator of said car to avoid the accident.

The reply of plaintiff denies the allegations of the answer attributing negligence to the plaintiff. A trial of the case before court and jury resulted in a verdict and judgment for plaintiff, from which defendant appeals.

The defendant having made a motion for a directed verdict at the close of plaintiff's evidence, and renewing the same at the close of all of the evidence, and making a like complaint on its motion for a new trial, which motions were all overruled, now submits three assignments of error, but all of the same import, which may be summed up in the single statement:

"That the testimony in the case established the gross negligence of the plaintiff and failed to establish any negligence on the part of the defendant."

It seems to be agreed by both the plaintiff and the defendant, in which agreement this court concurs, that the above proposition, in turn, resolves itself into the question whether upon the whole case the evidence was such as required its submission to the jury, or should a verdict have been directed for the defendant.

It is in evidence that when plaintiff drove his team and wagon across the defendant's track about 100 yards south of the intersection where the accident happened, for the purpose of driving north on the right-hand side of the street, he looked both north and south and saw no car at all to the south and was certain there was none nearer than Vine street, 100 yards away. He then drove north on Twenty-Seventh street parallel with defendant's track at the rate of about 4 or 5 miles an hour for the distance of about 150 feet, which took him to the intersection of Twenty-Seventh and W streets, where the accident occurred. It is admitted by the plaintiff that he did not again look south for an approaching street car before venturing to cross defendant's track at the W street intersection. This fact alone, however, is not necessarily conclusive evidence of negligence. It depends much upon what consideration should be given to the fact that the plaintiff had looked for street cars to the south a moment or two before and saw none. In the case of *Fairbanks v. Bangor. O. & O. R. Co.*, 95 Me. 78, 49 Atl. 421, it is said:

"There is no absolute rule of law that a person riding along a street must look and listen for an approaching car before entering upon the track of an electric railway. Whether his

failure to look and listen amounts to negligence must be determined from all the facts and circumstances proved."

See, also, *Robbins v. Springfield Street R. Co.*, 165 Mass. 30, 42 N. E. 334; *Watson v. Boone Electric Co.*, 163 Iowa, 316, 144 N. W. 350; *Callett v. Central California Traction Co.*, 36 Cal. App. 240, 171 Pac. 984; *Wallenburg v. Missouri P. R. Co.*, 88 Neb. 642, 126 N. W. 289, 37 L. R. A. (N. S.) 135.

But, even assuming that the act of the plaintiff in attempting to cross the intersection under the circumstances he did was negligence on his part, neither would this fact alone necessarily bar plaintiff's right to recover. The plaintiff's right to recover would still depend upon the conduct of the defendant and the manner in which it operated its car in approaching the intersection while plaintiff was in the act of making the crossing, and whether the defendant was negligent or not in the operation of its car at this point, under all the facts and circumstances disclosed by the evidence. "Negligence of plaintiff in driving across a street railway track without stopping to look and listen will not excuse the company from its duty to use reasonable diligence to stop its car after discovering the perilous situation, and if its failure to do so, after seeing the danger, directly and immediately causes an injury to him, the company may be held liable for such injury." *Omaha Street R. Co. v. Larson*, 70 Neb. 591, 97 N. W. 824. See, also, *McKenna v. Omaha & C. B. Street R. Co.*, 97 Neb. 281, 149 N. W. 826. This was the rule of law even when any act of contributory negligence of the plaintiff would bar recovery. *Harris v. Lincoln Traction Co.*, 78 Neb. 681, 111 N. W. 580. A double reason exists for the recognition of the rule at this time, now that the rule of comparative negligence is in vogue.

The motorman in charge of the operation of defendant's car testified that he first saw the plaintiff when he came out of the lumber yard with his team and wagon and crossed the street to the right-hand side thereof and proceeded northward at the time the defendant's car was crossing Vine street, 450 feet

to the south, and that he had the plaintiff in plain view from that time until the collision at or near the intersection of W street; that he was running from 8 to 10 miles an hour and could stop his car, when running at that rate of speed, within 25 or 30 feet; that when within about 35 feet of the plaintiff he sounded the gong, and that when it became apparent that plaintiff was attempting to cross the track the car was between 20 and 25 feet away from plaintiff's wagon, "then I applied the air, that is all there is to it;" that the defendant's car then hit the wagon, but not hard enough to jolt it much, and the car stopped exactly where the wagon was hit.

The plaintiff testified that he was upon the crossing when he first saw defendant's car; that his attention was first attracted to it by the ringing of the bell, and which seemed to him at that time was about 50 or 60 feet away, but that it was upon him in an instant; that the car hit his wagon two times, and that the second time that caused him to be thrown from the wagon and injured.

[1] Other witnesses also testified to different versions as to how the accident happened, but we think enough has been stated to show that there was such a conflict in the evidence upon material issues as to require a submission of the case to the jury. "Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting, and where different minds might reasonably draw different conclusions as to these questions from the facts established." *City of Omaha v. Houlihan*, 72 Neb. 326, 100 N. W. 415. See, also, *Kafka v. Union Stock Yards Co.*, 87 Neb. 331, 127 N. W. 129.

[2] We think the conflict in the evidence in the case at bar requires the application of the rule above quoted. The trial court submitted all the issues concerning which there was a conflict of testimony to the jury by appropriate instructions, to which no complaint is made. We think the court did not err in so doing, and the judgment below is therefore affirmed.

CASE et al. v. SUPREME TRIBE OF BEN HUR. (No. 20756.)

(Supreme Court of Nebraska. May 16, 1921.)

(Syllabus by the Court.)

1. Insurance §719(3) — Beneficiary association may increase rates and change plan of assessment if no injustice done.

When an insured in a fraternal benefit association agrees to be bound by future changes of the by-laws, the association may make amendments increasing the rates and changing the plan of assessments for the general good of the order, so long as such changes do not work an injustice between the individual members, are not discriminatory, and are reasonable.

2. Insurance §719(3)—Increase of rates or change of plan of assessment of beneficiary association presumed reasonable.

In the absence of averment or proof to the contrary, it will be presumed that an increase of rates or change of plan of assessments to increase revenues was reasonable as to the amount of the increase in the charges, when it appears that the amended regulation was duly enacted.

3. Insurance §719(3) — That increase of rates is prohibitive to older members does not itself make the rate unreasonable.

Though the increase of assessments, adopted by a fraternal association, should be so high as to make it unprofitable and prohibitive to older members, that fact, standing alone, would not make the rate unreasonable, if the assessment is no more than experience has shown is necessary to properly meet the cost of covering such individual with insurance at his attained age.

4. Insurance §719(3)—Division of members of fraternal benefit association into two classes held discriminatory.

Where such an association, by amendment of its by-laws, divides its members into two classes, placing all members belonging to the association prior to a certain date in one class, and all who have joined or should join after that date in another class, and provides that each class shall raise its own funds and pay its own losses, and that the former class is to continue without the aid of growth and the addition of young blood, and makes it necessary, where a member of the former class should desire to change and become a member of the latter class, that he surrender what rights he had in the funds of the former class and surrender that security furnished by the mutual promises of members of that class, *held*, that the classification is discriminatory and unreasonable as against the members of the former class, and will not be upheld.

5. Insurance §719(3)—Amendment changing benefit certificate held not a reduction in the amount of benefits thereunder.

Where a benefit certificate provided that, in case insured should reach 70 years of age and be disabled, he should receive disability

benefits, and his policy then be considered paid up, an amendment to the by-laws, made prior to insured's reaching 70 years of age and becoming disabled, which required payment of assessments during the period of such disability, after the age of 70, impairs no vested rights under the policy, and is not to be treated as a reduction in the amount of benefits provided by the policy.

6. Insurance §719(3) — Signed agreement to pay additional assessment during disability held not a waiver of objection to discriminatory classification.

Where the insured, on the representation to him by the agent of the association that his policy was paid up, and that he would not be required to make any further payments, signed a statement presented to him by the agent, which contained in it a printed clause, agreeing that insured would pay additional assessments during such period of disability, but where no consideration moved from the association to him for such agreement, and there were no elements of estoppel shown and none pleaded, *held*, insured had not waived his right to object to the discriminatory classification of members, and was not bound by such signed statement; it being further shown that the amount he had paid to the association in the past was sufficient to cover all payments due, or to become due, on his policy, in accordance with the association's rules as they existed prior to the establishment of rates upon the discriminatory basis complained of.

Appeal from District Court, Lancaster County; Morning, Judge.

Action by Minnie E. Case and another against the Supreme Tribe of Ben Hur. Judgment for plaintiffs on a directed verdict, and defendant appeals. Affirmed.

Garlow & Long, of Columbus, for appellant.
Burr & Brown, of Lincoln, for appellees.

FLANSBURG, J. This is an action on a benefit certificate issued by the Supreme Tribe of Ben Hur, a foreign fraternal beneficiary association. The defendant contends that the policy had become forfeited by default of payment of the assessments. These assessments were levied by virtue of amendments to the by-laws made after the certificate sued on was issued, and plaintiffs claim the amended by-laws were unreasonable, impairing vested rights under the benefit certificate, and were therefore not binding on insured. At the close of the testimony the court directed a verdict for the plaintiffs. Defendant appeals.

The certificate sued on contained the usual provision that the insured would be bound by all the laws, rules and regulations of the society thereafter enacted. It was in the amount of \$500, and was issued to John Case in 1901, when he was 54 years of age. Plaintiffs were named as beneficiaries.

At the time this certificate was issued the

by-laws of defendant association provided for the monthly payments of \$1 for insurance, the amount of the benefit being rated according to age, so that while members entering between the ages of 18 and 25 received benefit certificates in the amount of \$1,500 for a monthly payment of \$1, members entering at 50 years of age received certificates of \$500 only. All members were also required to pay a per capita tax of 75 cents semiannually, together with lodge dues, or what were called "court dues," levied by the subordinate court.

The benefit certificate in question provided, that, in the event of the insured becoming physically disabled from old age after reaching 70 years and making proof of such fact, he should receive one-tenth of the face of the policy that year and a like sum each year thereafter until the whole benefit was paid or until the member should die, and it also, however, further provided "that such member shall continue to pay his or her court dues and per capita tax" though the monthly payments for insurance were not required from that time forward.

In May, 1908, the by-laws of this defendant association were amended in the manner of which plaintiffs complain, whereby all holders of benefit certificates issued prior to July 1, 1908, were put in what is called class A, and all holders of certificates issued after that time were put in class B. The two classes were kept distinct. Each, it was provided, should raise its own funds and pay its own losses. In case the monthly payments of Class A members, as previously fixed, should be insufficient, additional payments would be required to be paid from time to time. The rates required to be paid by the class B members were determined by valuation upon the basis of tables of mortality, and the rate was to be fixed according to the age attained by the member at his entrance.

It was further provided that any class A member could, at any time up to July 1, 1910, by surrendering his certificate and paying the rates fixed by the age of such member at such time, according to the schedule of rates adopted for class B members, become a member of class B without being required to pass medical examination, such examination, however, to be required in case he desired a disability clause in his certificate such as appears in the certificate here involved, and, in that case, it was necessary before a transfer would be allowed that he be found to be in good health and not physically disabled at the time of the transfer. It was further provided by these amended rules that the disability benefit for members in either class A or class B would be allowed only upon the condition that, after such disabilities were proved and insured became entitled to the disability benefit, he would still continue, not only to pay the per capita tax and court dues

as theretofore provided, but would in addition continue to pay all monthly payments and assessments required. In order to change from class A to class B, in other words, it was necessary for the class A member to surrender his certificate and take a new one at a rate based upon his age at the time of the transfer, as if he were an entirely new applicant for insurance in the association, and, except in the instances as stated, he would not be required to pass a medical examination.

The insured, after these amendments were adopted, remained in class A and made all payments called for up to September 1, 1916. On July 12, 1916, he became 70 years of age, and on September 12, 1916, he applied for the old age disability benefit. His application was approved, and he was paid the first installment of \$50. In this application, signed by insured, which was on a printed form furnished by the company, there was a printed statement that insured agreed to continue to pay, in addition to the court dues and the per capita tax, the monthly insurance payments and assessments during the continuation of such policy and during the period when he was entitled to the disability benefits.

It is claimed by plaintiffs that insured did not know of this statement in the application. The officer of the defendant association, whose duty it was to help make out and receive such applications, testified, and her testimony stands on that issue, that she read the application to him and also that she told him it was her understanding that no further payments were required from him thereafter except the per capita tax and dues, and that his policy so far as insurance payments were concerned was fully paid up.

From the time that the association allowed insured the disability benefit in September, 1916, and paid him the \$50 installment, he made no further insurance payments, as provided by the amended by-laws, nor in accordance with the statement made in the application just above referred to. The per capita tax and court dues were tendered by insured, but the defendant refused to accept these and demanded the regular monthly payments and assessments as fixed at that time, and so the matter stood from September, 1916, until the insured died in February, 1917; the association claiming that the insured's policy had lapsed by reason of his failure to pay the regular monthly payments and assessments for insurance from and after the time of the granting of the disability benefits to him.

The questions presented are: (1) Whether the classification under the amended by-laws was unreasonable and discriminatory so as to make invalid the increased assessments levied upon the insured in this case; (2) whether the provision that insured should

continue to pay insurance rates, when, by the terms of his certificate, it was to be paid up in case of disability at 70, in effect reduced the benefits and thereby destroyed vested rights under the contract; and (3) whether insured had waived his rights to refuse to pay insurance rates after reaching 70 by signing the agreement to pay such additional assessments when he signed his application for the disability benefit.

[1] It is the rule in this state that, when an insured agrees to be bound by future changes of the by-laws, a fraternal association may make amendments increasing the rate and changing the plan of assessments for the general good of the order, so long as such changes do not work an injustice between the individual members, are not discriminatory, and are reasonable. Insured, in the case before us, remained in the class of old members who had entered the association prior to 1908. The exact amount of increase in assessments levied against him the record does not disclose. There is no averment nor proof that the assessments made were unreasonable in amount, nor greater than sufficient to the proper operation of this division of the association as a separate entity, raising its own funds and paying its own losses. On the other hand, it does not appear that the rates fixed for the members of the new class were more than were necessary to the operation of that class, nor larger than required to properly raise funds to prepare against and pay death claims as they should accrue. The rates in this class were based upon mortality tables and in accordance with the principle that each member should pay in proportion to the hazard of his own individual risk.

[2, 3] The next question is, therefore, whether the creation of the two divisions of members, each operating independently of the other, did in itself work an unjust discrimination as against the plaintiff. There is no vested right to a continuance of a plan of insurance which experience might demonstrate would result disastrously to the society or its members. *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; *Polk v. Mutual Reserve Fund Life Ass'n*, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222. It is also true that, in the absence of averment or proof to the contrary, it will be presumed that an increase of rates or change of plan of assessment to increase revenues was reasonable as to the amount of the increase in the charges, if the amended regulation was duly enacted by the association. *Supreme Council Catholic Knights of America v. Fenwick*, 169 Ky. 269, 183 S. W. 906; *Demings v. Supreme Lodge, Knights of Pythias*, 131 N. Y. 522, 30 N. E. 572; *Supreme Lodge, Knights of Honor, v. Bieler*, 58 Ind. App. 550, 105 N. E. 244. It is unnecessary, therefore, to discuss the amount of assessments in this case, since

there is no proof of the financial condition of the company and no evidence tending to show that the assessments were more than were reasonably necessary to carry out the objects of the order.

Considering the class B members as a separate division, the plan devised of requiring each member to pay a rate in conformity to the costs of insurance based on age is a reasonable regulation as among the members in that class. And it would further, as settled by the laws of this state, have been a reasonable regulation to have required all the members of this association at the time when the amended by-laws were enacted to have commenced anew and to have paid assessments based upon mortality tables, the amount of such rate to be determined by the age attained by the respective members at the date of such change in the rule of assessment. *Funk v. Stevens*, 102 Neb. 681, 169 N. W. 8, 11 A. L. R. 639; *Thomas v. Knights of Maccabees of the World*, 85 Wash. 665, 149 Pac. 7, L. R. A. 1918A, 750, Ann. Cas. 1917B, 804; *Hollingsworth v. Supreme Council of Royal Arcanum*, 175 N. C. 615, 96 S. E. 81, Ann. Cas. 1918E, 401; *Supreme Lodge, Knights of Pythias v. Mims*, 241 U. S. 574, 36 Sup. Ct. 702, 60 L. Ed. 1179, L. R. A. 1916F, 919; *Reynolds v. Supreme Council of Royal Arcanum*, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776. Though the increase of the assessment provided by a fraternal association should be so high as to make it unprofitable and prohibitive to older members, that fact, standing alone, would not make the rate unreasonable, if the assessment is no more than experience has shown is necessary properly to meet the cost of covering such individual with insurance at his attained age. It may be here, and in fact in most, if not all, such fraternal companies, insurance has been furnished in the past at rates far below cost. The member has lived and had the value of his assessments in the protection given him, and, when it is found that each must pay in exact accord with the risk the company has assumed in carrying him, he cannot complain. As Judge Holmes said in *Supreme Lodge, Knights of Pythias, v. Mims*, supra:

"It is proper to remember that for many years the plaintiff has been insured, and although by what he is not likely to regard as bad fortune his beneficiary has not profited by it, she would have if he had died. As he happily has lived, he has to bear the burdens incident to the nature of the enterprise into which he went open eyed."

But when such increase in assessments is made it must progress upon a uniform plan. It must be remembered that the promises of this association are the mutual promises of all the members in it, individually and collectively, to one another. Each member also has the right to see that all new members

shall equally assume such mutual obligations. The basis for rates must be just, and not discriminative. In this case all members of the order, prior to 1908, are severed from the association and become a distinct entity apart from it. It is manifest that to thus cut off the old members, undesirable risks, into a company by themselves and make them pay their own losses and raise their own funds without the aid of growth and the addition of young blood, since no new members can under the amended by-laws be placed in this division, would result in a separate division of membership; in fact, a distinct company in itself, which would have a constantly dwindling membership and a rapidly increasing assessment until the lone survivor would have to pay his own death claim. Such classification and division of members, destroying the mutuality of the promises of the members of the association as a whole and requiring older members to be thrown out upon their resources and alone compelled to proceed without the accession of new members, which destroyed the very working power of the plan under which they were operating, has been held an effectual repudiation of the contract obligation owing them by the society, and has quite universally been held an unreasonable and unjust regulation as to them, and therefore void. *Wilson v. Supreme Conclave, I. O. H.*, 174 N. C. 628, 94 S. E. 443; *Williams v. Supreme Conclave, I. O. H.*, 172 N. C. 787, 90 S. E. 888; *Strauss v. Mutual Reserve Fund Life Ass'n*, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 606, 83 Am. St. Rep. 699; *Tusant v. Grand Lodge, A. O. U. W.*, 183 Iowa, 489, 163 N. W. 690, L. R. A. 1918F, 452; *Parks v. Supreme Circle, Brotherhood of America*, 83 N. J. Eq. 131, 89 Atl. 1042; *Benjamin v. Mutual Reserve Fund Life Ass'n*, 146 Cal. 34, 79 Pac. 517; *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457.

In the cases just cited the facts as to classification and assessment were in all instances very similar, and in some identical, with the method followed in the case at bar. In the *Tusant Case*, *supra*, members joining before a certain date were put in class A, and those joining after, in class B, each operating separately as if a distinct association, raising its own funds and paying its own losses. Class A was assessed on the old plan, by increasing amount of assessment, and was allowed no new members, and class B was assessed upon an insurance risk basis as determined by the age of the member. The court in that case said:

"It is sufficient to say that it is of the very essence of mutual insurance and of the efficiency thereof that it shall grow, and that it shall continue to receive new and younger blood. * * * When these men joined the order, they joined themselves to a membership many of whom had already reached their expectancy.

These plaintiffs began at once to pay death losses on such. When they paid such losses they had nothing to expect in return from those whose membership had ceased by death. Their only way of compensation was from those who should come after. They relied and had a right to rely for the security of their insurance upon the new blood which was to come."

By this reasoning it is shown how the shutting off of new members into class A, operating under the old plan, in effect actually destroyed its working ability. Obviously, then, if this class were to be continued under the old plan, the shutting off of new members was in fact an actual destruction of their plan of operation. Defendant's answer to this is, however, that insured had the option of joining class B with the new members and taking insurance at his then attained age. But, in order to do that, it was necessary that he part from the class in which he then was and surrender up all rights that he had therein. He was entitled to share in the funds of this class, and was entitled to have that fund, as well as the mutual promises of all the other members of that class, as his security, and these we do not believe he could be required to release without his consent. These, by going into class B, he would be required to lose. In class B he would begin again upon his then attained age, losing the right to benefit or credit by reason of funds already accumulated in class A, and losing the added security that would be given him were he still allowed protection of such fund and mutual promises. In 1908, when the amendment divided the membership and allowed a transfer from class A to class B, no provision was made for any transfer of the funds. This, at that time, could only have been effected by a transfer of the entire class, and, of course, power of insured was limited to transferring his own membership only. In 1916, it is true, the by-laws were amended providing for the transfer of a pro rata portion of the funds of class A to the funds of class B, following the transfer of a member, but this amendment was enacted only a month before the insured reached the age of 70, and so short a time before his proof of disability that he, no doubt, could not have passed the necessary physical examination were he to keep alive the old age disability clause of his contract, and, furthermore, a transfer of the pro rata portion of the fund was not all that plaintiff was entitled to; he was entitled to have that fund in its entirety continue for his security. As we view it, he was entitled to belong to the association as he had joined it and what it had grown to be, protected by the mutual promises of all, and not required to release any part of the funds accumulated under the previous plan of assessment.

It is unnecessary to discuss at length the

cases above cited holding the classification discriminative. In all those cases the classification and method followed was the same as in the case at bar, with this exception, that in some of those cases no right of transfer was allowed by the older members to the new class, and in the others—the cases of Wilson, Williams, Tusant and Parks—such transfer was allowed; but in some of those cases at least the rule was stated that in the allowance of such transfer the old members were discriminated against, since they were required to re-rate on their then attained ages, and hence surrender rights that they had become entitled to by their long-time membership and contributions to the society. As an abstract principle of law, under our holding in Funk v. Stevens, supra, and other cases cited, this last statement of principle is incorrect. But the distinction must be borne in mind that, when all members of the association are required to re-rate, instead of causing a division of membership into classes, the beneficial interest of each individual member in the funds and assets of the society remains unaffected. The accumulated funds still remain as his security, and the mutual promises of all its members still afford him protection; while in the transfer of an old member from class A to class B he surrenders all interest and rights to security in the funds and promises of all class A members, and in fact joins a new company as a new member.

It seems to us that in the latter case cited it was those rights, required to be surrendered up, which the courts had principally in mind when they said that to require the old members to enter the class of new members destroyed what rights those members had theretofore attained. This must have been so in the North Carolina cases. In that jurisdiction it has been held in Hollingsworth v. Supreme Council of Royal Arcanum, 175 N. C. 615, 96 S. E. 81, Ann. Cas. 1918E, 401, following the same principle as enunciated in the holding of our court in Funk v. Stevens, 102 Neb. 681, 169 N. W. 6, 11 A. L. R. 639, that an amendment of the by-laws requiring all members to re-rate according to their attained age on the basis of risk as based on mortality tables was a reasonable and valid regulation, and the court in that case, referring to the North Carolina cases, above cited, which hold the classification in question discriminatory, said:

"There is another ground of distinction between the Strauss, Williams, and Wilson Cases, and the other cases cited in them, on the one hand, and our case on the other. In the former, there was not only a raising to a higher figure of the rates, but there also was classification and discrimination. That is, the old members were put in one class and the new members in another, and the losses (death benefits) in the old class were paid from the funds collected from that class, while the losses in the new class were paid from the funds collect-

ed from that class; but in this case it appears that all moneys collected from assessments are mingled or blended in one fund, and losses paid solely out of it. It is, therefore, a single or common fund for the payment of death benefits. In the one case there is classification and discrimination, while in the other, there is neither."

[4] It therefore appears to us that the increased and added assessments upon the certificate of insured in this case, being based upon an unjust discrimination, were illegal and unenforceable. Insured, however, paid the increased assessments until in September, 1916, when, being 70 years of age and disabled on that account, he received his first installment of disability benefit, and he refused from that time on up to the time of his death a few months later to pay the insurance assessments, contending that his policy was fully paid up, and, according to its terms and the rate of assessment fixed prior to the amendment complained of, such was the fact.

[5] Plaintiffs contend further that, since the benefit certificate itself did not provide for payment of insurance assessments after disability was proved, an amendment of the by-laws requiring payment of the assessments during such period was in effect a reduction of the benefits and impaired vested rights of insured under the policy. We think this position is untenable. The argument put forth by plaintiff that an increase of rates reduces benefits has been adopted in some states, but not in ours. It is true that an increase in rates diminishes the marginal return on the policy in the instances here presented, and in fact in every insurance contract. Our court, however, in accord with the generally accepted rule upon that subject, holds that reasonable increases in assessments do not impair vested rights in the nature of a direct reduction of the benefit to be derived from the policy. Had the insured reached the age of 70 and his policy been matured so that his rights thereunder had become vested before the by-laws were amended, a different question would have been presented; but here, in advance of any rights becoming vested, it was determined for what period of time assessments should be made. This alone we do not believe would invalidate the assessments, which, it was provided, should become due after the disability rights under the contract accrued.

[6] We come, then, to the question of whether the insured had waived his rights to attack the unwarranted increase in the amount of assessments, or the levy of the additional illegal assessments, here complained of. The payment of the increased assessments up to the time of his applying for disability benefit in September, 1916, would not prevent him from claiming subsequent assessments unlawful; there being no element of estoppel shown and none pleaded

nor urged in this action upon that ground. The record is silent upon facts pertaining to that question. It is true the printed application which was signed by insured recited an agreement to pay these illegal assessments from that time forward, but the officer of the company whose duty it was to collect assessments explained to him when he signed the application that the policy was then paid up and no further assessments could be required of him. When the next following insurance payment became due, insured refused to pay it. He did not become in default as to payment of the per capita tax and court dues called for in his certificate.

His action in signing the statement in the face of the explanation of the company's agent and his attitude from that time on could not be construed as a waiver of his right to object to these assessments, since it was apparent to all parties that no waiver was intended. No estoppel could be based upon this statement signed by him; the company did not change its position toward him; he had made every payment called for or due at the time this first installment was delivered to him; neither party disputed his right to collect this \$50 payment; such payment could not be made to depend upon a promise by him that he would meet future insurance assessments as they became due; the association, in other words, paid him only what the policy in terms and what the law then bound it to do. The statement could not be considered a contract or agreement to pay a further assessment, since there was no consideration moving to insured from the company to support it. Though it be a fact that insured signed this statement that he would pay a future unenforceable assessment, that certainly would not bind him, unless the company had been misled or changed its position in some way, or unless the insured received some consideration for the promise. Neither of such facts appears in this case.

We therefore are of opinion that plaintiffs in this case are entitled to recover upon the policy, and that the judgment of the lower court should be

Affirmed.

ZEDIKER v. STATE. (No. 21868.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Larceny $\Leftrightarrow$ 77(1) — Instruction on defendant's possession of goods should have been qualified by stating that whether inference of his theft should be drawn therefrom was a fact for the jury.

In the trial of a defendant upon a charge of larceny, it is reversible error for the court

to instruct the jury that, if they were "satisfied from the evidence beyond a reasonable doubt that, shortly after the theft of the property described in the information, some part thereof was found in the possession of the defendant, and if his possession of the same has not been explained to your satisfaction, then you would be justified in inferring from said facts that the defendant stole the said property," unless the instruction is qualified to the effect that it is for the jury alone to say, in the light of all the facts and circumstances shown in the evidence, whether any such inference shall be drawn.

2. Criminal law $\Leftrightarrow$ 823(2) — Court in instruction may not assume as established the corpus delicti which is in dispute.

Upon a larceny charge, where the corpus delicti is in dispute, or is not admitted by the defendant, it is error for the court in one of the instructions to assume that it is established, or to refer to it as an established fact, even though it is submitted to them for their determination by another instruction.

Error to District Court, Box Butte County; Westover, Judge.

Urban R. Zediker was convicted of larceny, and he brings error. Reversed and remanded.

Eugene Burton and Robt. O. Reddish, both of Alliance, for plaintiff in error.

Clarence A. Davis, Atty. Gen., and Jackson B. Chase, Asst. Atty. Gen., for the State.

Heard before LETTON, DAY, and DEAN, JJ., and CLEMENTS and MORNING, District Judges.

MORNING, District Judge. The defendant was convicted of larceny in the district court for Box Butte county and prosecutes error.

[1] The only assignment of error necessary for us to consider is that relating to instruction No. 4, given by the court to the jury. Said instruction reads:

"In this case you are instructed that there is evidence tending to show that the property described in the information, or a part thereof, was found shortly after it was stolen, in the possession of the defendant, and on this proposition you are instructed 'that the unexplained possession of stolen property shortly after the theft of it, is a fact which may justify the jury in inferring that the person so in possession is the thief.' And in this case, if you are satisfied from the evidence beyond a reasonable doubt that, shortly after the theft of the property described in the information, some part thereof was found in the possession of the defendant, and if his possession of the same has not been explained to your satisfaction, then you would be justified in inferring from said facts that the defendant stole the said property."

The quotation set out in said instruction was taken from the syllabus of *Palmer v. State*, 70 Neb. 136, 97 N. W. 235, and states a correct rule of law, but it should have contained the qualification, or one in substance like it, which was embodied in the instruction dealt with in the above-cited case, viz. "whether such inference should be drawn is a fact exclusively for the jury." *Pospisil v. State*, 106 Neb. —, 182 N. W. 506. And we think also that the court should have instructed the jury, in that connection, that, if they believed the explanation of the defendant as to how he came into possession of the property, or if it created in their minds a reasonable doubt as to his guilt, they should acquit the defendant.

[2] This instruction also assumed that the corpus delicti was an established fact—that is, it assumed that the property found in the possession of defendant had been stolen—whereas this was a fact which the jury must find from the evidence, beyond a reasonable doubt, before there could be any inference drawn from, or any legal significance attached to, the fact that the property was found in the possession of the defendant.

"Unless the jury are satisfied beyond a reasonable doubt that the offense has been committed, the unexplained recent possession of goods will not justify the conclusion that the person in whose possession they are found is the thief." 17 R. O. L. 72, § 76.

In criminal cases, the court may, in the instructions to the jury, assume the existence of collateral facts established by uncontroverted evidence which tend to prove one of the constituent elements of the crime. *Welsh v. State*, 60 Neb. 101, 82 N. W. 368. They may also assume the existence of any fact forming a material element of the crime, where such fact is admitted by the accused, or where his defense is of such a nature that it is by him treated as established. *Hill v. State*, 42 Neb. 503, 60 N. W. 916; *Morgan v. State*, 51 Neb. 672, 71 N. W. 788; *Pisar v. State*, 56 Neb. 455, 76 N. W. 869. But it is reversible error for the court to assume in the instructions that the corpus delicti, or any fact necessary to establish the guilt of the accused, has been proved, and so relieve the jury from its consideration, unless the same is expressly or tacitly admitted by defendant. The presiding judge is without lawful authority to determine the issue, or any of the facts involved therein. That is the function of the jury, regardless of the state of the evidence. They are the sole judges of

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the credibility of the witnesses and of the weight to be given to the evidence, and the court cannot assume that they are convinced of any constituent element of guilt because they ought to be. They may entirely discredit any witness, though uncontradicted, or refuse to believe all the evidence tending to establish guilt even though it is unopposed and free from conflict. *Heldt v. State*, 20 Neb. 492, 30 N. W. 626, 57 Am. Rep. 835; *Metz v. State*, 46 Neb. 547, 65 N. W. 190; *Goldsberry v. State*, 66 Neb. 312, 92 N. W. 906. And if the court in one instruction assumes the existence of a material fact, which should have been submitted to the jury, the error is not cured by the submission of it in another instruction. This was expressly held by this court in *Metz v. State*, supra, where we were called upon to consider an instruction given by the trial court in the following language:

"If you believe from the evidence, beyond a reasonable doubt, that soon after the burglary of the storehouse or warehouse of the said Jasper N. Binford and the larceny of the corn therefrom, portion of the said corn so stolen was in the exclusive possession of the defendant George Metz, you are instructed that this circumstance, if so proved, is presumptive, but not conclusive, evidence of the defendant's guilt, and you should consider this circumstance, if so proven, to your satisfaction, along with the other evidence in the case in arriving at your verdict, giving it such weight and effect as you think it entitled to, and giving the defendant the benefit of any reasonable doubt of guilt."

Chief Justice Norval, in discussing that instruction, on page 554 of 46 Neb., on page 192 of 65 N.W. of the opinion, said:

"The foregoing was erroneous for more than one reason. By it the court assumed that a burglary and larceny had been committed. The accused, during the entire trial, strenuously insisted that such were not the facts, and it was prejudicial error for the court to assume as established the corpus delicti. True, the question was submitted to the jury for their determination by another instruction, but that did not cure the error indicated in the instruction quoted, since the jury would be left in doubt as to which instruction should guide them in their deliberations."

For the reasons indicated in the foregoing discussion, we hold that the fourth instruction given by the court below was prejudicially erroneous, and that the judgment of conviction should be reversed and the cause remanded for further proceedings.

Reversed and remanded.

ALSTON v. ALSTON et al. (No. 21654.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser **§3(2)**—Contracts construed as executory contracts of sale and not leases.

Contracts upon which this action is predicated held to be executory contracts for the sale of real estate, and not leases.

2. Homestead **§21**—Where purchaser occupies land under executory sale contract partly performed, his wife may become vested with homestead interest therein.

Where the purchaser of real estate under an executory contract of sale partially performed occupies such real estate with his wife and family as his home, his wife may become vested with a homestead interest in the same.

(Additional Syllabus by Editorial Staff.)

3. Homestead **§117**—Assignment by husband without wife's consent held void.

Where a wife rightfully claimed a homestead interest in premises her husband had contracted to purchase, it follows that an assignment thereof by her husband to others without her knowledge and consent was void and of no effect.

4. Equity **§66**—Plaintiff seeking to recover homestead rights must do equity.

A wife seeking to recover homestead rights in property her husband had purchased as against his assignees under an assignment without her knowledge and consent, in seeking equity must do equity by making equitable reimbursements to the assignees.

Appeal from District Court, Douglas County; Sears, Judge.

Suit by Annie Alston against Philip Alston and others. Decree for plaintiff, and defendants appeal. Modified and affirmed.

E. R. Leigh, of So. Omaha, for appellants. Wm. M. Burton and Benj. S. Baker, both of Omaha, for appellee.

Heard before LYTTON, DAY and DEAN, JJ., and SHEPHERD and STEWART, District Judges.

SHEPHERD, District Judge. The plaintiff sued the defendants in equity to cancel an assignment of contracts relating to real estate in South Omaha, said contracts having been made by the Midway Investment Company to Philip Alston, and said assignment being by him alone to the defendants Lustgarten and Cohn. The plaintiff, who is the wife of Philip Alston, contends that said contracts conveyed to him an interest which could be made the subject of homestead, and that she lived on the property with her husband and children and made it her homestead, and that the assignment by her hus-

band without her signature or consent was of no force and effect.

Defendants assert that neither the plaintiff nor her husband acquired any right under said contracts to which a claim of homestead could attach; that said contracts were nothing more than contracts of letting for rent, and that, construed most favorably for the Alstons, they gave only an option to purchase, which was never exercised; and that, in the second place, neither of the Alstons ever made, or claimed to make, the property their homestead. They say that defendant Philip Alston received a valuable consideration for his assignment to Lustgarten and Cohn and that since said assignment said Lustgarten and Cohn have paid a total of \$140 on the said contracts, and have been, by their tenants, in continuous possession of the property. And they further say that when the assignment was made plaintiff and her husband were not occupying the premises, but had abandoned the same as their home. The court found for the plaintiff, canceled the assignment, and decreed ouster of the defendants.

[1] Examination of the record discloses that the contract (there were two contracts identical as to wording, one for one lot and one for another) is very much like those commonly used in welling out additions upon monthly payments. Though the language of the instrument is "has agreed to let" and "has agreed to take," and though the monthly payments are described as "rent," the full amount promised to be paid is the full sale price of the lot. The following excerpt gives some aid to understanding it:

"All rent paid hereunder for the use of said property, together with interest at the rate of six per centum per annum, shall be deducted from the agreed purchase price, but should the said Phil Alston fail to make the payment of rents as agreed (time being the essence of this agreement) he shall forfeit his right to purchase said property, together with all payments as rent hereunder, which amounts shall be understood to be fully earned, and said tenant may be at once dispossessed and shall quit and surrender the premises in as good state and condition as they were at the commencement of the term reasonable use and wear thereof and damages by the elements excepted."

Philip Alston had made some payments upon the contract. It is in evidence that he had applied to the company for a computation of the balance to be paid to secure a deed. Mr. Merrow, the president of the company, testified that he stated that the company would not be inclined to deed to the assignees without assignment from the plaintiff as well as from her husband, thereby indicating to some degree that the company construed the contract as conveying a right to which the wife's claim of homestead might attach. However, he elsewhere states that

the company desired to avoid entanglements and to be on the safe side.

In the case of Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683, this court said:

"In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law."

The court continues:

"The instrument in suit has some direct earmarks of a lease. It contains some terms and expressions which would, taken literally, stamp it as a lease; but when its substance is examined critically, the apparent character of the instrument is destroyed. The arrangement of the consideration in reference to the payment by installments being \$60 for each of the four years succeeding the time of the execution of the contract, and \$660 at the expiration of the fifth year, the \$60 payments being each the one year's interest at 10 per cent. per annum of the \$600, which it seems more than probable was a principal sum of the consideration for the contract between the parties, furnishes a strong indication of a sale. There is a further strong indication of a sale in the feature of the agreement in relation to a conveyance of the property to the contractee by the contractor on full payment of all sums stated in the contract, as evidenced by the notes. All things considered, we are forced to conclude that the instrument declared upon in the petition was an executory contract for the sale of land."

It seems plain in this case that the instruments in question were, according to the intention of the parties and within the rules of law, instruments of like character. And we so hold, approving the decision of the trial court in that regard.

[2] It remains to consider if the plaintiff ever made the premises her homestead, and whether she continued to claim the same as such at the time of the assignment. It is clear from the record that she lived there with her husband and children for a considerable time after the purchase of the place under these contracts. Then she made a hurried departure to Texas to visit her sick sister there, taking the children with her. Her

husband followed later, as he puts it, to get the children. There was evidently some trouble between the husband and wife. While in Texas the matter of staying there on a farm was considered, but the plaintiff decided against this and returned to Omaha, finding the furniture removed from the house and the defendants in possession, and later learning of the assignment by her husband to Ben Lustgarten and Louis Cohn. She says that immediately upon her return she went to the premises intending to continue her occupation of the same.

The plaintiff's story is corroborated by a number of witnesses and by some documentary evidence. It is strongly denied by Philip Alston, by his sisters, and some other witnesses, and in a measure by some circumstances. But there is not enough evidence on the part of the defendants to justify us in reversing the finding in this particular of the experienced judge who saw the witnesses and heard their testimony as it came from their lips. The finding of the trial court was that the plaintiff had a homestead in the premises. From a careful examination of the record it does not appear that he erred in his conclusion.

[3] The contracts in question being executory contracts of sale partially performed, and the plaintiff rightfully claiming a homestead in the premises involved, it follows that the assignment to the defendants, without her knowledge and consent, was void and of no effect.

[4] The defendants ask that they be reimbursed, in any event and as a matter of equity, for the \$140 in payments made by them upon the contracts, saying that plaintiff must have made them if defendants had not. Under the circumstances, the court is of opinion that the plaintiff should bear this burden. Asking equity, she should be willing to do equity. Within 60 days of the final determination of the case upon mandate in the district court, she is required to pay defendants said sum of \$140 with interest at 7 per cent. per annum from the date of her original decree, and the same is hereby made a lien upon her interest in the property in defendants' favor. As so modified, the judgment and decree of the district court is affirmed.

Affirmed, as modified.

HORNBY v. STATE LIFE INS. CO.
(No. 21512)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Insurance ⇨646(6)—Presumption that injury resulting in death was not voluntarily self-inflicted.

In a suit on an insurance policy, covering death caused by violent, external and accidental means, where the proof reasonably shows that an injury was produced by violent and external means, and where there is no ground for suspicion that the wound was intentionally inflicted, there is a presumption that the insured did not voluntarily inflict the injury upon himself, and it is presumed that the injury was the result of accident.

2. Insurance ⇨455—Time of infection immaterial where death was produced by blood poisoning from accident.

Where the insured sustains an injury through violent, external and accidental means, and blood poisoning sets in, finally resulting in death, it is immaterial whether the infection was introduced at the time of the accident and through the instrument operating to cause the injury, if the infection enters before the wound has become so cured as to prevent exposure to infection, and if the infection comes about naturally, without any apparent human act to produce it.

3. Insurance ⇨466—Blood poisoning held result of accident, independent of other causes.

The blood poisoning resulting in such a wound will be considered as the effect of the injury, and not as an additional or other cause aside from the accident, and the consequent death is held to be the result of the accident exclusively and independently of other causes.

4. Trial ⇨235(2)—Instruction as to determination of cause of action held not misleading.

An instruction that the jury, in determining the cause of the injury, might consider all the facts and circumstances in evidence, and were entitled to draw reasonable inferences and conclusions from such facts and circumstances, held not erroneous and not misleading so as to authorize the jury to draw illogical inferences.

5. Evidence ⇨555—Opinion of expert must be based on facts.

An opinion of an expert must be based upon facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support that conclusion.

Letton, J., dissenting.

Appeal from District Court, Douglas County; Estelle, Judge.

Action by Thomas C. Hornby, administrator of the estate of George H. Hornby,

deceased, against the State Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

T. W. Blackburn, of Omaha, for appellant.
E. F. Dougherty and M. L. Corey, both of Omaha, for appellee.

Heard before LETTON, DAY, DEAN, FLANSBURG, and ROSE, JJ.

FLANSBURG, J. This is an action to recover on an insurance policy under a provision allowing double indemnity in case of the death of the insured, resulting from bodily injury, sustained and effected directly through external, violent and accidental means, exclusively and independently of all other causes. The company had paid the face of the policy, but denied liability for double indemnity, under the provision mentioned. Trial was had to a jury and judgment resulted in favor of the plaintiff. The defendant insurance company appeals.

The testimony upon which plaintiff's case is based stands practically without contradiction, and the defendant contends, under the facts so shown, that the plaintiff is not entitled to recover, and argues that there is no evidence that the insured sustained a bodily injury through external, violent and accidental means, and that there is no evidence sufficient to show that death was the result of the accidental injury alleged, since death is shown to have been caused by blood poisoning, and since it does not appear that the poisonous infection was introduced into the wound at the time of the initial injury.

The testimony in behalf of the plaintiff shows that insured and his son, in the latter part of October, 1918, were engaged on the farm of the insured near Valentine, Neb., in harvesting a crop of beans, and that the field was badly infested with sand burs. While the harvesting was going on, as insured's wife says, or shortly after it concluded, as insured's son puts it, the insured was noticed by them to be pressing and picking at his thumb. The son testifies that he looked at insured's thumb and there appeared to be a small hole, a place like a thorn leaves after it has gone in, and that just about the little red spot in the center the skin had turned red and that a sort of callous had formed about the place. The widow's testimony was that she noticed the insured pressing his thumb and picking at it, as if to remove a sliver.

Insured was engaged in the undertaking business, to which he devoted part of his time each week. Shortly after the time the above observations were made, the insured left for Valentine, and was gone a week, engaged in his undertaking business. The testimony shows that he did not directly handle bodies, as he had a helper to do that,

but that he did do embalming and inject embalming fluids. When he returned to the farm he was still pressing and working with his thumb. At that time it had become slightly swollen, and from then on the testimony fully shows the progress of an infection, resulting in the swelling of his entire arm, and finally in his death, which occurred on November 17 following. The testimony of physicians in behalf of the plaintiff was to the effect that any such infection, originating underneath the skin, is always due to entrance of germs by means of some injury which has resulted in an opening of the skin, although the opening may be ever so slight, and that in this particular instance the infection must have entered through the opening in the skin of insured's thumb. That death resulted from blood poisoning, so introduced into the physical system of the insured, would seem to be beyond reasonable question.

The testimony, however, in behalf of the defendant, which stands undisputed, is that whenever an infection enters a wound it will manifest itself in a few hours, almost always within 24 to 36 hours, and never more than 3 days afterwards. It would seem, then, from the testimony as it stands, that the infection of which the insured died, though perhaps not received at the time of the original injury to his thumb, was at least received later through that injury and before it had become entirely cured.

It is one of defendant's contentions that the evidence is insufficient to show that the insured met with any injury through external, violent and accidental means, and that, though there is evidence to show that there was a small abrasion or slight hole in the insured's thumb, there is nothing to show how it was produced, and that its cause must rest entirely in conjecture; and in argument defendant suggests that the insured may have had a pimple or a growth in his thumb resulting from some internal cause, and may have picked at it so as to, himself, have opened the skin and caused a wound through which the poisonous infection entered, and that, since one inference is as likely to be drawn as the other, the plaintiff has not carried the burden of proof, and that the plaintiff's action should, therefore, be dismissed.

The testimony of plaintiff's physicians shows that insured's thumb had been examined, in an endeavor to find some foreign substance that had pierced the skin, but that no thorn, or other foreign substance, was discovered, and that the place where any such foreign matter might have lodged was cut away. One of these physicians testifies that when the skin is pierced by a thorn, or other foreign substance, and the foreign matter, or a part thereof, is left in the skin, a callous will form immediately about it, thus walling off the foreign substance from the

physical system; that nature thus provides a protective remedy.

The testimony of insured's son, describing the wound as a place like a thorn leaves after it has gone in, with a little red opening where the skin had been pierced, and with a callous about it, in connection with the circumstance of the insured's being employed at that time, or immediately before, in a field infested with sand burs, and in the light of the actions of the insured in pressing his thumb and picking at it, as if to remove a splinter, would, to the ordinary mind, it seems to us, reasonably result in the conviction that a thorn, or some such foreign matter had pierced insured's thumb.

[1, 2] This evidence, furthermore, is aided by the presumption that insured did not voluntarily inflict an injury upon himself. It is plain that the insured's thumb was pierced by some foreign substance. The wound and the nature of the wound are proved. Such an injury could only be the result of violent and external means, and, when the proof goes so far, the presumption is in favor of an accident. Under this condition of the evidence, aided by such presumption, we are unable to agree with the defendant's argument that the cause of the injury must be left entirely to conjecture, or that the jury was called upon to guess, without evidence or reasonable inference to guide it, between the theory that the wound was caused through accidental means and the theory that the insured had, himself, with some instrument, voluntarily produced it. *Caldwell v. Iowa State Travelling Men's Ass'n*, 156 Iowa, 327, 136 N. W. 678; *Omberg v. United States Mutual Accident Ass'n*, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; *Peck v. Equitable Accident Ass'n*, 52 Hun, 255, 5 N. Y. Supp. 215; 1 C. J. 495, § 278.

Though we do not deem it necessary to go into that question, some of the decisions are to the effect that even where the insured, through a voluntary act, pricks at a pimple and opens the skin, and in doing so unknowingly uses an instrument carrying infection, the resulting blood poisoning will be held to be the result of accident, rather than due to the voluntary act of the insured. *Max v. Travelers' Ins. Co.* (C. C.) 130 Fed. 985; *Lewis v. Ocean Accident & Guarantee Corp.*, 224 N. Y. 18, 120 N. E. 56, 7 A. L. R. 1129; *Interstate Business Men's Accident Ass'n v. Lewis*, 257 Fed. 241, 168 C. C. A. 325. And see *National Surety Co. v. Love*, 102 Neb. 633, 168 N. W. 597.

Defendant makes the contention, since it is incumbent on the plaintiff to prove that death resulted from an accident exclusively and independently of all other causes than the accident, that, before he can recover in this case, he must show that the poisonous infection was received as a part of the accident and at the time of the original injury.

It is argued that when there is an accidental injury, resulting in an abrasion of the skin, but no infectious matter is injected into the wound through the instrument operating to cause the injury, the injury resulting from the accident becomes complete, and, when an infection enters later through the wound produced, it becomes a new and intervening cause and one other than from the accident itself, and that, when death results in such case from blood poisoning, though, under the general rules of law on proximate cause, the death may be considered to have been caused by the accident, yet, under the specific provisions of the policy, before there can be a liability, the death must result from the accident exclusively and independently of all other causes, and it is argued that the accident is not the sole cause independent of all others, where blood poisoning later sets in and acts as a contributing cause, and that the company is not liable for the results of such several causes taken together.

The question then, as it now occurs, is whether the infection shown in this case, entering a wound which had been previously produced by accidental means, was an additional, contributing or other cause than the injury produced by the accident itself, or whether it was merely incidental to the wound and a natural consequence therefrom.

The abrasion of the skin caused a necessary exposure to such an infection. It was an exposure that could not be entirely guarded against until the foreign substance was removed, or the wound cured. It was a natural consequence that such an infection might set in, and that the wound, of slight and trivial nature in its beginning, should through natural processes develop dire results. The infection was not of some specific disease to which there had been a careless or conscious exposure (see *Maryland Casualty Co. v. Spitz*, 248 Fed. 817, 159 C. C. A. 119, L. R. A. 1918C, 1191), but of a kind that naturally develops from the wound itself, without any apparent human act to aid it. When the infection enters through the wound, produced by the original accidental injury, naturally and before the wound has become so cured as to prevent exposure to infection, it seems to us immaterial when the infection enters. *Rich v. Hartford Accident & Indemnity Co.*, 208 Ill. App. 506; *Delaney v. Modern Accident Club*, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603; *Bell v. State Life Ins. Co.*, 24 Ga. App. 497, 101 S. E. 541. When it appears that the original injury continues to develop in character and grow worse, it is impossible to determine just when an infection has entered it. In the eyes of the ordinary individual it is the original injury, through the process of development, which produces the final result, and the provision of the policy must be in-

terpreted in that light. *Lewis v. Ocean Accident & Guarantee Corp.*, supra; *Delaney v. Modern Accident Club*, supra. There is no specific expression in the policy, as is found in some policies covering death by accident, that, whenever an accidental injury through the complication of infection shall produce death, there shall be no liability on the part of the company, unless the infection is shown to have been introduced at the time of the accident and by the instrument operating to cause the injury, and where the contract does not so provide we can see no reason for making such an exception.

It is true, as defendant argues, that when insured's son first examined the wound he said that, though there was a small hole, it appeared to have healed over. Just what he meant is somewhat indefinite, but that testimony does not show that the wound had been cured, or that the danger of infection from the original injury had passed. The insured, it was shown, continued to work at his thumb, in an apparent endeavor to remove some object from the wound. It seems quite apparent that the injury had not been cured, but continued from the beginning to be a source of irritation, though it may be true that the surface of the skin over it may have appeared to heal.

[3] We believe that the blood poisoning shown in this case was a natural incident of the wound, and should be considered as an effect of the original injury, rather than as an independent or additional cause. *Ward v. Aetna Life Ins. Co.*, 82 Neb. 499, 118 N. W. 70; *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845; *Caldwell v. Iowa State Traveling Men's Ass'n*, supra; 1 C. J. 430, § 76.

[4] Error is predicated upon the giving of an instruction telling the jury that—

"In determining the question as to whether or not the death of said George H. Hornby would have resulted from external, violent, and accidental means exclusively and independently of all other causes, you are entitled to consider all the facts and circumstances which have been introduced in evidence before you, and you are entitled to draw reasonable inferences and conclusions from such facts and circumstances."

The case of *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629, 168 N. W. 596, is relied upon. That was an action upon an insurance policy covering death by accidental means. Insured died from drinking carbolic acid. The lower court directed a verdict for the plaintiff, relying upon the presumption that death was by accidental means. This court, however, said, in reversing the case, that, since it appeared that insured drank carbolic acid, it was presumed that he did so voluntarily, and that the evidence of suicidal intent so introduced into the case destroyed

the force of the presumption of death by accidental means, and held that it was incumbent upon the plaintiff to show that the death was accidental "by evidence of the actual facts or a situation from which accident is the reasonable inference." In other words, the record must present to the jury such a state of facts that reasonable inferences, showing accident, can be drawn therefrom, and the case cannot be left to the jury for a guess or conjecture in arriving at a conclusion.

In a similar case, *Rawitzer v. Mutual Benefit Health & Accident Ass'n*, 101 Neb. 219, 162 N. W. 637, where death was also the result of carbolic acid poisoning, the court held that the surrounding circumstances were shown to be such as to allow of reasonable inferences as to the cause of death, and that the case was one which should have been submitted to the jury.

As before pointed out, we are of opinion that the condition of the evidence in this case presents a situation where a natural and reasonable inference could be drawn that the injury was accidental, and the matter of passing upon those inferences was for the jury. Since there was sufficient to take the case to the jury, we believe there was no error in the instruction given. *North Chicago Street R. Co. v. Rodert*, 203 Ill. 413, 67 N. E. 812; *Vandalia Coal Co. v. Moore* (Ind. App.) 121 N. E. 685; *Wilcox v. Southern Railway*, 91 S. C. 71, 74 S. E. 122; *Central of Georgia R. Co. v. Ellison*, 199 Ala. 571, 75 South. 159; 38 Cyc. 1673.

[5] It is argued that there is prejudicial error in the admission of testimony. Dr. Jonas, who examined the insured after the poisoning had progressed up the arm, was allowed to testify in behalf of the plaintiff that the poisoning was from external means. We see nothing improper in the admission of that testimony, since the doctor testified that poisoning of that kind in that locality always came from without through an opening in

the skin. On cross-examination he was asked, if septicemia had been in the body prior to the injury, whether or not it might not extend to the surface and manifest itself there, to which the doctor answered that he had only one opinion about this case—that the poisoning came from without, from "an accident." No motion was made to strike out this answer, but it is now contended that the doctor was thus allowed to express his opinion that the injury was the result of accidental means, and therefore that the testimony was improperly received. Such an opinion as to a conclusion of fact could, of course, not be received as evidence. *Dreher v. Order of United Commercial Travelers of America* (Wis.) 180 N. W. 815. We take it that the doctor meant "injury" instead of "accident," and was not attempting to give evidence as to how the injury had been caused, and we cannot see that the answer would mislead the jury.

The further objection is made that the petition did not state a cause of action, since the name of the beneficiary under the policy was not disclosed. The action was brought by the administrator, and upon a policy, the provisions of which were fully known to the defendant. The trial court allowed an amendment of the pleadings during the trial, and the name of the beneficiary was inserted. We do not see that the defendant could have been taken by surprise by this amendment, or prejudiced in any way.

The case is therefore
Affirmed.

LETTON, J. (dissenting). It seems to me the majority opinion rests upon an inference based upon an inference. First, the inference that a sand bur, or other substance, penetrated the thumb. Second, the inference that a malignant germ entered the body through a perforation of the skin thus created. In my opinion the evidence does not justify the recovery.

BROWN v. FIREMEN'S INS. CO. OF NEWARK, N. J. (No. 21534.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Insurance $\S$ 558(1)—Requirement in fire policy that insured furnish written proof waived by conduct causing insured to believe that settlement would be made without proof.

A provision in a fire insurance policy whereby the insured is required, in the event of loss, to furnish written proof thereof, signed and sworn to by him, within 60 days after the fire, is for the insurance company's benefit, and is waived by it by a course of conduct on its part, during such period of time, which reasonably induces the insured to believe that settlement will be made without such proof, if the insured, acting on such belief, fails to comply with said provision.

2. Insurance $\S$ 558(6)—Intimation of settlement held waiver of provision requiring sworn proof of loss.

Under the facts stated in the opinion, held, that the provision of the policy requiring the insured to furnish written proof of loss, signed and sworn to by him, within 60 days after the fire, was waived.

3. Appeal and error $\S$ 1071(6)—Denial of request for separate findings of fact and conclusions of law not prejudicial, where a single question of fact was involved.

Where a cause was tried to the court without a jury, and there was but a single question of fact, the determination of which was decisive of the case, the trial court did not commit prejudicial error in denying the defendant's request for separate findings of fact and conclusions of law.

Appeal from District Court, Antelope County; Allen, Judge.

Action by Le Roy Brown against the Firemen's Insurance Company of Newark, N. J. Judgment for plaintiff, and defendant appeals. Affirmed.

Montgomery, Hall & Young, of Omaha, and Williams & Kryger, of Neligh, for appellant. Jackson & Rice, of Neligh, for appellee.

Heard before LETTON, DAY, and DEAN, JJ., and CLEMENTS and MORNING, District Judges.

MORNING, District Judge. Action by Le Roy Brown, in the district court for Antelope county, against the Firemen's Insurance Company of Newark, New Jersey, to recover on a fire insurance policy issued to the plaintiff by said defendant on an automobile, which was destroyed by fire during the life of said policy. By stipulation of the parties the cause was tried to the court without a

jury. There was a judgment for plaintiff, and defendant appealed.

While plaintiff was driving the insured car on a country road, near Deloit, at about 9 or 10 o'clock at night, it was stalled in the mud and broke down. Plaintiff endeavored to get some one to pull his car out, but failed. He then procured a car from a garage at Deloit and started home, but found the car he had borrowed did not work well, and he returned it and got another car. While he was making this exchange, some one came along and told him of the fire. It was then about midnight. Owing to the nature of the defense presented, the circumstances of the fire are not disclosed by the record and are not material to a consideration of the case.

The policy of insurance sued upon provided:

"In the event of loss or damage the assured shall forthwith give notice thereof in writing to this company or the authorized agent who issued this policy, and shall protect the property from further loss or damage; and within sixty days thereafter, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said assured, stating the knowledge and belief of the assured as to the time and cause of the loss or damage, the interest of the assured and of all others in the property."

Said policy also provided that failure on the part of the assured to render such sworn statement of loss to the company within 60 days of the date of loss shall render a claim thereon null and void; that the company shall not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by any requirement, act or proceeding on its part relating to the appraisal or to the examination herein provided for; and that the sum for which the company should be liable upon the policy "shall be payable sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company," and that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the assured shall have fully complied with all the foregoing requirements."

The sole defense insisted upon by defendant is that written proof of loss, sworn to by the assured, was not furnished as required by the policy. No proof of loss was made by plaintiff other than notice of the fire given to the local agent, and the communication of the same to the state agent; but plaintiff insists that, under the facts shown by the evidence, the defendant waived written proof of loss. Whether the proof of loss called for by the policy was waived or dispensed with by the company is the decisive question in the case, and our answer to this question

must depend upon the legal consequences to be attached to the conduct of the parties as disclosed by the evidence.

The evidence shows, quite conclusively, that the next day after the fire Mr. Van Kirk, the defendant's local agent at Neligh, who wrote this policy, was notified of the fire by plaintiff, and that plaintiff gave him such information as he had on the subject; that, immediately, the local agent wrote to Mr. Wilcuts, the defendant's state agent, at Omaha, notifying him of the loss, and within five or six days thereafter the state agent went to Neligh, and he and the local agent drove out to where the burned car was stalled in the mud; that they spent 20 or 30 minutes looking the car over and discussing how to get it out of the mud; and the state agent made some inquiry of residents of the vicinity as to the names of the parties who were in the car when it was stalled and abandoned; that the local agent communicated to the state agent the information he had received from plaintiff concerning the fire; that, while at Neligh, the state agent made some inquiry about plaintiff and about the car, and then left. The local agent testified that the state agent told him before he left Neligh that the company was liable, and that it was only a question of the amount, and that he would be back again and settle, and that he informed plaintiff of the visit and investigations of the state agent, and that the state agent had said the company would settle, and that the state agent would be back again for that purpose. The state agent in his testimony denied that he made any statement to the local agent to the effect that the company was liable and would settle, and the evidence offered by the company is to the effect that the local agent had no authority to make any such statement to the plaintiff or to do anything in connection with the claim, but that, on the contrary, the local agent was expressly instructed by the state agent to do nothing in connection with the matter and to refrain from discussing it. A member of the law firm employed by plaintiff to look after this claim testified that he talked with the local agent after the inspection of the damaged car by the state agent, and that the local agent informed him that the state agent had stated that the company was liable, that the claim would be settled, and that it was only a question of the amount. Plaintiff and his attorney both testified that they had been told by the local agent that the claim would be settled and that it was not necessary for plaintiff to do anything further. After the visit of the state agent to Neligh the matter of this fire seems to have been referred to a special examiner by the name of Pipkin, at Omaha, but what, if anything, he did in connection with the claim the record does not disclose.

The letter of the local agent notifying the state agent of the loss was dated March 23,

the day after the fire. On March 24 the state agent sent the following letter to the local agent:

"Mr. C. B. Van Kirk, Agent, Neligh, Nebraska—Dear Sir: I am duly in receipt of your letter of the 23d advising that you have had a loss on a car, and that the proposition does not look good to you. In this instance, permit me to advise you to say nothing about the loss other than that you have reported the matter to the company. I will endeavor to reach Neligh tomorrow or possibly Wednesday. Yours truly, S. E. Wilcuts."

On April 23, after the state agent had been out to inspect the car, the local agent wrote him that plaintiff was in and was anxious to have his claim adjusted, and to let the local agent hear from him at once and get this matter settled up. To this letter the state agent replied under date of April 27:

"Mr. C. B. Van Kirk, Agent, Neligh, Nebraska—Dear Mr. Van Kirk: Re auto loss, Roy Brown. I am in receipt of your letter of the 23d reading as follows: 'Mr. Brown was in this morning and is very anxious to have his claim adjusted, so please let me hear from you at once as we must get this matter settled up.' Yours truly, C. B. Van Kirk. P. S. Please come up.' Mr. Brown seems more to be in a hurry than he did when I was in Neligh with you. However, I thank you for your letter and am obliged to advise you that the company has taken the matter entirely out of my hands and I can do nothing until instructed by them. You can rest assured, Mr. Van Kirk, that the matter has and is receiving proper attention by the Chicago office. Yours very truly, S. E. Wilcuts, State Agent."

On May 12, 1919, the company wrote to the attorneys for plaintiff as follows:

"Messrs. Jackson & Rice, Attorneys for Leroy Brown, Neligh, Nebraska. Policy 1—Roy Brown, Neligh, Neb.—Gentlemen: I am in receipt of your letter of April 29 regarding above policy and regret that circumstances have delayed answer. I beg to advise that we have referred this claim to Mr. Charles W. Pipkin of Omaha, Nebraska, who is the only one who has authority to represent us in this matter except, of course, this office and our Nebraska state agent, Mr. S. E. Wilcuts. Yours truly, Neal Bassett, Vice-President."

Aside from the conflict in the evidence as to what the state agent told the local agent while the former was at Neligh to look at the car, there is no dispute as to what was done. Notice of the loss having been promptly given and the company having acted upon it and entered upon the work of inspecting the property and investigating the circumstances to the extent shown by the evidence, can the company now be permitted to escape liability because formal proof of loss was not given? We think it cannot. In *Union Insurance Co. v. Barwick*, 36 Neb. 223, 54 N. W. 519, Chief Justice Maxwell, on page 231 of 36 Neb., on page 520 of 54 N. W., said:

"A company may have notice from their own agent at a given point that a certain loss has occurred, and if it acts upon that information and sends an adjuster to estimate the amount of the same, etc., it is no doubt a waiver of proof."

This language of Judge Maxwell was quoted with approval in *Farrell v. Farmers' & Merchants' Ins. Co.*, 84 Neb. 72, 120 N. W. 929. In the case last cited it was held that an agent of an insurance company charged with the duty of adjusting its losses has authority to waive the giving of notice and proof of loss, and in the syllabus it is said:

"And if such an adjuster, after property covered by a policy of insurance issued by his principal has been destroyed by fire, goes to the scene of the conflagration, and informs an agent of the assured, who was directed to look after an adjustment of said loss, that said loss is total, and the company will be compelled to pay it, and that, if the policy holder were present, they would have no trouble in settling, such conduct and statement, if the assured relies thereon, amount to a waiver on the part of the company of notice and proof of loss, and will estop it from insisting on a forfeiture based upon the nonreceipt of such notice and proof."

It is the established doctrine of this court that provisions in insurance policies requiring waivers to be in writing have no application to proofs of loss and stipulations to be performed after loss. *Morgenstern v. Insurance Co. of North America*, 89 Neb. 459, 131 N. W. 969. In the *Morgenstern Case*, Judge Barnes, on page 464 of 89 Neb., on page 971 of 131 N. W., said:

"It is contended by the defendant that there is no competent evidence in the record upon which to predicate a waiver, and it is insisted that there could be no waiver unless the same was indorsed in writing on the policy by some one who was authorized to make such indorsement. This contention cannot be sustained, for the more recent authorities hold that the company may, by its conduct, waive proof of loss when it has notice of the breach of such condition; that notice to the agent is notice to the company, and such waiver need not be in writing."

The requirement of the policy that the insured should furnish, within 60 days, written proof of loss verified under oath was for the company's benefit, and could be waived by the company, either expressly or by such

conduct as would lead the insured to believe that settlement would be made without it.

[1, 2] The whole course of conduct of defendant and those representing it in connection with this loss, after receiving notice of it, was well calculated, if, indeed, it was not intended, to lull plaintiff into the belief that nothing further was required of him to bring about an adjustment and settlement of his claim, and that if any further information was desired it would be called for by those in whose hands it had been placed for investigation and "proper attention." Having started its investigation and having given plaintiff to understand that the claim was in the hands of a special examiner and that the home office had been and was giving it "proper attention," the defendant cannot, after the time fixed by the policy for furnishing written proof of loss has expired, be permitted to defend against liability on this policy on the sole ground that proof of loss was not furnished in the form and within the time called for by the policy.

[3] Before the submission of the cause in the district court, the defendant requested the court to state his conclusions of fact separately from his conclusions of law. This request was denied, and defendant now insists that this was error under the holdings of this court in *Wiley v. Shars*, 21 Neb. 712, 33 N. W. 418, and *Lyman & Co. v. Waterman*, 51 Neb. 283, 70 N. W. 921.

The amount of defendant's liability, if any, was stipulated by the parties, and the only defense presented was failure to give formal proof of loss as required by the policy, and this depended upon whether, under the circumstances, technical proof of loss had been waived. The sole question of fact for the court to decide was, therefore, whether the defendant had so conducted itself in relation to this loss as to constitute a waiver. The judgment of the court could not have been in favor of plaintiff without finding that proof of loss had been waived. An affirmative finding on that question is implied in the general finding and judgment for plaintiff, and the court did not deprive defendant of any substantial right by refusing to make an express separate finding as to such fact. If error was committed, it was without prejudice to the rights of defendant.

It follows that the judgment of the district court must be and is affirmed.

DERR et al. v. KIRKPATRICK. (No. 22081.)
(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Master and servant §420—Compensation claimant's counsel entitled to fees for service in district court affirming award.

When an employer appeals to the district court from an award of the compensation commissioner and fails to reduce the amount of such award, the employee's counsel is entitled to the allowance of a reasonable attorney's fee for services in the district court. Section 3666, Rev. St. 1913, as amended by section 4, chapter 91, Laws 1919.

2. Master and servant §418(6)—Compensation judgment on conflicting evidence final.

When the evidence in a case that is brought under the Employers' Liability Act conflicts with respect to material matter, the judgment will not be disturbed if there is sufficient evidence in the record to support it. *Lincoln Gas & Electric Light Co. v. Crowley*, 104 Neb. 701, 178 N. W. 640.

3. Appeal and error §977(1)—New trial §6—Granting a new trial is in court's discretion.

The granting of a new trial is largely committed to the discretion of the trial court, and unless a clear abuse has been shown this court will not interfere. *Bruner Co. v. Fidelity & Casualty Co.*, 101 Neb. 825, 166 N. W. 242.

4. Master and servant §420—Supreme Court may allow compensation claimant's counsel reasonable fee.

Where an employer in an action brought under the Employers' Liability Act appeals from the judgment of the district court to this court and fails to reduce the amount of the recovery, this court will, on application, allow the employee's counsel a reasonable attorney's fee. Section 3666, Rev. St. 1913, as amended by section 4, chapter 91, Laws 1919.

Appeal from District Court, Lancaster County; Stewart, Judge.

Application by William Kirkpatrick for compensation for personal injuries, opposed by Charles Derr, employer, and the Maryland Casualty Company, insurer. An award was made for a specific time, and subsequently weekly payments were ordered continued because of continued disability, and the employer and insurer appealed to the district court, which rendered judgment in favor of the servant, and the employer and insurer appeal. Affirmed.

J. Ralph Dykes, of Omaha, for appellants.
Clifford L. Rein, of Lincoln, for appellee.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, and ROSE, JJ.

DEAN, J. This suit originated in the compensation commissioner's office, where William Kirkpatrick, defendant, filed an application for an order against Charles Derr, his employer, and the Maryland Casualty Company, the employer's surety, the plaintiffs herein, to enforce continued payments of \$15 a week, as compensation, theretofore paid by plaintiffs, for disabilities sustained by defendant, April 10, 1920, in the course of his employment while working for Derr in his furniture house as helper, clerk and repair man. January 12, 1921, the hearing was concluded and defendant was awarded \$15 a week from December 3, 1920, to the date of the hearing. The award further provided that the payments should continue for a period of five additional weeks after the hearing and that during that period defendant should submit to medical treatment at plaintiffs' cost. It was further ordered that another hearing be had at the expiration of the five weeks' treatment period that the commissioner might determine the extent of defendant's disability and make such award as the facts would warrant. Both parties complied with this order. When the parties again appeared after the expiration of the five weeks' medical treatment, the commissioner found that the disability continued and that its extent could not then be fully determined. Thereupon it was ordered that plaintiffs continue the payment of compensation at \$15 a week from the date of the last payment as long as the disability remained. Plaintiffs being dissatisfied with the final award of the commissioner appealed therefrom to the district court.

The district court found that defendant's disability began April 10, 1920, and that "the duration of such disability cannot now be determined." The court thereupon rendered a judgment against plaintiffs compelling them to pay defendant \$15 a week from February 3, 1921, "until said disability be ended or determined." Plaintiffs having failed to reduce the amount of the commissioner's award, the court allowed defendant \$50 as an attorney fee. From the judgment so rendered plaintiffs appealed.

Kirkpatrick testified in substance: That the accident happened April 10, 1920, when under Derr's direction, he went with a fellow employee to a private residence in Lincoln to bring therefrom a base-burner stove, weighing 500 or 600 pounds, to be stored in Derr's warehouse; that the stove was in a middle room, and the two men alone carried it out through the front room, over the porch and down the steps; that on account of mud they could not use the stove truck, and had to carry the stove over the lawn through the mud to the truck, a distance of 60 feet from the house; that they lifted the stove a foot or 18 inches to the bed of the

truck, and that by carrying the stove and straining himself in lifting it up to the truck he was in some way injured and immediately became sick and faint; that when they returned he was unable to help carry the stove into the store because of his injury; that he then went home and the next day was ill, and on the day following he returned to the store, but that owing to the pains that he suffered he was unable to do any work; that he was then sent home in a truck by his employer, where he suffered pain for about five weeks, when "this ailment started in the back" of each of his hands and persisted up to the time of the trial so that he could not then close his hands; that he has performed no work since the day of the accident and is unable to feed himself or to dress or undress himself; that he received payments as compensation in the sum of \$630, and that \$200 hospital bills were paid by plaintiffs; that the payments so made included the time to February 3, 1921, when further payments were refused by plaintiffs.

Mr. Turner is the man who helped Kirkpatrick to carry the base-burner from the dining room and load it on the truck. He testified that it weighed about 600 pounds. His testimony corroborates generally that of the defendant. He said:

"Q. Do you know what is the usual thing for truck or teamsters to pick those things up by hand or to drag it on a truck? A. If we have got sidewalk or flooring you take a truck and haul them, but if you have nothing but ground you cannot wheel the trucks; you have simply got to pick it up and carry it. * * * Q. Now, when you got this stove out to the truck, did you have to lift up on it any to get it into the wagon? A. Yes; had to raise it between 16 and 18 inches. Q. That is, had to pull it up in addition to carrying it to the truck? A. Yes, sir. You see to carry a base-burner, you have got to catch hold of the stovepipe hole, and reach down and catch the ash-pan, and reach the door board, and push against one another and carry in this position. So it is a strain all through your neck, body and arms. After you get to the wagon, we had to kind of up (indicating) like this, and put it in the end. To do that, you have got to have a pretty good stomach on you or you cannot do it. * * * Q. Now, what did Mr. Kirkpatrick do as soon as you folks set that stove down on the floor of the truck? A. On the floor of the truck? Q. Yes. A. Well, he was right by the corner of the wagon and kind of leaned up against the wagon like this. 'Gosh,' he says, 'I have tore myself all to pieces.' Q. That is what he said? A. It seemed like he relaxed all over."

With respect to the carrying of the stove, he further testified that—

"It hurt me for two or three days, my neck. * * * My wife and I, I took the truck and we drove out to see him (Kirkpatrick) and he

was in bad condition * * * Mr. Derr and I talked and said we are afraid Kirk is going to make a die of it. Mr. Derr and I were just talking in the store."

Defendant was examined by a physician about three weeks after the accident. On the part of defendant he testified that he found Kirkpatrick "suffering from violent strain with evidence of overstrain of the abdominal muscles and hydrocele of the cord. Q. What history did he give you? A. Of having lifted a weight too heavy for him, and having broken down under it—having lifted a stove too heavy to carry," and further that there was no indication of rheumatism, but that he "suspected that hydrocele of the cord was a rupture, and we watched him carefully to see whether we could handle it without an operation. I believe I threatened him with an operation for a while—finally managed without it. Somebody kept him at rest in bed and gave him things to ease the pain. * * * Q. Now, you may state whether or not, in your professional opinion, the high increased temperature and bronchial pneumonia found there might have been aggravated by the effects of the strain in lifting that he complained of, or might have predisposed him to take such disease as that. A. I think you will find it a very common thing in medical works that lowered resistance will predispose a patient to any kind of infection anywhere in the body." The doctor further testified that he had the patient under observation for several months, and that he examined him from time to time and there was no doubt in his mind but that Kirkpatrick's condition was brought about by the excessive strain in carrying the stove. On the cross-examination he testified:

"Q. How did the infection get in the hand and fingers? A. Circulating in the blood stream to the hands. * * * Q. Doctor, one more question. You said the hydrocele of cord disappeared, or had disappeared, June 17; wasn't it, you said, hydrocele of cord practically disappeared under medical treatment June 17? A. It must have been about that time. Q. Then the only condition you found at that time was this condition in the hands? A. Yes, sir."

Plaintiffs argue that the accident never happened. There is also some argument to the effect that defendant's condition arose from an abnormal condition of his teeth and that he was afflicted with pyorrhea. Defendant called a dentist on this point, and from his testimony it appears that the condition of his teeth was not abnormal and that there was but a trace of pyorrhea, "in the first stages," and that it was not sufficient to injuriously affect his health; that two of his large molars were decayed and removed. We conclude that plaintiffs' argument on this point is not sustained.

[2] Only two witnesses testified on the part of plaintiffs and both were physicians. They did not examine defendant until about seven months after the accident. Plaintiffs in their brief say: "The medical testimony is conflicting." We do not find that it conflicts at all points; but, even admitting that plaintiffs' statement reflects the fact, in the present state of the record, it is not incumbent on us to discuss the evidence if there is sufficient to support the judgment. The medical testimony seems to be ample to support defendant's contention and under the rule we will not discuss it further. *Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492; *Miller v. Morris & Co.*, 101 Neb. 169, 162 N. W. 417; *Anderson v. Kiene*, 103 Neb. 773, 174 N. W. 301; *Lincoln Gas & Electric Light Co. v. Crowley*, 104 Neb. 701, 178 N. W. 640.

[3] Plaintiffs contend that the court erred in not granting a new trial on their motion. In *Bruner Co. v. Fidelity & Casualty Co.*, 101 Neb. 825, 166 N. W. 242, we held:

"The granting of a new trial is largely committed to the discretion of the trial court, and unless a clear abuse has been shown this court will not interfere."

Abuse of discretion has not been shown. Error does not appear in the ruling.

[1, 4] It is argued that the district court erred in allowing defendant an attorney fee of \$50 for services in that court. We do not think so, in view of the fact that the employer appealed and failed to obtain any reduction in the amount of the award. Section 3666, Rev. St. 1913, as amended, section 4, chapter 91, Laws 1918, provides that—

Whenever "proceedings are had before the compensation commissioner, a reasonable attorney's fee shall be allowed the employee by the court in the event the employer appeals from the award of the commissioner and fails to obtain any reduction in the amount of such award; the appellate court shall in like manner allow the plaintiff a reasonable sum as attorney's fees for the appellate proceedings."

Under the act defendant's counsel is entitled to a fee of \$100 for his services in this court and this amount is ordered to be paid by plaintiffs.

From the facts before us we conclude that defendant is entitled to compensation at the rate of \$15 a week from the time that the court found that plaintiffs ceased paying compensation, namely, from February 3, 1921. We hold, however, that the record discloses such reasonable grounds for controversy that the appeal was justified. It therefore follows that plaintiffs are not subject to the statutory "waiting time" penalty.

The judgment of the district court is affirmed.

KISER v. SULLIVAN et al. (No. 21591.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Witnesses $\S$ 146—Husband of nonresident married woman competent to testify to conversations with decedent.

In an action by a nonresident married woman against a representative of a deceased person to recover title to lands in this state, her husband is a competent witness to testify to conversations with such deceased person, notwithstanding the provisions of section 7894, Rev. St. 1913. *Holladay v. Rich*, 93 Neb. 491, 140 N. W. 794, distinguished.

2. Evidence $\S$ 271(16)—Self-serving declarations incompetent to disprove prior agreement to reconvey lands.

Self-serving declarations made by a decedent are incompetent to disprove a prior agreement to reconvey lands.

3. Trusts $\S$ 110—Evidence insufficient to establish agreement by decedent to reconvey lands.

Evidence examined and found sufficient to sustain the judgment of the district court.

4. Trusts $\S$ 96—Transaction held an attempt to create an express trust without writing and prohibited by the statute of frauds.

A constructive trust is not created by a daughter conveying lands by warranty deed, without consideration, to her father, upon an oral agreement with him that he will reconvey the lands to her upon his death or upon her request; but such transaction is an attempt to create an express trust, and, not being in writing, is inhibited by the statute of frauds.

Appeal from District Court, Lincoln County; Grimes, Judge.

Action by Sarah Alice Kiser against Eola Pearl Sullivan and Charles Sullivan, her husband. From judgment for defendants, plaintiff appeals. Affirmed.

Halligan, Beatty & Halligan, of North Platte, for appellant.

John Grant, and Wm. E. Shuman, both of North Platte, for appellees.

Heard before LETTON, DAY, and DEAN, JJ., and GOOD and RAPER, District Judges.

GOOD, District Judge. This action was brought in the district court for Lincoln county, to establish and enforce an alleged constructive trust in lands situate in said county. Defendants prevailed, and plaintiff appeals.

Sarah Alice Kiser is the plaintiff and Eola Pearl Sullivan and Charles Sullivan, husband and wife, are defendants. The plaintiff and defendant Eola Pearl Sullivan are sisters, and both are daughters of Jeremiah Snider, deceased.

Plaintiff alleges in her petition that she was the owner of the northwest quarter of section 26, township 13, range 28, in Lincoln county, by virtue of a patent issued to her by the United States government, on the 7th day of March, 1890, and that she had on the 15th of February, 1888, made final proof under homestead entry to entitle her to such patent; that plaintiff and her husband, in March, 1888, at the oral request of her father, executed a mortgage on said lands to the Lombard Investment Company for the sum of \$650, and that she received no part of the proceeds of the mortgage loan, but permitted her father to receive the proceeds for his use and benefit; that plaintiff and her husband, on the 19th day of May, 1888, at the request and solicitation of, and for the purpose of providing a home for her father, deeded said lands to him, with the express oral understanding and agreement with him that at his death, or at such time as she should request a reconveyance, said lands should be reconveyed to her; that she received no consideration for the conveyance of said lands to her father, and that by reason of the relationship and the confidence reposed in him she relied upon his oral promise to reconvey said lands to her, and by reason of the transaction a constructive trust was created and her father became a trustee, holding the legal title for her benefit; that her father, in violation of his trust, in his last will, which has been admitted to probate, devised said lands to the defendant Eola Pearl Sullivan, who claims by virtue of said devise to be the owner of said lands. Plaintiff asks the court to decree that Eola Pearl Sullivan holds the legal title to said lands in trust for the plaintiff, and that she be required to convey the same to her.

The defendants deny that there was any agreement on the part of Jeremiah Snider to reconvey the lands to plaintiff, and deny that the transfer of the land was without consideration, and allege that the statements in the petition are insufficient to constitute a cause of action, and other matters of defense, which need not be considered.

[1] 1. On the trial the plaintiff called as a witness her husband, and he testified to conversations with Jeremiah Snider occurring shortly before the execution of the mortgage to the Lombard Investment Company, and to other conversations occurring shortly prior to the execution of the deed to him by plaintiff and the witness. The conversations related to the conveyance of the lands, and tended to support plaintiff's contention that there was no consideration for the conveyance, and that an agreement existed that said Jeremiah Snider should reconvey the lands to plaintiff. This, however, was received over objection that the witness was incompetent to testify to the conversations, because of the prohibitions

contained in section 7894, Rev. St. 1913, which provides:

"No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness."

The testimony was excluded from consideration in rendering judgment for the defendants.

Plaintiff contends that this evidence was admissible and should have been considered. The precise question is as to whether the witness had a direct legal interest in the result of the suit. If so, the evidence should have been excluded; and, if not, then it was properly admitted and should have been considered. The record discloses that at the time of the trial, and for many years immediately previous thereto, the plaintiff and her husband had been residents of Oregon. Under the provisions of section 1269, Rev. St. 1913, if a married woman owning lands in the state of Nebraska is a nonresident thereof, she may convey the same by her deed, without her husband joining in such conveyance. Under this statute, while plaintiff and her husband were residents of another state, she could, without the consent of her husband, and without his joining in the deed, sell and convey any lands that she might own in Nebraska. Had she succeeded in this action, he would have had no interest in the lands that he could sell and convey. He would have no other than an indirect interest in the success of his wife, and the possibility of inheriting from her in the event she should predecease him while owning lands in this state. The possibility of inheriting is not a direct legal interest, and would not disqualify the witness. *Rine v. Rine*, 100 Neb. 225, 158 N. W. 941. It follows that, as he had no direct legal interest in the result of the suit, he was not disqualified by the statute from testifying, and his evidence should have been considered in deciding the case. His testimony is in the record, and, as this is a trial de novo, it will be considered. We are not unmindful that this court has held, in *Holladay v. Rich*, 93 Neb. 491, 140 N. W. 794:

"In an action by a married woman for specific performance of a contract to convey real estate, her husband has a direct legal interest in the result, within the meaning of section 329 of the Code [Rev. St. 1913, § 7894]."

From a reading of the opinion, however, it is clear that the learned justice was then speaking of a situation where the parties were residents of this state; and under the decedent law in this state, where the husband and wife are residents of the state, neither could convey his or her lands with-

out the consent of the other, and the husband would have a direct legal interest in any lands of which the wife was seized during coverture; and, of course, as applying to a situation where husband and wife were residents of Nebraska, and the adverse party was the representative of a deceased person, the husband would not be a competent witness for the wife as to any conversations had with the representative's decedent.

[2] 2. Plaintiff complains because of the admission of certain evidence on behalf of the defendants. A number of witnesses were called to testify to conversations with Jeremiah Snider, in which he stated his intention to devise the lands to Eola Pearl Sullivan, and tending to negative the idea that he had promised to reconvey the land to plaintiff. This, however, was in the nature of a self-deserving declaration, and was not competent to disprove a prior promise to reconvey, and was clearly incompetent. It has been held, in *Harrison v. Harrison*, 80 Neb. 103, 113 N. W. 1042, that "declarations against interest cannot be annulled or explained away by counter declarations;" and in *Dalby v. Maxfield*, 244 Ill. 214, 91 N. E. 420, 135 Am. St. Rep. 312, the Supreme Court of Illinois, in passing upon the same question, held:

"Self-serving statements made by decedent during his last illness in regard to the disposition of his estate, inconsistent with the existence of the contract to will it to defendant, were inadmissible to negative such agreement."

See, also, *Oliphant v. Liversidge*, 142 Ill. 160, 30 N. E. 334, and *Oswald v. Nehls*, 233 Ill. 438, 84 N. E. 619.

[3] 3. Plaintiff contends that the judgment is contrary to the weight of the evidence. We have carefully read and considered all of the evidence, and, after excluding the evidence that was improperly admitted, and considering that which was excluded from the consideration of the trial court, we have reached the same conclusion as did the trial court. The evidence in support of the alleged oral contract consists almost exclusively of the testimony of plaintiff and her husband; the plaintiff testifying to conversations which she overheard between her father and her husband, and the latter testifying to conversations had between him and Jeremiah Snider and to conversations he had overheard between his wife and her father. It is conceded that these conversations tend very strongly to sustain the plaintiff's contention, but it must be remembered that they are vitally interested, and self-interest tends to color the testimony, even where the witness is void of corrupt intent. After the lapse of more than 30 years it is rather strange, to say the least, that the evidence of the plaintiff and her husband should dovetail so completely, and that she would remember the conversations which she overheard in

almost the identical words and in the same sequence as her husband; and it is more than passing strange that more than 30 years should elapse without this alleged contract ever being directly referred to between the parties; and that, where there were several members in the family and at home at the time of the contract, none of the other parties had any actual knowledge of the contract. It is also remarkable that the deed, absolute upon its face, was made for the purpose of giving to plaintiff's father a home during his lifetime, when a life lease would have answered every purpose, especially when a competent attorney was consulted, who was doubtless familiar with the purpose of the conveyance and who drew the same. It is also significant that at the time of the conveyance plaintiff's father was in ill health and was not expected to survive long. The plaintiff moved away from the state, and she never made any inquiry, so far as the record discloses, as to whether the taxes upon the place were paid, nor did she ever request a reconveyance to her. The deed upon its face recites a consideration of \$1,600. There is no competent evidence that plaintiff did not receive any of this consideration. It is true that plaintiff's husband testified that they received no part of the consideration, but he was not present when the deed was delivered. The rule of law is well established that an oral contract of this character can only be established by evidence that is clear, convincing, and satisfactory, and that the very terms of the conveyance are evidence and must be overcome. *Doane v. Dunham*, 64 Neb. 135, 89 N. W. 640. After a careful consideration of all the evidence, we find that it is not "clear, convincing, and satisfactory."

[4] 4. There is still another reason why the plaintiff is not entitled to recover in this action. Plaintiff in her action seeks to establish a constructive trust in the defendant, Eola Pearl Sullivan. It will be conceded that Mrs. Sullivan can have no greater right to this land than would her father, if living; and the converse is true, that the plaintiff can have no greater right against the defendant than she could have had if the action had been brought against her father in his lifetime. If the transaction between the plaintiff and her father creates a trust, then the defendant, Eola Pearl Sullivan should be held to be a constructive trustee, as she took title to the lands as devisee under her father's will; but the conveyance of the land by Mrs. Kiser to her father, upon an oral agreement that he would upon his death or upon her request reconvey the lands to her, did not create a constructive trust, but was an attempt to create an express trust, and, not being in writing, is inhibited by the statute of frauds. That an express trust cannot be created by parol, and that an attempt to do so falls under the ban of the statute, has been

so often decided that a citation of authorities to sustain the proposition would be a work of supererogation.

The judgment of the district court is affirmed.

THOMPSON v. TODD et al. (No. 21663.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

Homestead §109—Taking of stay order held not to estop defendants from claiming surplus from sale of homestead on mortgage foreclosure after confirmation, as against judgment creditor.

One T. was the owner of six lots covered by a mortgage, two of which lots were occupied as the family homestead. The property was sold separately under foreclosure proceedings in which a judgment creditor was found to have a second lien. T. took a nine month's stay of the order of sale under the statute. *Held*, this did not estop him from claiming, after confirmation, the surplus proceeds arising from the sale of the homestead property.

Appeal from District Court, Wheeler County; Paine, Judge.

Suit by A. C. Thompson against John H. Todd and others, in which a judgment was rendered foreclosing a first mortgage, and, after satisfaction thereof, defendants Todd petitioned that the remaining surplus be paid to them by virtue of their homestead right, to which cross-petitioner M. E. Michelson, a judgment creditor, filed objections, and from a judgment holding that the petitioners were estopped to claim surplus, they appeal. *Reversed*, with directions.

Albert & Wagner, of Columbus, and J. M. Shreve, of Bartlett, for appellants.

A. L. Bishop, of Bartlett, for appellee.

Heard before LETTON, DAY and DEAN, JJ., and GOOD and RAPER, District Judges.

LETTON, J. This was a suit to foreclose a mortgage on six lots belonging to John H.

and Mary E. Todd, two of which constituted their family homestead. M. E. Michelson was the owner of a judgment against the Todds. The two lots constituting the homestead were sold separately from the other four, the homestead bringing \$700 and the other lot \$600. After the satisfaction of the mortgage debt there remained about \$568 surplus. Defendants filed a petition to have this surplus paid to them by virtue of their homestead right in the two lots. Cross-petitioner Michelson objected, claiming the same by virtue of the lien of her judgment, and also pleading that defendants Todd are estopped from asserting the homestead right at this time, having filed a request for a stay of the order of sale, which was granted.

The court found that, on account of a stay having been requested, the Todds were estopped to claim the surplus. A case very similar in its facts is *Hooper v. Castetter*, 45 Neb. 67, 63 N. W. 135. In that case the court held that the question of the homestead right of the mortgagor was not involved nor litigated in the foreclosure suit; that the decree rendered therein was not a bar to the mortgagor's application to have the surplus paid to him in lieu of his homestead; that, though the judgments were liens upon the real estate, they were subject to the mortgagor's homestead rights in the property; that the decree in the foreclosure suit finding the judgments were liens and ordering them paid out of the surplus should be construed to mean that they were liens, and should be paid out of the surplus, subject to the mortgagor's homestead rights; that the judgment creditors did not acquire by the decree any greater liens upon or right to the money than they had against the property; and that the surplus might be claimed as exempt at any time before it was finally distributed by the order of the court.

We are satisfied with the reasoning in that case. It is decisive of the question presented. The judgment of the district court is reversed and the cause remanded, with instructions to award to defendants Todd the surplus arising from the sale of their homestead.

Reversed, with directions.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**WEBER v. INTERSTATE BUSINESS MEN'S
ACC. ASS'N.**(Supreme Court of North Dakota. July 22,
1921.)*(Syllabus by the Court.)***1. Insurance — §645(1) — By-law as defense
must be pleaded and proved.**

The defendant, an accident insurance company, relied on a certain by-law to avoid liability on a certain policy of insurance. It neither pleaded nor proved the by-law nor the substance thereof.

It is held that, if such by-law, in any circumstances, might constitute a defense, a prerequisite thereto would require it to be properly pleaded, and its contents established by competent evidence, and, that not having been done, the defense in that regard, if any, is not available.

**2. Insurance — §465 — Suicide while insane is
death by "accidental means."**

Where the insured in an accident insurance policy commits suicide while so insane as not to comprehend the nature of the act nor the physical result which would flow from it, his death is caused by accidental means within the meaning of the policy insuring against bodily injury from external, violent, and accidental means.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accidental Means.]

Robinson, C. J., dissenting.

Appeal from District Court, McIntosh County; Frank P. Allen, Judge.

Action by Andrew Weber, as guardian of the estate of Fred Bodman and others, minors against the Interstate Business Men's Accident Association. Judgment for plaintiff, and defendant appeals. Affirmed.

G. M. Gannon, of Lodi, Cal., and A. A. Ludwigs, of Ashley (R. M. Haines, of Des Moines, Iowa, of counsel), for appellant.

I. A. Mackoff, of Ashley, Curtis & Remington, of Lisbon, and E. T. Burke, of Bismarck, for respondent.

GRACE, J. This appeal is from a judgment in plaintiff's favor for \$5,000, with interest and costs, and from an order denying defendant's motion for a new trial.

The action is brought by plaintiff as guardian of the estate of the minor children of Fred J. Bodman, deceased, to recover on what purports to be a certain accident insurance policy in the sum of \$5,000 issued by the defendant to Fred J. Bodman in his lifetime.

The insurance is against injury or death by violent, external, and accidental means. On December 11, 1918, defendant issued its policy to the insured. It would appear from

the testimony, that this policy (Exhibit A) may not have been the one in force at the time death occurred. There is some evidence to indicate that it lapsed; that the insured applied for reinstatement, and requested a duplicate of the policy, claiming that he was unable to find the old one.

A discussion of this point is not very material, as will appear from the following stipulation:

"(1) That Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman, and Myron Bodman are the infant children of Fred J. Bodman, deceased, and that Andrew Weber, the plaintiff in this action, is the duly appointed, qualified, and acting guardian of their estates.

"(2) That the defendant, the Interstate Business Men's Accident Association of Des Moines, Iowa, is a corporation engaged in the business of insurance against accident, and that during the lifetime of Fred J. Bodman the defendant issued a policy, in which policy it insured the said Fred J. Bodman against injury or death by violent, external, and accidental means, and that said policy was fully paid up and in full force and effect on the 12th day of May, 1919.

"(3) That the wards of the plaintiff, hereinbefore named, are the beneficiaries named in the said policy, and are entitled to the full benefit of all of the benefits thereof.

"(4) That the amount payable under the terms of the said policy in case of accidental death of the said Fred J. Bodman is the sum of \$5,000.

"(5) That no part of the same has been paid to the wards of the plaintiff nor to any one authorized to receive the same in their behalf."

The plaintiff claims that on the 12th day of May, 1919, insured came to his death by external, violent, and accidental means, to wit, by the wheels of a railroad coach running over his neck.

The complaint states a cause of action for recovery on the policy. In substance, the answer admits the issuance and delivery of the policy, the payment of the premiums, and that the policy was in full force and effect at the time of the death; and, after denying the allegations not admitted, it alleges that the death of Bodman was not caused by external, violent, and accidental means, but was caused by the willful and premeditated self-destruction of the deceased, with suicidal intent, and was due wholly to his own acts, and not to the acts of any other person or agency.

The only issue presented by the pleadings is whether the death of the insured was due to an act of suicide committed while he was sane. The answer does not allege that he was sane. It states, however, that the act of self-destruction was willful and premeditated. If it were premeditated, it would tend to denote sanity, and to some degree the word means deliberation. If there is

any other issue in the case—and we do not think there is—it arose from the introduction in evidence of what purports to be a portion of the by-laws of the defendant association which, so far as material here, is as follows:

"Limitation of Risk.—The accident department of the association does not assume any liability for accidental injury sustained * * * if the occasion of the accident be disease, bodily or mental infirmity, *insanity,*" etc.

The defendant introduced Exhibit A in evidence (a synopsis of the by-law being on the back thereof), it would appear, for the sole purpose of establishing proof of this particular by-law. The defendant did not plead the by-law, and, we think, in order to adduce proof of it, it should have been pleaded either in the original pleading or by an amendment thereof, or, in any event, even though improperly received in evidence, by reason of not being pleaded, if it were to be given any consideration as evidence, the defendant at least should have made a motion to amend the pleadings to correspond with the proof. No amendment nor any such motion was made, and from this it would appear that the by-law should not have been received nor admitted as evidence, and we so determine. It must follow, in these circumstances, that the alleged by-law is no defense, and does not prevent a recovery on the policy. 1 Cyc. 288; 1 C. J. 494; Gray v. National Benefit Ass'n, 111 Ind. 531, 11 N. E. 477; Stevens v. Cont. Ins. Co., 12 N. D. 463, 97 N. W. 862; Ennis v. Retail Merchants' Ass'n, Mutual Fire Ins., 33 N. D. 21, 156 N. W. 234.

On the back of the policy is the following:

"The following is a synopsis of the provisions of the articles of incorporation and by-laws now in force and effect: The right of any member to claim benefits or indemnity will be determined by the provisions of the articles of incorporation and the by-laws in force at the time the accident happens, out of which any claim arises."

Assuming for the present that under the laws of this state the by-laws of the defendant could be proved as a part of its contract or policy of insurance—a subject which will be treated later in the opinion—it is clear that the identical by-law or by-laws relied on in force at the time of the happening of the accident out of which the claim arises should be pleaded. To plead a synopsis or abbreviation of it would not be sufficient, for those relying on its terms, to limit liability, might omit an important part of it, or might omit a part which to them might seem immaterial, and yet which might have an important bearing on their liability.

It must also appear by the pleadings that the by-law is the one in effect at the time the accident occurs. The synopsis of the by-law above set forth, and contained in Exhibit A,

if it were ever a by-law, was perhaps in force on the 11th day of December, 1913, the date of the policy. But the by-laws of the company are subject to change from time to time, and those which are in force at the time of the accident are the ones only which are operative.

It was approximately six years from the date of Exhibit A until the accident. The above by-law may have been entirely changed or eliminated, or another of entirely different meaning and phraseology enacted since that time, which in that event would be the one in effect at the time of the accident. In that case the above by-law would be of no force nor effect. So that it would appear that it was incumbent on the defendant, not only to plead the above by-law in full, but, as well, to adduce competent evidence to show that it was in full force and effect at the time of the accident. There was no foundation laid for any such proof, and no competent evidence of the actual, complete by-laws, if any, in force at the time of the accident.

The general rule is that, if the defendant desired to assert nonliability on the policy by reason of the protection afforded it by certain by-laws or provisos or conditions which are claimed to be a part of the policy, or referred to and claimed to be made a part of it, they should be fully pleaded and established by competent evidence.

A pleading of the synopsis is not sufficient, nor are the conclusions of the pleader, as drawn from and based on the by-law, proviso, etc. It would appear that the admission in evidence of the synopsis of the by-law above mentioned was not evidence of a by-law in force at the time of the accident.

Furthermore, if the by-law were properly pleaded and proved, it still would not be effective to avoid liability on the policy, as it is contrary to the specific provisions of section 6638, C. L. 1913, which, so far as material here, is as follows:

"No policy of insurance against loss or damage by the sickness, bodily injury or death by accident of the assured shall be issued or delivered in this state if it contain any of the following provisions."

Subdivision 2: "A provision referring to the Constitution, by-laws or rules of the company or association or attempting to make the same a part of the policy."

The other subdivisions of the section need not be here considered.

It is clear from the above section that the by-law could not become a part of the policy. Such a provision, if inserted in it or attached to it, is absolutely void and of no effect. Evidence of it should not have been received, and it could not be pleaded nor in any manner used as a defense. The by-law being prohibited by law from becoming a part of the policy, it is for that reason void, and for

the same reason is void as being against public policy.

The Legislature, in enacting the above law, intended, no doubt, to prohibit accident insurance companies from adding subsequent provisos or conditions to a policy, through the medium of by-laws the enactment and terms of which were consented to in a way by the insured at the time of the issuance of the policy. No doubt the Legislature was aware that this practice had been resorted to to such a degree that it in effect destroyed the consideration for the payment of the premium. In other words, the Legislature, no doubt, was aware of a practice among insurance companies writing the class of insurance specified in the section above mentioned, whereby subsequent to the date of issue of the policy it was practically made worthless to the insured by the incorporation therein of new provisos and conditions through subsequently enacted by-laws made a part of the policy by which they were largely relieved of liability. In other words, they greatly decreased the risk, and thus made the policy largely worthless to the insured or the beneficiary, or, perhaps, the Legislature acquired knowledge that such insurance companies were making immense profits by these various practices, now prohibited by the law, which, when permitted, assisted the company to avoid a large portion of its risks. Whatever may have been the cause which moved the Legislature to enact the law, it has done so, and its act in that regard would seem to be one of wisdom, founded on a sound public policy, and intended to protect the insured against impositions, which are prohibited by the law.

Whether the contract is an Iowa contract is not a matter pleaded nor proved. That should have been done if defendant desired to avail itself of any benefit or advantage in that regard. Having failed to do so, it waived them. In the absence of pleading and proof to the contrary, it should be deemed a North Dakota contract, and the laws of this state are applicable to it in determining its legal effect.

It is not necessary here to determine what application the above section would have if the contract had been properly asserted and proved to be an Iowa contract. That question is not in this case, and needs no further consideration. It is proper here to consider the only defense interposed, which is to the effect that the insured came to his death by wilful and premeditated self-destruction with suicidal intent. We are clearly of the opinion that this defense must fail for want of proof. The evidence clearly tends to show that the insured took his life while not in the possession of his mental faculties, and when they were disordered, and thus his mind was unsound and not in a condition to reason; in other words, he was then violently insane.

[2] Further proof of insanity is afforded by the physical facts, for it would appear to a reasonable mind that no person possessed of any reason, or, in other words, unless wholly insane, could terminate his own life in such a cruel, inhuman, and fiendish manner. The testimony shows that the body was found on one side of one of the rails of the railroad, and the head on the other side of it, indicating that, if he committed suicide, he placed his body in such position on the rail that the wheels of one of the trucks of a car, which was part of a moving train, would pass over his neck, and thus sever the head from the body, which was virtually what happened. It may also be noted that the defendant, in attempting to prove the by-law, in effect conceded the insanity.

We are of the opinion that the evidence is in such state as to show that the insured at the time he destroyed his own life was so insane as not to comprehend the nature of the act or of the physical result which would flow from it, and for this reason his suicide was caused by accidental means within the meaning of this policy, insuring against bodily injuries from external, violent, and accidental means. *Tuttle v. Iowa State Traveling Men's Association*, 132 Iowa. 652, 104 N. W. 1131, 7 L. R. A. (N. S.) 223; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; *Blackstone v. Standard Life Accident Ins. Co.* 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; *Grand Lodge, I. O. M. A., v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

Here we will consider another important feature of this case. Dr. C. A. Campbell, a duly licensed and practicing physician of Ashley, N. D., the village where the accident happened, testified as a witness on behalf of plaintiff. The evidence shows he examined the dead body of Fred J. Bodman. In addition to other testimony, he stated that the jaw was broken, and that there were several contusions and bruises on one side of the face; that the angle of the right lower jaw was broken. His further testimony, in the form of questions and answers, is as follows:

"Q. From the position that you saw the head, and from its location adjacent to the rail, what would you say caused the fracture of the jaw? A. I couldn't say, except that the jaw had been hit.

"Q. Might not that have happened by the pressing down of the wheel upon the neck and pressing the head and jawbone into the cinders and track? A. That wouldn't be the easiest way of explaining it.

"Q. How would you explain that? A. I should fancy that he was struck first by some projecting iron or thing.

"Q. You mean to say that from the position of that body that he might have been struck by something besides the car wheel? A. Yes, sir.

"Q. There is nothing that I can think of on a car that would hit him there, and at the

same time cut off his head and break the jaw. Do you think that that blow to the jaw might have taken place and broken the jaw before the head was cut off? A. It might have been.

"Q. Was that a serious event, that breaking of the jaw? A. If the person were alive; yes.

"Q. From the position of the body you would not think that that injury to the jaw resulted from any other cause than the passing of the wheel over the neck, would you? A. The break of the jaw was not caused by the severing of the neck, something hit him."

Dr. Campbell was a disinterested witness. His evidence, above set forth, is of a substantial character, and sufficient to show that in some unaccountable and unknown manner the insured was struck by something besides the car wheel; and the jury, from the evidence above set forth, could draw the conclusion that, from being struck on the jaw with such force as to break it, he was thereby thrown on the rail and further injured, as the evidence shows. In other words, the testimony of Dr. Campbell in this regard is substantial in character and sufficient to sustain the verdict of the jury.

It will also be noticed that nowhere does the defendant claim that the evidence is insufficient to sustain the verdict. But, if the defendant had assigned as a cause for reversal of the judgment the insufficiency of the evidence to sustain the verdict, the general rule is well settled on an appeal from a judgment entered on a verdict that, if there is any substantial evidence to sustain the verdict, the judgment should be affirmed. That rule is applicable here, and, applied, the evidence of Dr. Campbell is sufficient to sustain the verdict.

There is error assigned by reason of the court having given a certain instruction, and particular stress is placed on the following part of it:

"If you find that he was impelled to an act of self-destruction by an insane impulse which the reason that was left in him did not enable him to resist, or if his reasoning powers were so far overcome by his mental condition that he could not exercise his reasoning faculties on the act which he was about to do, the company is liable."

Other extracts from the instruction are as follows:

"I instruct you further, gentlemen, in connection with this matter, that the only defense that the defendant has interposed to the demand of the plaintiff is that the death of Mr. Bodman, while admitted, was not accidental, but was self-inflicted, and was what is ordinarily termed suicide. In this connection, you are instructed that, if you find that the deceased, Fred J. Bodman, did place himself upon the rail where the wheels of the train were about to pass, you must determine whether or not he was insane or sane at the time. If you do find that he placed himself in the way of the train and he was a sane man at that time, then the death was not accidental, and under those

circumstances your verdict should be for the defendant. If, however, you find that he did place himself in the way of the train, but he was at that time insane, and that his act was the mad act of a man bereft of his reason, then the death was an accident, and you should find for the plaintiff and against the defendant.

"In other words, self-destruction of a sane man knowingly and deliberately making way with himself is not an accident, but the self-destruction of a man whose mind is deranged and whose reason is gone, when the self-destruction results from such insanity, is accidental.

"I instruct you further, gentlemen, that it is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring him liable. To do that the act of self-destruction must have been caused by insanity, and the mind of the deceased must have been so far deranged as to make him incapable of using rational judgment in regard to the act which he was committing."

The instruction is too lengthy to set out in full, but sufficient has been above set forth to demonstrate that it was quite comprehensive. We think, as a whole, it fully and fairly states the law applicable to the issues involved in the case. It is therefore clear to our minds that there was no reversible error in giving the instruction, nor was there reversible error in refusing to give the instruction requested by the defendant, the contents of which is as follows:

"The jury are instructed that by the terms of the insurance contract upon which this action is based, and which is in evidence before you, it is provided, among other things, that the defendant insurance company does not assume any liability for death resulting from accident occasioned by mental infirmity or insanity; and I instruct you that, this being a part of the insurance contract, it is binding upon the parties thereto, and that therefore in this case, if you should find that the deceased, Fred Bodman, came to his death by his own act of self-destruction, even if you should also find that his act in taking his own life was due to disease or mental or bodily infirmity or insanity or fits, yet there could be no recovery in this case by plaintiff, and that because of the terms of the insurance contract above mentioned.

"I instruct you, gentlemen of the jury, that there is just one question for you to determine in this action, and that is: Did the deceased, Fred Bodman, come to his death from an act of self-destruction, or, in other words, did he commit suicide? If you should find that he did not commit suicide, then your verdict should be for the plaintiff; but, on the other hand, if you should find from the evidence that he did commit suicide, then the plaintiff cannot recover, and your verdict must be for the defendant."

The court, in its general instruction, did submit to the jury the question of whether the insured committed suicide while sane, and gave full instructions covering that

question. The court properly refused to give the remainder of the instruction for the reason that the defendant did not, and, further, could not, plead and prove as a defense that the act of suicide was committed while the insured was insane.

We have above analyzed these questions quite fully, and have shown that such a condition, contained in a by-law, would be contrary to the laws of this state. In short, by-laws, in this class of insurance, cannot in this state be interposed as a defense to a liability on the policy, if they are against the law, and hence against public policy. They cannot be made a part of the policy by a provision referring to the constitution, by-laws, or rules of the company attempting to make the same a part of the policy.

The instruction requested was contrary to the law above mentioned, and hence the court did not err in refusing to give it. The instruction requested also related to issues not formed by the pleadings, and was properly denied.

The verdict is not contrary to the evidence, and there was no error in the court denying defendant's motion for a new trial.

The order and judgment of the court appealed from are affirmed.

Respondent is entitled to his statutory costs and disbursements on appeal.

CHRISTIANSON, J. (concurring specially). This is an action upon an accident insurance contract. The complaint alleges:

"(1) That he (Weber) is the duly appointed, qualified, and acting guardian of the estates of Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman and Myron Bodman, who are the infant children of Fred J. Bodman, deceased.

"(2) That during the lifetime of the said Fred J. Bodman he was the holder of a policy issued by the defendant which is an accident insurance corporation, in which said policy the said defendant did insure the said Fred J. Bodman against injury or death by violent, external, and accidental means, and that said policy was fully paid up and in full force and effect upon the 12th day of May, 1919.

"(3) That the wards of the plaintiff hereinbefore named are the beneficiaries named in the said policy, and are entitled to the full benefit of all the provisions thereof.

"(4) That on the said 12th day of May, 1919, the said Fred J. Bodman came to his death by external, violent, and accidental means, to wit, by being run over and decapitated by a railroad train.

"(5) That the amount payable under the terms of the said policy in case of accidental death of the said Fred J. Bodman is the sum of \$5,000.

"(6) That no part of the same has been paid to the wards of plaintiffs, nor to any one authorized to receive the same in their behalf."

The defendant in its answer admitted the allegations of paragraphs 1, 2, 3, 5, and 6

of the complaint. The answer also contained the following allegation:

"Further answering, it alleges that the death of the said Fred J. Bodman was not caused by external, violent, and accidental means, but was caused by the willful and premeditated self-destruction of the said deceased with suicidal intent and was due wholly to his own acts, and not to the acts of any other person or agency."

The action was tried to a jury upon the issues framed by these pleadings. The jury returned a verdict in favor of the plaintiff. The defendant moved for a new trial on the grounds: That the verdict is contrary to the evidence; that the verdict is contrary to the court's instructions; that the court erred in giving, and in refusing to give, certain instructions to the jury. The motion for a new trial was denied, and the defendant has appealed to this court from the judgment and from the order denying a new trial. While the defendant specified, in the language of the statute, as grounds for a new trial, that the verdict was contrary to the evidence and contrary to the court's instructions, these grounds were apparently abandoned, and the only question presented on this appeal is whether the trial court erred in giving and in refusing to give certain instructions. The instructions given and refused upon which error is predicated relate to the question whether the deceased was sane or insane at the time of his death. The trial court instructed the jury thus:

"If you find that he was impelled to the act of self-destruction by an insane impulse which the reason that was left in him did not enable him to resist, or if his reasoning powers were so far overcome by his mental condition that he could not exercise his reasoning faculties on the act which he was about to do, the company is liable."

The defendant requested that the jury be instructed that by the terms of the insurance contract—

"The defendant insurance company does not assume any liability for death resulting from accident occasioned by mental infirmity or insanity, * * * and that therefore in this case, if you should find that the deceased, Fred Bodman, came to his death by his own act of self-destruction, even if you should also find that his act in taking his own life was due to disease or mental or bodily infirmity or insanity or fits, yet there could be no recovery in this case by the plaintiff, and that because of the terms of the insurance contract."

The trial court refused to give this instruction.

It will be noted that the requested instruction refers to, and purports to be based upon, certain provisions of the insurance contract involved in this suit. The defendant does not challenge the correctness of the rule announced in the instruction given by

the trial court, considered as an abstract proposition. On the contrary, it admits on this appeal that the authorities sustain the rule that death from suicide is caused by accidental means within the meaning of a policy of insurance against bodily injuries from "external, violent, and accidental means," if the insured was at the time of the act so insane that he did not understand the nature of the act or that death would result therefrom. But appellant contends that this rule is not applicable in this case for the reason that the policy here involved contained a provision that "the accident department of the association does not assume any liability * * * if the occasion of the accident be * * * insanity." Hence, in considering appellant's specifications of error, the first pertinent question to determine is whether its premise is correct, viz. whether the insurance contract in suit contains the provision defendant asserts that it contains.

[1] It will be noted that the complaint did not purport to set out the policy or the terms and conditions thereof. The complaint merely averred that the deceased was the holder of an accident policy issued by the defendant whereby he was insured "against injury or death by violent, external, and accidental means." The only issue tendered by the answer was as to the character of the death. The answer alleged affirmatively "that the death was not caused by external, violent, and accidental means, but was caused by the willful and premeditated self-destruction of the said deceased with suicidal intent and was due wholly to his own acts and not to the acts of any other person or agency." There was not even an intimation in the answer that the policy contained a provision relieving the defendant from liability from accidents occasioned by insanity. But the defendant contends that, regardless of the issues framed by the pleadings, the defendant became entitled to the benefit of the provision in the policy and to have appropriate instructions given as regards thereto by reason of the evidence admitted upon the trial of the case.

Let us see how well this contention is founded. At the commencement of the trial the parties entered into the following stipulation:

"It is stipulated by and between the plaintiff and the defendant that the following facts are conceded by both sides upon the trial of this action.

"I. That Fred Bodman, Estelle Bodman, Esther Bodman, Maxine Bodman, and Myron Bodman are the infant children of Fred J. Bodman, deceased, and that Andrew Weber, the plaintiff in this action, is the duly appointed, qualified and acting guardian of their estates.

"II. That the defendant, the Interstate Business Men's Accident Association of Des Moines, Iowa, is a corporation engaged in the business

of insurance against accident, and that during the lifetime of Fred J. Bodman the defendant issued a policy, in which policy it insured the said Fred J. Bodman against injury or death by violent, external, and accidental means, and that said policy was fully paid up and in full force and effect on the 12th day of May 1919.

"III. That the wards of the plaintiff, hereinbefore named, are the beneficiaries named in the said policy, and are entitled to the full benefit of all of the benefits thereof.

"IV. That the amount payable under the terms of the said policy in case of accidental death of the said Fred J. Bodman is the sum of \$5,000.

"V. That no part of the same has been paid to the wards of the plaintiff, nor to any one authorized to receive the same in their behalf."

In presenting his case in chief the plaintiff, in addition to the foregoing stipulation, offered the testimony of only one witness, who testified to the fact that the insured, Fred Bodman, came to his death on May 12, 1919, by being run over by a railroad train at Ashley in this state. No reference was made to the mental condition of the deceased. The first evidence adduced by the defendant consisted of certain testimony tending to lay a foundation for the introduction in evidence of the policy of insurance. The policy sought to be and eventually admitted in evidence did not purport to be the original one issued to the deceased, but purported to be merely a copy. Defendant's counsel spent much time and adduced considerable testimony for the purpose of laying a foundation for the admission of the copy in lieu of the original, and there was and is the gravest doubt if in fact a sufficient foundation was laid to justify the admission of the copy. At all events the question which must have been uppermost in the mind of the trial judge at the time was whether a sufficient foundation had been laid to admit the proffered exhibit at all. The face of the policy received in evidence was as follows:

"Number 66707. Not Exceeding \$5,000.00.

"Certificate of Membership.

"Interstate Business Men's Accident Association of Des Moines, Iowa.

"This certifies that Fred J. Bodman is a member of the Interstate Business Men's Accident Association, and is entitled to such benefits as may be provided in and by the articles of incorporation and by-laws of said association in force and effect at the time the accident occurs from which a claim for benefits arises, and by the acceptance of this certificate he agrees to the several provisions and conditions of the said articles of incorporation and by-laws as from time to time they may be amended or changed.

"In witness whereof the said Interstate Business Men's Accident Association at its home office in Des Moines, Iowa, has caused this certificate to be signed by its president and secre-

tary, and its corporate seal to be hereunto affixed this 11th day of December, A. D. 1913.

"Ernest M. Brown,

"Secy. & Treas.

"G. S. Gilbertson,

"President.

"C. P. W. Registered."

On the back of the certificate is the following heading in large type, viz.:

"The following is a synopsis of the provisions of the articles of incorporation and by-laws now in force and effect. The right of any member to claim benefits or indemnity will be determined by the provisions of the articles of incorporation and the by-laws in force at the time the accident happens out of which any claim arises."

Immediately following this heading is what purports to be a synopsis of the provisions of the articles of incorporation and by-laws in force at the time the certificate was issued. Among other things stated therein is the following:

"The accident department of the association does not assume any liability * * * if the occasion of the accident be * * * insanity."

Immediately following the synopsis of the articles of incorporation and by-laws, at the bottom of the page, is the following, also, printed in large type:

"A printed copy of the articles of incorporation and of the by-laws is inclosed with this certificate. The member should read the same carefully and inform himself of the rights and duties of membership. This duty you owe to yourself and the association."

The certificate of insurance also contains a copy of the application. The original application was also offered in evidence. In the application no reference is made to the fact that the association is not liable "if the occasion of the accident be * * * suicide." In fact, no reference is made to the question of limitation of liability. The application, however, contains this declaration on the part of the applicant:

"I hereby agree that I will accept the certificate of membership which may be issued to me subject to all the provisions, conditions, and limitations contained in the articles of incorporation and by-laws of said association, as the same now are or as they may be legally amended or changed, and I agree to comply with all the provisions thereof."

It will be noted that the certificate of membership states that the assured—

"is entitled to such benefits as may be provided in and by the articles of incorporation and by-laws of said association in force and effect at the time the accident occurs from which a claim for benefits arises."

These statements speak for themselves. The certificate of membership by its express terms did not purport to be the whole con-

tract. It specifically referred to the articles of incorporation and the by-laws as establishing the essential elements of the contract. When the contest was raging, during the trial of the cause, as to whether the certificate should be admitted, the trial judge by a mere inspection of the certificate was advised that the benefits conferred upon the assured were those provided in the articles of incorporation and by-laws of the association in effect at the time the accident occurred. This necessarily inferred that whatever limitations there were as to liability were also specified in such articles and by-laws. It was necessary that the certificate of membership be introduced as a foundation for the admission of the articles of incorporation and by-laws. But there is no good reason why the trial court should have believed that the defendant, when it offered the certificate in evidence also, thereby sought to prove the contents of the articles of incorporation and by-laws. Manifestly the articles of incorporation must have been a matter of public record in the state where the association was incorporated; and it is a matter of common knowledge that the by-laws of a corporation are generally entered in some appropriate record of the corporation. Not only is it presumed that the ordinary course of business has been followed, but the very "synopsis" which defendant asserts constitutes evidence of the articles of incorporation and by-laws shows that it is not a copy thereof, but is merely a statement of conclusions as to the contents and effect of the articles and by-laws. It also shows that the articles of incorporation and by-laws are not contained in or in any manner made part of the certificate of insurance, but are extraneous thereto and were set forth in some other document inclosed therewith. It was deemed necessary to conclude the so-called "synopsis" by stating in large type that "the member should read the inclosed copy of the articles of incorporation and of the by-laws carefully and inform himself of the rights and duties of membership" in the association. This was urged upon him as a duty which he owed to himself and to the association. Of course, if the "synopsis" had been a copy or even a complete statement of the contents of the articles of incorporation and of the by-laws, this statement and caution would hardly have been necessary.

In the circumstances, how can it be said that the trial court erred in not considering the articles of incorporation and the by-laws of the defendant corporation in the instructions to the jury? How can it be said that the trial court in admitting the certificate of insurance must, for the purposes of the submission of the case to the jury, be deemed to have admitted the certificate, among others, for the purpose of proving the articles of incorporation and the by-laws? There

is nothing obscure about the rules of evidence relating to the mode of proving the contents of the articles of incorporation and the by-laws of a corporation. Aside from the applicable statutory provisions, the various legal treatises deal fully with the subject. See 3 Ency. Evidence, 657; Jones' Commentaries on Evidence, §§ 200a, 522; Bacon, Life & Accident Insurance (4th Ed.) § 103; Fletcher's Ency. of Corporations, § 488. See, also, sections 7909, 7919, subd. 7, C. L. 1913.

In the case at bar the defendant was permitted to introduce the certificate of insurance in evidence. This constituted an essential foundation for the introduction of proof as to the contents of the articles of incorporation and of the by-laws. Whether defendant had or desired to present such proof was a matter for it to determine. It failed to present such proof. As the trial court said in a memorandum opinion filed with the order denying a new trial in this case:

"As the matter now stands, there is no proof of the existence or contents of the by-laws."

This, in my opinion, correctly states the condition as it existed at the time when the trial court instructed the jury; and, of course, the instructions given were properly limited to the issues raised by the pleadings and the proof. As already stated under the pleadings, only one issue was presented, namely, whether the death of the insured was occasioned by accidental means, or whether such death was occasioned by "the willful and premeditated self-destruction of the said deceased with suicidal intent." Upon this issue the court had before it the policy of insurance, which specifically referred to the articles of incorporation and the by-laws of the corporation for the other elements of the contract. No attempt was made to prove the contents of such articles or by-laws. There was, however, not only the admission in the defendant's answer, but the stipulation made at the commencement of the trial that "during the lifetime of Fred J. Bodman, the defendant issued a policy in which policy it insured the said Fred J. Bodman against injury or death by violent, external, and accidental means." So, leaving wholly on one side the question of the sufficiency of defendant's pleading to raise the issue of its limited liability, it seems clear to me that the trial court committed no error in giving the instruction which it gave and in refusing to give the instruction which defendant requested. The instruction which it gave is concededly correct in the absence of evidence on the part of the defendant showing that its liability was limited by virtue of provisions in its articles of incorporation or by-laws. The instruction which defendant requested purported to be based upon, and

asked that there be submitted to the jury for consideration, provisions of the by-laws of the defendant corporation which were not in evidence. In other words, the trial court did what the law required it to do—instructed upon the issues which were properly raised by the pleadings and the proof, and refused to instruct with respect to matters for which there was no basis either in the pleadings or in the proof.

I concur in an affirmance of the judgment and the order appealed from. My reasons for doing so are those set forth above. I express no opinion upon any question except those discussed by me in this opinion.

BRONSON and BIRDZELL, JJ., concur.

ROBINSON, C. J. I dissent. In this case there has not been a fair trial on the merits. There is a question as to whether or not the insurance policy is in evidence. The pleadings are dead wrong. There should be a new trial on amended pleadings and a judgment based on real facts, and not on fine-spun theories. This court should see that the legal procedure is not made a game of skill and chance, and that a decision for \$5,000 does not turn on the skill or adroitness of counsel in the making of stipulations or in anything they may do or leave undone.

THOMAS v. RASMUSSEN et al. (No. 21604.)
(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Highways §165 — Statute limiting speed held inapplicable where one motor vehicle passes another traveling in the same direction.

The provision of section 28, c. 222, Laws 1919, requiring the speed of a motor vehicle on a public highway to be reduced to, and maintained at, a rate not exceeding 15 miles an hour when approaching any of the various objects therein mentioned, has no application to a case where one motor vehicle overtakes and passes another traveling in the same direction; such passing being governed by the provisions of section 29 and the general limitations of speed found in section 28 of said chapter.

2. Highways §184(2)—Evidence insufficient to sustain verdict for personal injuries against defendant alleged to be engaged in "racing."

Evidence examined and found insufficient to sustain the verdict against defendant Pederson.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Race.]

Appeal from District Court, Dawson County; Grimes, Judge.

Action by Rosa Mae Thomas against Lloyd Rasmussen and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

L. J. Nisley and Cook & Cook, all of Lexington, for appellants.

Hainer, Craft & Edgerton, of Aurora, and T. M. Hewitt, of Lexington, for appellee.

Heard before LETTON, DAY, and DEAN, JJ., CLEMENTS and MORNING, District Judges.

E. J. CLEMENTS, District Judge. This is an action to recover damages for an injury to plaintiff's person sustained in an automobile accident, which, it is alleged, was caused by the negligence of defendants. From a verdict and judgment for plaintiff, defendants appeal.

The following facts are established by the pleadings and undisputed evidence, to wit: On September 11, 1919, at about 10 o'clock p. m., the plaintiff, at the invitation of her brother-in-law, Fred Troxel, was riding in a Buick automobile owned by said Troxel and being driven by him westward on the Lincoln Highway about one mile east of Cozad, Nebraska. At that place said highway extends east and west, and is a graded road having two traveled tracks about three or four feet apart. Said automobile was then traveling in the left-hand or south one of said tracks at a speed of about 20 miles an hour. The defendant, Ferdinand Pederson, driving a Dodge automobile, and the defendant, Lloyd Rasmussen, driving a Ford, were also traveling westward on said highway at that time and place, the Dodge being a short distance ahead of the Ford, at a speed estimated by plaintiff's witnesses at from 30 to 35 miles an hour and by defendants' witnesses at from 20 to 30 miles an hour. Pederson passed said Buick car on the north and right-hand side without in any manner touching it. Rasmussen also attempted to pass on the north side, but in doing so the left side of his Ford, from the rear, came in contact with the bumper of the Buick, the Buick car tipped over and plaintiff was thereby injured. When they overtook the Buick car neither of the defendants indicated to its driver by sound or call that he desired to pass.

The plaintiff alleged, and introduced evidence to prove, that at the time of the accident defendants were racing; that defendant Rasmussen, while passing the Buick car on the north side, turned to the left and attempted to run in ahead of it at a less distance than 30 feet therefrom, and in so doing collided therewith and thereby overturned it. Defendants deny this, and contend, and have introduced evidence to prove, that Rasmussen did not turn to the left or run into the Buick car, but that said car was driven into the rear of his Ford while he was traveling in the north track.

At the close of plaintiff's case, and after all evidence was in and both parties had rested, each of the defendants moved the court to direct a verdict in his favor, for the reason that the evidence is not sufficient to sustain a verdict against him, which motions were overruled, and each defendant contends that said ruling against him was erroneous.

A careful reading of the record shows that the evidence introduced by plaintiff supports her allegations that defendant Rasmussen, in attempting to pass on the right-hand side, negligently turned his Ford to the left and drove it against the car in which plaintiff was riding, thereby overturning it and injuring plaintiff. This evidence, if believed by the jury, which it evidently was, fully justifies and sustains the verdict against said defendant Rasmussen. Therefore the trial court did not err in overruling his motion for a directed verdict.

Where a person is injured by the racing of two or more other parties on a public highway, all engaged in the race are liable, although only one of the vehicles came in contact with the injured person or the vehicle in which he is riding. *Berry, Automobiles* (2d Ed.) § 184. Plaintiff seeks to hold defendant Pederson liable under this rule. As his automobile did not come in contact with the Troxel car, Pederson cannot be held liable, unless plaintiff's allegation that defendants were racing is proved by a preponderance of the evidence; and this question was raised by his motion for a directed verdict.

[2] Racing, as defined by Webster, is a running in competition, a contest of speed. Is there sufficient evidence to support a finding that defendants were running in competition or engaged in a contest of speed? The only competent evidence in the record bearing upon this question shows that defendants were driving on a well-traveled highway, outside of a city or village, at a speed variously estimated at from 20 to 35 miles an hour; that both were driving on the same and right side of the road in the same track, Rasmussen a short distance behind Pederson. It is true that several of plaintiff's witnesses said defendants were racing, but this assertion was a mere conclusion. None of said witnesses saw either of defendants or knew or pretended to know how they were driving until they were within a short distance of the place of the accident; and the only facts or circumstances disclosed by the record on which such conclusion was based are as above stated. The defendant Pederson testified that he did not try to prevent any car from passing him; that when he passed the Buick he did not know that there was another car behind him and did not know that Rasmussen was in the neighborhood until after the accident. Defendant Rasmussen testified that he drove behind Pederson's car several miles and made no effort to pass

same; that there was no rivalry as to who could drive the faster. We therefore feel compelled to hold that there is not sufficient evidence to sustain a verdict against the defendant Pederson, and that the court erred in overruling his motion for a directed verdict.

In defendant's brief it is argued that the trial court erred in giving each of instructions Nos. 1, 7, 8, 9, 12, 13, 14 and 18. The objections urged against instructions Nos. 1, 7 and 9 will be considered together.

For a statement of the issues in the instructions, the trial court substantially copied the pleadings of the parties. Instruction No. 1 is almost a verbatim copy of plaintiff's petition. This method of stating the issues has been repeatedly condemned by this court. *Tobler v. Union Stockyards Co.*, 85 Neb. 413, 123 N. W. 461. And if it results in prejudice to the complaining party it is sufficient grounds for reversal. *Hanna v. Hanna*, 104 Neb. 231, 176 N. W. 732.

In plaintiff's petition so copied, it is alleged that when defendants approached plaintiff they did not "reduce their speed to a rate not exceeding 15 miles an hour, but negligently and unlawfully maintained a much greater speed than 15 miles an hour in passing plaintiff." In instruction No. 7 the court quoted from section 28, c: 222, Laws 1919, the following, to wit:

"No person shall operate a motor vehicle on any highway outside of a city or village at a rate of speed greater than is reasonable and proper, having regard for the traffic and use of the road and the condition of the road, nor at a rate of speed such as to endanger the life or limb of any person, nor in any case at a rate of speed exceeding thirty-five miles per hour. * * * Upon approaching an intersection of highways or a bridge, or a sharp curve, or a deep descent, or another vehicle, or an animal, or person, outside of any village or city, the person operating a motor vehicle shall reduce the speed of such vehicle to a rate not exceeding fifteen miles an hour and shall not exceed such speed until entirely past such intersection, bridge, curve, descent, vehicle, animal, or person."

A part of section 31 of said chapter, which requires an automobile to be equipped with brakes, signals, and lights, was also copied in said instruction. In instruction No. 9 the court told the jury that it is competent to consider said statutes as affecting the question of defendants' negligence.

In section 29 of the same chapter it is provided:

"Whenever any person traveling with any vehicle or conveyance on any road in this state shall overtake another vehicle or conveyance traveling in the same direction and shall by sound or call indicate to the driver thereof his or her desire to pass, it shall be the duty of the driver of the vehicle or conveyance in front, if the nature of the ground or the condition of his load will permit, to promptly turn to the

right of the center of the road, and the driver of the vehicle or conveyance behind shall then turn to the left of the center of the road and pass without interfering or interrupting, and the driver of said vehicle or conveyance passing shall not return to the center of the road until at least thirty feet ahead of the vehicle or conveyance passed."

[1] The provisions of said sections 28 and 29 above quoted supersede the common-law rules of the road as to matters covered by them. To determine the correct meaning and interpretation of said provisions they must be considered and construed together. Effect must be given, if possible, to every word, clause and sentence, so that no part of said provisions will be inoperative, superfluous, void or insignificant; and they must be construed, if possible, so they will not be inconsistent and one destroy another. *Sutherland, Statutory Construction* (Lewis' 2d Ed.) § 380.

The statutory provisions above quoted clearly recognize the right of a person to drive a motor vehicle on a public highway, outside of a city or village, at a rate of speed not exceeding 35 miles an hour, where such a rate would be reasonable and not endanger the life or limb of any person, and to pass another vehicle traveling in the same direction; and the rules governing the action of the parties, which should be observed by them in such passing, are specifically laid down. It seems improbable and incredible that the Legislature intended that such rights can be exercised only when the vehicle to be passed is traveling at a speed of less than 15 miles an hour. If such were the law, then it would be lawful for all motor vehicles traveling in the same direction on a public highway to travel 35 miles an hour in case they all maintained that speed; but if the car in the lead should maintain a speed of 15 miles an hour, then all others would be compelled to remain behind it and travel at no greater speed, or violate the law. We think that such a construction would render these provisions inconsistent and contradictory, the law impracticable and unreasonable, and would violate the above well-established and familiar rules of statutory construction. We therefore hold that the part of said section 28 requiring the speed of a motor vehicle to be reduced to, and maintained at, a rate not exceeding 15 miles an hour has no application to a case, like the one at bar, where one automobile overtakes and passes another which is being driven in the same direction. This is the construction placed on a similar statute of Kansas in *State v. Pfeifer*, 96 Kan. 791, 153 Pac. 552, and we have found no authority which announces a contrary doctrine. It follows that the court erred in giving instructions Nos. 1, 7 and 9 in which the jury were directed to consider said provision of section 28 in determining whether the defendants were negligent.

The giving of instruction No. 12 was also error, for it permitted the plaintiff to recover against the defendant Pederson, if the jury found he was racing, and we have hereinbefore held that there was not sufficient evidence to justify the submission to the jury of the issue of whether the defendants were racing.

In instruction No. 13 the court charged the jury that, if it found that the defendant Rasmussen had violated the provisions of the statute therein specified and plaintiff sustained injury thereby, said defendant is liable for the damages resulting from said injury. This is equivalent to saying that the violation of such statutory provisions is negligence as a matter of law, which is the doctrine announced in *Walker v. Klopp*, 99 Neb. 794, 157 N. W. 962, L. R. A. 1916E, 1292, and which was expressly disapproved by this court in the later case of *Stevens v. Luther*, 105 Neb. —, 180 N. W. 87. The giving of said instruction was therefore error.

We find no material error in any of the other instructions complained of.

Because of the errors hereinbefore pointed out, the judgment of the district court is reversed and the case remanded for further proceedings.

Reversed.

LOWMAN v. SHOTKOSKI. (No. 21629.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. **Contracts** ¶189—Where written contract is susceptible of two interpretations, parol evidence introduced without objection will be considered.

Where the language of a written contract is susceptible of two interpretations as to the time when it became effective, and parol evidence has been introduced without objection as to the surrounding circumstances at the time of its execution, the court will consider all the facts in evidence in order to arrive at the meaning and intention of the parties at that time.

2. **Brokers** ¶11 — Plaintiff may not recover for loss of profits on sale which was not bona fide.

An action for loss of profits cannot be maintained where the evidence establishes that the sale, damages for the loss of profits on which the plaintiff seeks to recover, was not an actual bona fide sale.

(Additional Syllabus by Editorial Staff.)

3. **Words and phrases**—"From."

The word "from" is a term of exclusion, but it is generally held that, though a term of exclusion, it is to be construed inclusively or exclusively according to the context, the subject-matter or the expressed opinion of the parties.

Appeal from District Court, Platte County; Thomas Post, Judge.

Action by George T. Lowman against Joseph Shotkoski. Directed verdict for defendant, and from a judgment of dismissal, the plaintiff appeals. Affirmed.

Garlow & Long, of Columbus, for appellant.

Reeder & Lightner, of Columbus, for appellee.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

LETTON, J. Defendant entered into a written contract with plaintiff whereby he appointed plaintiff "sole and exclusive agent to sell his 365-acre farm in Nance county for \$70,000." He agreed to pay \$1,000 commission, and a further commission of all over \$60,000 for which the agent might sell the land. The terms of sale were:

"Cash to bind the sale, \$4,000, balance as follows: First mortgage \$20,000 for 9 years at 5½ per cent., second mortgage \$8,800, 5 years, March 1st, 1920, at 6 per cent., and \$27,200 March 1st, 1920."

The contract gave the agent the right to purchase on the terms named therein, and deduct commission. It also provided:

"Terms of this contract to be valid and binding for the term of 10 days from the date hereof."

The petition pleads that on the same day plaintiff tendered defendant the sum of \$4,000 as first payment on the real estate, as provided in the contract; that he informed defendant that he was ready, able and willing to purchase the land, but that defendant refused and failed to execute the proffered contract of sale, or any other contract, but permitted the land to be sold by another agent, making performance of his agreement with plaintiff impossible; that plaintiff had the land resold at that time to one Bisson, and that he lost his profit on such sale amounting to \$2,905, for which he prays judgment.

The answer admits the contract, but alleges that at the time of its execution the land was listed with other agents, including one Schild; that Schild had shown one Eggl his farm and was about to close a contract of sale with Eggl; that defendant had signed the contract on July 15, and had given Schild the entire day of July 16, 1919, to complete the sale; that before the contract with plaintiff went into effect, Schild sold the land to Eggl; that plaintiff knew Eggl was Schild's customer and had practically closed the deal; that plaintiff, through Bisson, who was his partner or accomplice, induced Eggl to

sign a contract of purchase of the land from Bisson by falsely representing to Eggl that he could not purchase the land through any one but plaintiff; that as soon as Eggl ascertained the truth he canceled the contract with Bisson, and purchased the land through Schild; that neither plaintiff nor Bisson wished to purchase the land for himself, but the offer to purchase was made only upon the strength of a sale by Bisson to Eggl, and was really made in behalf of Eggl.

At the conclusion of the evidence the defendant moved for a directed verdict. The motion was sustained and judgment of dismissal rendered, from which plaintiff appeals.

[1] The evidence on behalf of plaintiff establishes that one Bisson, the owner of a restaurant in Columbus at which plaintiff boarded, told him on July 15, 1919, that he had a contract as agent with Eggl for the sale of his land in Polk county; that Eggl wanted to purchase the Kelm land owned by defendant in Nance county; that it would have to be sold within a certain time, and that other parties had a contract for the sale which had expired. The morning of the next day, July 16, he and Bisson drove to defendant's house. Plaintiff asked defendant if he would give him a contract for a short time, and 10 days' time was agreed upon. Plaintiff drew up the contract, which defendant signed. Bisson was present at this conversation. Plaintiff testifies that on the way home he tried to sell the land to Bisson, and finally sold it to him that afternoon for \$197 an acre; that Bisson gave him a check for \$3,900 and \$10 in money; that later in the day he and Bisson drove out to see defendant, and he told defendant he was ready to make the deal; that defendant wanted to consult his banker at Genoa; that on the way there defendant said, "What if Vaught has sold the land?" I said, "Go call him and ask him, and if he has sold it, it is all right with me; but if he has not sold it, it is my deal;" that defendant tried to call Vaught by telephone, but could not reach him. While the banker was looking at the contract in the bank, Vaught called defendant out, and when defendant returned he informed plaintiff that Vaught had sold the place, and he could not go farther with him.

The evidence in behalf of plaintiff further establishes that, after their return from defendant's home in the morning, Bisson showed Eggl the contract with Lowman, and called his particular attention to the clause in which it states that Lowman had the exclusive agency, and told Eggl he would have to buy the farm from Lowman or him; that Eggl then entered into a contract to buy from Bisson; but, when he ascertained later that he could still purchase the land from Vaught, he refused to complete the contract, and his check was returned to

him and he bought through Schild and Vaught.

[3] Plaintiff's position is that he had the right to sell the land, or to purchase it himself for 10 days, including the 16th day of July. Defendant insists that the pretended offer of purchase by Lowman and sale by him to Bisson were not made in good faith, but only as part of a scheme to procure a commission on the sale to Eggl made by Schild and Vaught. He also contends that the language for terms of "10 days from date hereof" means that the day of the date is excluded, and further that plaintiff knew he had no authority to sell on the 16th. The courts are by no means uniform in their construction of language of this nature in a contract. Generally speaking, the word "from" is a term of exclusion, but since the decision in *Pugh v. Leeds*, 2 Cowp. (Eng.) 714, in which the subject was examined at length by Lord Mansfield, it is generally held that, though a term of exclusion, it is to be construed inclusively or exclusively according to the context, the subject-matter or the expressed intention of the parties. 38 Cyc. 317. The context yields no light on the question presented, but no objection was made to parol testimony tending to disclose the intention of the parties.

Among other things the contract provides:

"We further agree not to price said land to any person whomsoever, or to do or perform any act that might interfere with the operation of this agency or the sale of said property by said agent."

The testimony of plaintiff discloses that he knew that Vaught had the right to sell the land that day. If the contract was in force on the 16th, neither defendant nor Schild and Vaught had the right to sell to any one else than plaintiff, and this and other undisputed facts show the understanding of the parties was that Vaught or Schild might sell on that day. Furthermore, on the evening of the 15th, defendant and wife had signed a written contract for the sale of the land presented by Vaught, and were anticipating its execution on the 16th. But even if the contract included the 16th, we are of the opinion that the evidence does not establish that plaintiff ever suffered any actual loss of profits. He and Bisson both knew before they went to see defendant early in the morning of the 16th that Eggl was negotiating with Schild and Vaught for the purchase of the land. They deny defendant's testimony that he told them that morning the facts as to the transaction with Vaught the night before, but their own testimony convicts them of knowledge of the negotiations. After they returned to Columbus Bisson showed Eggl the contract with plaintiff and called his particular attention to the clause giving plaintiff the exclusive agency to sell, and

procured a contract from Eggli to purchase the land. Bisson says he then bought the land from plaintiff, and later in the evening they drove to defendant's house, where plaintiff attempted to buy. Before this time Schild and Vaught had shown the land to Eggli, and he had determined to buy it when he sold his land. The fact that Bisson negotiated the sale of Eggli's land is not material except to show the intimate connection of Bisson with Eggli's land transactions.

[2] The conduct of Lowman and Bisson in their dealings with Eggli and with defendant, as narrated in their testimony, the haste and expedition with which they worked, the fact that Bisson showed Eggli the Lowman contract, as we have stated, after he knew that Eggli had already made up his mind to buy from Vaught and was anxious to obtain the land, and that this occurred before the sale that plaintiff asserts he made to Bisson took place, convinces us that their actions were not in good faith; that the sale to Bisson was merely colorable or pretended; that plaintiff never suffered any actual loss of profits and has no right to recover in this case. This decision is based upon the undisputed testimony, and the natural, reasonable and proper inferences to be drawn from the conduct of the parties as narrated by the witnesses on behalf of the plaintiff. We conclude that the district court made no error in directing a verdict for the defendant, and that a verdict in favor of plaintiff would not be sustained.

Affirmed.

STANDARD OIL CO. v. CITY OF KEARNEY et al. (No. 21326.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Municipal corporations §63(2) — Authorities may determine rules and ordinances required for health, comfort and safety, but their action is not final and is reviewable in the courts.

In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations and ordinances are required for the health, comfort and safety of the people, but their action is not final and is subject to the scrutiny of the courts.

2. Municipal corporations §122(4) — To overturn ordinance as arbitrary, etc., the evidence should be clear and satisfactory.

To overturn a city ordinance as being arbitrary, unreasonable or discriminatory, the evidence of such facts should be clear and satisfactory.

3. Municipal corporations §625, 626 — Ordinance prohibiting construction of gas filling station on principal street held void.

In the light of the evidence, the ordinance set out in the opinion is held void as being an arbitrary, unreasonable and discriminatory exercise of the police power.

Dean, J., dissenting.

Appeal from District Court, Buffalo County; Hostetler, Judge.

Action by the Standard Oil Company against the City of Kearney, its Chief of Police, and another for injunction. From a judgment dismissing its cause of action, the plaintiff appeals. Reversed.

W. H. Herdman, of Omaha, and Pratt & Hamer, of Kearney, for appellant.

Ed. P. McDermott, of Kearney, for appellee.

Heard before MORRISSEY, C. J., and DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

DAY, J. The only question involved in this case is the validity of a certain ordinance of the city of Kearney, Nebraska.

Plaintiff, who was the owner of certain lots abutting upon Central avenue at Twenty-Fourth street in the city of Kearney, had commenced to erect thereon a filling station for the purpose of selling on the premises gasoline and lubricating oil to the users of motor vehicles. When the city council of defendant city learned of the character of the improvement the plaintiff intended to make and the nature of the business it proposed to conduct on the premises, the council very promptly passed the ordinance in question. Section 1 provides:

"That it shall be unlawful for any person or persons, firm, or corporation to erect or construct upon any lot, piece of lot, or parcel of land, a filling station wherein motor-propelled vehicles are run in for the purpose of receiving gasoline and oil, between Eighteenth and Thirty-First streets on Central avenue, in the city of Kearney, Nebraska."

Section 2 provides a penalty for a violation of the ordinance.

Acting under authority of this ordinance, the municipal authorities were proceeding to stop the further progress of the work on the filling station when this action was commenced. By this action the plaintiff sought an injunction restraining the municipal authorities from interfering with it in the construction of the improvement upon the ground that the ordinance is unreasonable, discriminatory, and an illegal invasion of its property rights. The trial court found the issues in favor of the defendants, and dismissed the plaintiff's cause of action. From this judgment plaintiff appeals.

[1] It is conceded that the Legislature has, by section 4862, Rev. St. 1913, delegated to the municipal authorities of cities of the class of defendant city the power to enact all needful ordinances, rules, and regulations for maintaining the peace, good government, and general welfare of such cities. It is manifest that the council in passing the ordinance in question was acting under the "general welfare" clause of the power delegated to it by the Legislature. Generally speaking, it is within the right of municipal legislative authority, acting under the "general welfare" clause, to determine what ordinances are required to protect and secure the public health, comfort, and safety, but it may not, under the guise of such power, enact ordinances which are unreasonable, or discriminatory, or an invasion of constitutional rights.

[2] In *Peterson v. State*, 79 Neb. 132, 112 N. W. 806, 14 L. R. A. (N. S.) 292, 126 Am. St. Rep. 651, it was held:

"The determination of the question whether an ordinance is reasonably necessary for the protection of life and property within the city is committed in the first instance to the municipal authorities, and, when they have acted and passed an ordinance, it is presumptively valid, and the courts will not interfere with its enforcement until the unreasonableness or want of necessity of such measure is made to appear by satisfactory evidence."

The same principle is announced in *State v. Withnell*, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. (N. S.) 898. Whether an ordinance of this character is a proper exercise of power becomes, therefore, in its last analysis, a question for the courts to decide, and when it appears from all of the facts and circumstances to the satisfaction of the court that an ordinance is unreasonable or discriminatory, or an invasion of constitutional rights, it is the duty of the courts to declare such ordinance void.

[3] With this general principle in mind, we proceed to examine the facts and circumstances existing at the time the ordinance was passed, and the mischief proposed to be remedied thereby. The record shows that the plaintiff was proceeding to erect upon its lots abutting on Central avenue and Twenty-Fourth street a filling station for the purpose of vending oils and gasoline to the users of motor vehicles, when stopped by the defendants. The general plan of the improvement contemplated the construction of a small one-story cement and concrete office building, standing well back from the two streets, and having a wide semi-circular driveway extending from Central avenue to Twenty-Fourth street across the plaintiff's premises. The plan was that a customer by driving across the sidewalk could enter upon the premises from either of the two streets; it being the intention that a custom-

er who entered the premises from Central avenue, after having his wants supplied, could make his exit on Twenty-Fourth street, and vice versa. Pumps were to be stationed along the driveway in the open air, well back from the streets, by means of which customers were to be supplied with gasoline. It was the plan to store the gasoline upon the premises in large steel tanks specially designed for the purpose, and buried in the ground, while the oil was to be stored in metal cans such as are generally used for that purpose. The building itself fully complied with the fire protection and building ordinances of the city, and the proposed manner of storing the gasoline and oils on the premises was not in violation of any ordinance of the city, or any law of the state.

It further appears that Central avenue is the principal business street in the city, and that the plaintiff's property is one of the important corners along that street. For about four blocks south of the proposed improvement, the business consists mostly of retail stores in buildings of one and two stories. Along the street are a few very valuable improvements, such as the federal post-office building, a church, a hotel, and residences.

It will be noted that the ordinance forbids the construction of a "filling station" wherein motor-propelled vehicles are run in for the purpose of receiving gasoline and oil. Just what the council may have intended by the term "filling station" is not entirely free from doubt. It would seem, however, that there could be an equipment which would come within the general meaning of that term, where no building was employed, and that, therefore, the building which the plaintiff proposed to construct was not the objectionable feature of the improvement. The ordinance, as we view it, does not prevent the storing of oils and gasoline on the premises within the restricted district, and selling them to users of motor vehicles at the curb of the street. In fact, it is shown that within a few doors from the plaintiff's premises, and within the district, gasoline is being sold to users from a pump at the curb; the gasoline being stored in a large tank beneath the sidewalk. If the ordinance was really intended as a good faith fire protection measure, it would seem that it would have been more general in its application, both as respects the territory in which it operated and the persons to whom it applied. It is difficult to see how there would be more danger to the public from selling gasoline and oil from a pump on the premises, than from selling the same commodities from a pump at the curb of the street; both being in the open air. Besides this, the ordinance by its terms operates on Central avenue only, and from the conditions as shown by the

photographs in evidence there would be as much danger from such a business conducted just off Central avenue as along that street.

In further support of the ordinance, it is argued that the crossing of the sidewalk by motor vehicles would unwarrantably interfere with the use thereof by pedestrians. The record does not show the approximate number of pedestrians using the sidewalk, nor the extent of the interference which the motor vehicles would entail. The court will, however, take judicial notice of the fact that the population of defendant city is less than 8,000, and from the circumstances in evidence, as shown by the photographs, we are convinced that the slight inconvenience to pedestrians by motor vehicles crossing the sidewalk is not of sufficient magnitude to justify the ordinance on that ground. The automobile as a business and pleasure vehicle has come to stay, and the rights of users, who constitute a considerable part of the public, must also be considered in determining the validity of ordinances of this nature. Besides this, within one block from the plaintiff's premises, and within the district, is a public garage, access to which is had across the sidewalk. It is conceded that the ordinance does not prohibit crossing the sidewalk to enter the garage. It is also claimed that the noise of the honking of horns and the running of the engines would be a nuisance to the other users of the street. The noise, however, is only incidental to and not a necessary part of the proposed business. If the protection of the public from noise was the purpose sought to be attained, it would seem that it could be easily controlled by proper ordinances going directly to that subject.

Without extending the argument further, we are satisfied from a consideration of the entire record that the ordinance cannot be sustained. While there are some phases of it which upon first impression appear to be within the domain of the proper exercise of the police power of the municipality, yet when considered in connection with the facts and circumstances as shown by the record it becomes apparent that it is an unreasonable, arbitrary, and discriminatory exercise of power. We think the real reason for the ordinance is set forth in the defendant's answer wherein it is charged that the construction of an oil-filling station on the principal street of the city would be an "everlasting eyesore and disgrace." While great latitude must be given to municipalities in the matter of the exercise of police power, it must not be carried to the extent that it is unreasonable, arbitrary, or discriminatory.

From what has been said, it follows that the trial court should have granted the relief prayed. The judgment of the district court is reversed and the cause remanded,

with directions to enter a decree granting the injunction prayed.

Reversed.

DEAN, J. (dissenting). Under the facts and the law it seems that the judgment should be affirmed. The ordinance prohibits the erection, on a certain designated part of a certain street, of all oil-filling stations of a certain class, namely, those "wherein motor-propelled vehicles are run in for the purpose of receiving gasoline and oils."

There is a stipulation in the record wherein, among other things, substantially these material facts appear: Immediately east, and across Central avenue, from the proposed site of the oil-filling station is located the United States post-office, a two-story marble building erected at a cost of about \$150,000, and also an apartment house. One block away from plaintiff's lots is located the three-story 100-room Midway hotel, and just across the street therefrom, and one block from plaintiff's lots, is the Christian Church, and east and north of that church is a residence district. About a half block west of plaintiff's lots is a Catholic Church, and connected therewith is a parochial school which is open and in continuous session nine months in the year. A block south of the Catholic Church and school is the Presbyterian Church, and across the street east from the Presbyterian Church is the Christian Science Church. Both sides of the four blocks that are directly south of plaintiff's lots are practically all built up with business houses. Central avenue, whereon the proposed oil-filling station is to be permanently located, is one of Kearney's principal business streets and is one of the main traveled routes from the business center on a paved street that leads to the State Teachers College. On the east and south sides of the block in which are situated plaintiff's lots the sidewalks are about 20 feet wide.

It is into the midst of such an environment that there has been permanently located, almost under the eaves of a \$150,000 federal building, by a judgment of this court, a noise-producing oil-filling station that is to be used, as we are informed by plaintiff's brief, "in said business of vending oils, grease, and gasoline." The environment of the new structure will, as the stipulation shows, consist of a group of four leading churches, a church school, an apartment house, a large hotel, and the federal building; a residence section of the city being on one side and the business center on the other. The oil station is permanently established over the protest of the city council, and in violation of an ordinance, adopted under the police power, and contrary to a judgment of the district court pronounced by a judge who has resided in Kearney more than 30 years, and who has been a district judge for almost 20 years.

One of Kearney's leading citizens, who lives directly across the street from a "two-pump" oil-filling station, testified, in substance, that on Saturday evenings, from 5 o'clock until midnight, and on Sunday afternoons and evenings and on holidays, the station does a very large business, and at such times from four to six cars stand and honk and wait, all clamoring to be served at one time, and that to add to the confusion about half of the cars while waiting permit their engines to run, so that the noise interferes with ordinary conversation on his porch and injuriously affects the health of his family. He further testified that the traffic on the street was congested by large motor trucks and mule trucks backing up to the curb to fill the tank of the station with gasoline almost every evening, and that it was further obstructed by from three to six cars standing at the curb in the evenings waiting to have air pumped into the tires. He said his knowledge was confined to the hours named as he was not at home very much during the day throughout the week. No evidence was offered by plaintiff on the question of noise, other than that of an employee of plaintiff who testified that their men were instructed to ask car drivers to stop their engines while the tank was being filled. It is, however, suggested in plaintiff's brief that it was the customers, and not the plaintiff, that created the noise and the confusion of which complaint is made. But that suggestion does not meet the objection. In view of the evidence it is perhaps well that the federal court has not yet begun to hold its sessions on the second floor of the federal building.

In its argument plaintiff contends that the ordinance is discriminatory because two "gasoline curb pumps" have been installed on the street in question. The contention is not sound. There is a vast difference between a "gasoline curb pump," a temporary and transitory contrivance, installed before the passage of the ordinance in question, and a permanent "oil-filling station," to be used for selling "oils, grease, and gasoline." They are not in the same class, nor can a comparison properly be drawn between a "gasoline curb pump" that was first brought into use by the pioneer oil sellers, and now almost obsolete, and a pretentious, modern and permanent "gas-filling station," the last word in architectural expression and design of the modern oil vender.

The majority opinion points out that the automobile, that indispensable adjunct of modern and social life, has come to stay. Likewise the pedestrian. And some inalienable rights remain to him. Among these is the right freely to walk in peace and in safety on either side of a public street that he may choose. It is obvious that an oil-filling station, located on a street corner in the bus-

iness center, no matter how attractive, when newly built, in architectural design and appearance, with cars darting in and darting out, across a greasy sidewalk, adds to the perils of the passing pedestrian, of whatever age or sex. But in its brief plaintiff makes this argument in extenuation of its persistent and unwelcome intrusion. It says:

"The slight inconvenience to pedestrians using the sidewalks on the same side of the street, although they could use the ones on the opposite side, must as a public necessity be submitted to."

Doubtless the same argument, upon which comment may well be spared, was advanced in the district court and was noted by the trial judge.

It has often been said that the police power is to the state what self-protection is to the citizen. It is for the city council then, under that beneficent power, reasonably to determine in the first instance in what district certain occupations, and the erection of certain structures, shall be prohibited. Under the police power the city council may determine too, whether the perils of automobile traffic to pedestrians upon the main street intersections, shall be diminished and the safety of the citizens enhanced, by preventing the establishment on its prominent street corners of such oil-filling stations and at such locations as the present case contemplates. And if complaint is made, as here made, and notwithstanding we must try the case here de novo, we have held, in the past, that the judgment of the district court, in an equity case, should be given great weight by this court when sitting as a court of review. And this case is not an exception. The question is: Has the council been unreasonable in its exercise of the police power? I submit that it does not clearly so appear. I fear that the fact has been overlooked that a reasonable exercise of the police power inheres in the city council.

A citizen should not be permitted so to use his property as to thereby create a nuisance, nor so to use it that it will become a menace to the personal and physical safety of others. Plainly speaking, plaintiff has been given permission to do both. In support of the views expressed herein these authorities are cited: *Ex parte Wolf*, 14 Neb. 24, 14 N. W. 660; *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 14 L. R. A. (N. S.) 292, 126 Am. St. Rep. 651; *In re Anderson*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; *State v. Withnell*, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. (N. S.) 898; 2 *McQuillin*, *Municipal Corporations*, § 732, and volume 3, §§ 890-924.

For the reasons herein stated, I respectfully dissent from the opinion of the majority of the court,

**CARTER TRANSFER & STORAGE CO. v.
CARTER et al. (No. 21452.)**

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Trade-marks and trade-names and unfair competition $\S$ 93(3)—Denial of purpose to mislead of little weight where names similar.

Where an established business with a trade-name representing good will is drawn into competition by a recent rival with a name so similar and so displayed as to be likely to mislead the former's customers and the public, the denial of a purpose to do so has little weight in the defense of a suit to prevent such a wrong.

2. Trade-marks and trade-names and unfair competition $\S$ 73(1) — Defendants may not use name, "Carter Brothers Transfer" to compete with Carter Transfer & Storage Company.

Equity may enjoin the use of a truck painted white with the name "Carter Brothers Transfer" displayed thereon in red letters, where it has recently come into competition with a formerly established business built up under the trade-name of the "Carter Transfer & Storage Company," a trade-name representing good will, and displayed in red letters on trucks painted white, the similarity being such as to be likely to mislead the public and the customers of the latter company.

Appeal from District Court, Lancaster County; Clements, Judge.

Suit by the Carter Transfer & Storage Company against Allen S. Carter and another. From a judgment of dismissal, plaintiffs appeals. Reversed and remanded, with instructions.

Fred C. Foster and O. K. Perrin, both of Lincoln, for appellant.

Stewart, Perry & Stewart, of Lincoln, for appellees.

Heard before MORRISSEY, C. J., and DAY, DEAN, LETTON, and ROSE, JJ.

PER CURIAM. This is a suit in equity to enjoin Allen S. Carter and David O. Carter, defendants, from using in Lincoln for the transportation of freight for hire any truck, van, or other vehicle, while painted white, with the name "Carter Brothers Transfer" thereon in red. The trial court dismissed the suit, and plaintiffs have appealed.

The controlling facts are not in dispute. There are two plaintiffs and both are corporations. For more than 12 years one of the plaintiffs, the "Carter Transfer & Storage Company," was engaged in the business of transporting freight for hire in Lincoln and vicinity. Its name appeared on its letter heads and other stationery. It had over 500 contracts in its corporate name. It had

many trucks and vans which it used on the public streets and at the railway stations. These were painted white and there was displayed thereon in red letters the trade-name of "Carter Transfer & Storage Company." In that name the corporation acquired a good reputation and established an extensive, profitable business. Prior to 1919, no one by the name of Carter, except those connected with the Carter Transfer & Storage Company, had been engaged in the business of transporting freight for hire in Lincoln. The other plaintiff, the Globe Delivery Company, was and is also engaged in the business of transporting freight for hire in Lincoln. In April, 1919, the business of the two corporations was consolidated and it has since been carried on partly in the name of one and partly in the name of the other. The principal owners of the stock of the Globe Delivery bought the capital stock, business and property of the Carter Transfer & Storage Company, including its good will and the right to use its name, letter heads, other stationery, trucks and vans. The original contracts for the transportation of freight were carried out in the name of the Carter Transfer & Storage Company and its letter heads and other stationery have been used for that purpose. Some of the vans and trucks as originally painted white with the trade-name displayed thereon in red have been continuously used without change since the consolidation. Other vans and trucks now in use bear the names of both corporations, the Globe Delivery Company as successor to the Carter Transfer & Storage Company. In this manner the new management has sought to retain as property owned by plaintiffs the good will of both corporations. Prior to the consolidation each of the two defendants, Allen S. Carter and David O. Carter, had been connected with the Carter Transfer & Storage Company in one capacity or another as stockholder, officer or employee. They are sons of the founder of the business enterprise conducted in that corporate name.

While the business of plaintiffs was being conducted in the names and in the manner outlined, defendants engaged in the same business in the same place and used on the public streets of Lincoln and at the railway stations a truck painted white with the name "Carter Brothers Transfer" displayed thereon in red letters.

Defendants plead and testify that they are not using the name "Carter Brothers Transfer" and their truck for the purpose of deceiving the public and the customers of plaintiffs or for the purpose of diverting the business of plaintiffs to themselves. They further plead and testify that they are engaged in the business of transporting freight for hire under their own name, as they claim a right to do, operating their truck honestly in

good faith for the purpose of doing a legitimate business.

The uncontradicted proof, nevertheless, shows that at least two regular customers of the "Carter Transfer & Storage Company" gave their business to "Carter Brothers Transfer" after the latter in that name became a competitor, that the mail of the two rivals is often confused, and that freight is sometimes mixed at the railway stations. Defendants have not been contented to use their own names without employing words in the name of their competitor or without imitating the latter's method of display. They have utilized their patronymic with "Brothers" and "Transfer" in red letters on a white background on their truck. As thus displayed before the public there is a marked similarity between the name "Carter Transfer & Storage Company" and "Carter Brothers Transfer." Without regard to the intentions of defendants the similarity is well calculated to mislead the public and customers of plaintiffs into believing that "Carter Brothers Transfer," thus displayed on the truck, is the name of the identical business established by the "Carter Transfer & Storage Company" during years of rectitude and efficient service.

[1] Good will in connection with a business is property. The owner of a business and of the property used in conducting it is the owner of the good will. The name is the trade designation of the business to which the good will attaches. The unfair use of a new artificial name by competitors, where the effect is to transfer to them good will of a business previously established by others under a similar trade-name, is a misappropriation of property. The good will of the Carter Transfer & Storage Company belongs to plaintiffs, and not to defendants. It is intangible property which a court of equity may protect. The modern rule, founded on business integrity and fair competition and supported by the better reasoning, is: Where an established business with a trade-name representing good will is drawn into competition by a recent rival with a name so similar and so displayed as to be likely to mislead the former's customers and the public, the denial of a purpose to do so has little weight in the defense of a suit to prevent such a wrong. 26 R. C. L. 873, § 51, 885, § 60; Payn's Sons Tobacco Co. v. Payette, 86 Misc. Rep. 276, 149 N. Y. Supp. 183; Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. (N. S.) 960, and note; W. B. Mfg. Co. v. Rubenstein, 236 Mass. 215, 128 N. E. 21, 11 A. L. R. 1283; Kyle v. Perfection Mattress Co., 127 Ala. 39, 28 South. 545, 50 L. R. A. 628, 85 Am. St. Rep. 78; Hudson v. Osborne, 39 L. J. (Eng.) 79.

[2] The undisputed evidence shows that the name adopted by defendants and their manner of displaying it on their truck will

quite likely mislead the public and customers of plaintiffs to the injury of the latter. Without questioning the motives or the honesty of defendants, who no doubt had an honorable part in building up the business of the Carter Transfer & Storage Company, a court of equity should hold that they have made no defense to this suit.

The judgment is reversed and the cause remanded, with an instruction to the district court to grant an injunction according to the prayer of the petition of plaintiffs.

Reversed, with directions.

WILLIAMS v. WILLIAMS. (No. 21533.) (Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Homestead §213—Pleading held sufficient to set forth selection of homestead from wife's separate property.

A pleading sufficiently sets forth the selection of the homestead from the wife's separate property, with her consent, where it is alleged therein that after their marriage the parties entered upon the tract in question pursuant to a prior agreement to make it their permanent home and joint homestead, that improvements were constructed sufficient for that purpose, and that it continued for several years to be the family residence.

2. Husband and wife §205(4)—Wife cannot withdraw from homestead after selection and sue husband in ejectment.

Where the homestead has been selected with the wife's consent, from her separate property, she cannot withdraw from the homestead and maintain ejectment against her husband, who remains in occupancy thereof, so long as the marital relation continues.

Appeal from District Court, Morrill County; Hobart, Judge.

Action by Gertie J. Williams against Ellis E. Williams. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Fawcett & Mockett, of Lincoln, and C. G. Perry, of Bridgeport, for appellant.

Williams, Hurd & Neighbors, of Bridgeport, for appellee.

DORSEY, C. Gertie J. Williams, the appellee, brought ejectment against her husband, the appellant, to recover possession of a quarter section of land in Morrill county. Her petition contained simply the formal allegations that she had a legal interest in, and was entitled to the possession of, the land, and that since January, 1916, the appellant had deprived her of the possession thereof.

The appellant's answer, in addition to a

general denial, set forth that the parties were married in 1911; that before the marriage the appellee had made entry and established her residence, in a small frame shack, upon the land under the government homestead laws; that they were married during a "leave of absence" which she had obtained, and it was agreed that immediately after the marriage they should return to and live upon her homestead, that the same should be their joint homestead, and that the appellant should break out, seed and cultivate the land and construct such improvements thereon as would make it a permanent and habitable home; that as soon as they were married they did move upon the land, which the appellant improved as he had promised, at his own expense and bestowing his own labor thereupon, making it a suitable and comfortable home; that he and his wife and the two children born to them lived there, in harmony, until January, 1916, when without just cause she left the state and has never since returned, although the appellant desired and repeatedly requested her so to do; that by reason of the foregoing he acquired a legal estate in the land of which the appellee could not deprive him, that she was not entitled to separate possession and could not maintain the action.

In her reply the appellee admitted the marriage, and that she had made entry and established her residence upon the land as alleged, but denied all other averments of the answer. For further reply she alleged that she had been compelled to leave because of his cruelty; that the appellant told her to get out if she did not like it, and since her departure told her not to come back; that it was for those reasons that she remained away from her home, and that it was impossible for them to live together.

The case coming on for trial, the appellant's motion for judgment upon the pleadings was overruled, and the trial court sustained the objection interposed by counsel for the appellee to the introduction of any testimony on the part of the appellant for the reason that his answer did not constitute a defense. Judgment was then entered in favor of the appellee for the possession of the premises, and this appeal resulted.

[1] The point upon which the case turned in the court below being, in effect, a demurrer to the answer, the issue here is whether or not the facts set forth therein would, if proved, support the husband's right to remain in possession of the wife's separate property when she is living apart from him and demands that he be ousted. The appellant's contention is that there was a selection of the land in question as the family homestead under section 3077, Rev. St. 1913, providing that the homestead may be selected from the separate property of the husband, or, with the consent of the wife, from her

separate property; that the husband acquired a vested right of homestead therein not subject to be defeated by the wife's voluntary removal from the family residence. We shall first inquire whether or not the appellant's answer sufficiently sets forth a selection of the land in controversy, with the appellee's consent, as the homestead, and second, whether, if the allegations of the answer are sufficient in that respect, the wife may terminate the husband's homestead right and dispossess him, in case she withdraws from the family domicile of her volition.

As to the sufficiency of the pleading, it was averred in the answer, in substance, that the parties entered upon the land after their marriage in pursuance of a prior agreement to make it their permanent home and joint homestead; that improvements were constructed sufficient for that purpose, and that it continued to be the family residence for four years. These allegations, we think, are sufficient to set out a selection of the homestead from the wife's separate property with her consent, in view of the rule that such consent may be presumed from the occupancy of the premises as a family home. *Hobson v. Huxtable*, 79 Neb. 334, 112 N. W. 658.

[2] Assuming that the wife's consent to the selection of the homestead was properly pleaded, there remains the question whether, if she concludes to depart from the home for whatever reason, she may put an end to the homestead character of the premises so as to entitle her to regain exclusive possession thereof by means of an action of ejectment against her husband, on the theory that he is wrongfully withholding her separate property. Counsel for the appellee cite the following from *Cook v. Cook*, 125 Ala. 583, 27 South. 918, 82 Am. St. Rep. 264:

"Nor is it of consequence that the land of which recovery is sought was at one time occupied by the husband and wife with their children as a homestead, nor that the husband and children still reside thereon, nor that the defendant at the time of the trial is willing and all along has been for the wife to return to this homestead and occupy it jointly with him. He has no right to compel her to let him into joint possession or occupation of any of her land, nor any right to exclude her from the possession and occupation altogether, unless she assents to joint possession and occupation with him. There is no law to compel a wife to live with her husband on her land or on his. There is no legal prohibition upon her separating from him and living apart. And having separated from him and left her home in his possession, she is entitled to recover it from him as if he were a stranger. To hold otherwise would be to give the husband rights and estates in the wife's lands which our statutes not only do not provide for, but expressly provide against."

Other cases cited in support of the same reasoning are *Buckingham v. Buckingham*,

81 Mich. 89, 45 N. W. 504; *Orater v. Orater*, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161. To these may be added *McDuff v. McDuff* (Cal. App.) 187 Pac. 87. It seems, however, that the conclusion of the Michigan Supreme Court in *Buckingham v. Buckingham*, supra, is founded, in part, upon the fact that, under the laws of that state, married women are given "such absolute right to the disposition of their own separate property that she may convey the homestead by deed without the husband's joining in the instrument;" that therefore the wife may abandon her husband and sue him in ejectment. In Nebraska, on the other hand, it is expressly provided by statute that the homestead cannot be conveyed or incumbered unless by an instrument signed and acknowledged by both spouses. Rev. St. 1913, sec. 3079.

The statutory provision just cited illustrates the character of the homestead right in this jurisdiction of one spouse in land selected as the homestead out of the property of the other. Once vested, it cannot be alienated otherwise than by a joint deed executed and acknowledged by both. It is an estate or interest, and not simply a right of occupancy dependent upon the whim of the spouse out of whose property it has been selected. True, the property may lose its homestead character by abandonment, but "neither spouse can abandon the homestead for the other without his or her free consent." *Weatherington v. Smith*, 77 Neb. 363, 109 N. W. 381, 13 L. R. A. (N. S.) 430, 124 Am. St. Rep. 855. The appellee's theory is that, notwithstanding the wife's consent to the selection of her separate property as the homestead, she may at any time thereafter, by removing from the homestead and thus making it no longer the joint residence of her husband and herself, terminate its homestead character and resume the independent control over it which the statute gives to every married woman over her separate property. This, we are convinced, is inconsistent with the interpretation heretofore placed by this court upon the homestead right of one spouse in the property of the other selected as such. "Where a homestead has been selected by husband and wife from the separate property of the wife, the wife cannot by a conveyance of the property deprive the husband of his homestead right therein while the marriage relation exists." *Miller v. Paustian*, 79 Neb. 196, 112 N. W. 342. That which she is not permitted to do by a conveyance, it would be illogical to hold that she could accomplish by her mere withdrawal from the family home.

It is held in *Morrill v. Skinner*, 57 Neb. 164, 77 N. W. 375, that the wife's right of homestead in the husband's property is not defeated, where she remains in occupancy, and

the husband abandons her and lives elsewhere. In view of the general policy of our laws in recognizing the equality and reciprocal property rights of both sexes, it follows, in our opinion, that the husband's right of homestead in the wife's property must be similarly protected. Where the homestead has been selected, with the wife's consent, from her separate property, she cannot withdraw from the homestead and maintain ejectment against her husband, who remains in occupancy thereof, so long as the marital relations continue.

The pleadings disclose a controversy as to which of the parties is responsible for the wife's withdrawal from the family home, the husband asserting that it was without just cause, and the wife alleging that it was the result of his cruelty and misconduct. If that difficulty be irremediable, relief may be obtained in an appropriate action, and if a divorce should be granted to either party, the wife would immediately become entitled to the possession of her real estate. Rev. St. 1913, § 1579.

For the reasons stated, we recommend that the judgment be reversed and the action dismissed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the action dismissed, and this opinion is adopted by and made the opinion of the court.

Reversed and dismissed.

FISCHER v. FISCHER et al. (No. 21564.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. **Frauds, statute of** § 5—Agreement by man to make child of woman equal heir with others held void.

A verbal contract whereby a widower with five minor children promises an unmarried woman, pregnant by a third person, that if she will marry him and be a mother to his children, he will make her child, when born, an equal heir with the others in his estate, is void under the third subdivision of section 2630, Rev. St. 1913.

2. **Frauds, statute of** § 5—Agreement to marry and care for man's children held within the statute of frauds.

Her agreement to marry and to care for his children constitute one entire contract made "upon consideration of marriage," and therefore within the statute.

3. **Frauds, statute of** § 129(1) — Marriage held not such part performance as would take contract without statute of frauds.

Neither the marriage nor, in addition, her compliance with the other terms of the con-

tract constitute such part performance as will require the enforcement thereof upon the ground that a refusal would work a fraud upon her.

4. Parent and child §14—Stepmother cannot be deemed to owe stepchildren no duty.

Without attempting to define the duty a stepmother owes to the children of her husband by a former wife, the proposition that she owes them no duty finds no support in nature, logic, or law.

Appeal from District Court, Adams County; Dilworth, Judge.

Action by William Deter Fischer against Gotthardt S. Fischer and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Halligan, Beatty & Halligan, of North Platte, for appellant.

Bruckman & Paulson, of Hastings, for appellees.

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG, and ROSE, JJ., and ALLEN and REDICK, District Judges.

REDICK, District Judge. This is an action in equity to compel the specific performance of an oral antenuptial agreement which plaintiff claims was made by his mother, Margaret Fischer, with the father of the defendants, Gotthardt Fisher. The circumstances out of which the agreement is alleged to have arisen, in brief, are as follows: Gotthardt Fischer had been a widower for about 2 years, having five minor children ranging from 6 to 14 years. Plaintiff's mother was an unmarried woman of 19, but pregnant of the plaintiff, whose father was other than Gotthardt. Through the efforts of friends Gotthardt and plaintiff's mother were introduced, and after three days' acquaintance, and upon urgent solicitation of Gotthardt, were married on or about January 7, 1882, and plaintiff was born May 10, thereafter.

The plaintiff states that the contract was that, in consideration of his mother marrying Gotthardt and being a mother to his children, taking care of them as her own until they reached manhood, the said Gotthardt would make the plaintiff an equal heir with the minor children of Gotthardt; plaintiff, therefore, claiming a one-sixth interest in the property of his stepfather, who by will gave it to his five children, expressly excluding plaintiff and two children of the Gotthardt marriage from all participation therein.

The only evidence of the contract comes from the mother, who, having refused the offer "because I was afraid I couldn't have a good home for my child, because the children would look down upon him," states the contract as contained in the answer to the question:

"And what did he say about that? A. He says that they wouldn't; that he would promise me that if I would marry him he would give my child his name, and a home, and no one should know that it was not his child, and that it should have the same right in everything as his children."

It also appears in the evidence that on May 19, 1911, the plaintiff's mother obtained a divorce from Gotthardt on the grounds of cruelty, and an allowance of \$4,000 permanent alimony.

[1-3] The defendants rely upon the statute of frauds as contained in section 2630, Rev. St. 1913, as follows:

"In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith. * * * Third. Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry"

—also that the decree for divorce and alimony operated as a rescission or cancellation of the contract.

Upon the mere reading of the statute and statement of the contract there would seem to be no question that the latter was clearly within the former. Where the supposed contract has nothing to rest upon as a consideration beyond the marriage, and even where there may be other considerations, but the real inducement was the marriage, there seems to be no conflict of opinion upon the proposition that the agreement is unenforceable. *Hunt v. Hunt*, 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 306; *Henry v. Henry*, 27 Ohio St. 121; *Mallory's Adm'r v. Mallory's Adm'r*, 92 Ky. 316, 17 S. W. 737; *Bradley v. Saddler*, 54 Ga. 681; *Dienst v. Dienst*, 175 Mich. 724, 141 N. W. 591; *Rowell v. Barber*, 142 Wis. 304, 125 N. W. 937, 27 L. R. A. (N. S.) 1140. The question has not been decided in this state.

Counsel for appellant, however, states the proposition in his brief as follows:

"An oral antenuptial agreement, fairly entered into between two parties, the consideration of which is the marriage of the parties, is not affected by the statute of frauds, when one of the parties in reliance thereon has married the other party, who has thereupon received, enjoyed and retained the benefits thereof, and where not to enforce such contract would be to perpetrate a fraud upon the innocent party."

The following cases are cited in support thereof, which will be considered in their order:

Moore v. Allen, 26 Colo. 197, 57 Pac. 698, 77 Am. St. Rep. 255, which holds that equity will not permit the statute to be made an instrument for the perpetration of a fraud, and that where the marriage has been induced by deception and artifice, a wife having entered into a relation from which she can-

not recede, the statute does not apply. The promise of the intended husband in that case was to convey to the wife certain real estate, and the fraud was claimed to arise from the fact that she had been given possession of the premises and had made lasting and valuable improvements thereon. It will therefore be noticed that there was some semblance of fraud entering into the contract, and the case belongs to that class in which the conscience of the chancellor is said to be touched by the peculiar hardships attendant upon a different decision. Moreover, the cases cited to support the decision fail to strengthen the application of the principle announced to the facts of that case. The first one, *Green v. Green*, 34 Kan. 740, 10 Pac. 156, 55 Am. St. Rep. 256, was another "hardship" case in which the plaintiff, a cripple, was induced to marry the mother of the defendants upon the representation that she owned a farm, and that its proceeds should go to their support after they were married so long as they lived. On the eve of the marriage she executed deeds of the farm, constituting all of her property, to her children by the former marriage for the consideration of love and affection, and without the knowledge of the plaintiff, and it was held that such deed was a fraud upon the rights of the husband and that he might have them set aside. The case presented a situation of active artifice and deception.

Peek v. Peek, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244. In this case the court held marriage is not of itself part performance, and say:

"But if the marriage was brought about by a fraudulent contrivance, as by a promise to have the conveyance executed, and the evasion of such promise by false representations, a court of equity will decree a conveyance."

The artifice used in that case was that the day before the marriage the intended husband called the plaintiff to the hotel for the purpose of executing the settlement agreed upon, and after leaving her for a few minutes returned, saying that a Mr. McKenny was out of town and it could not be attended to that evening; the next "he said he would have the deeds drawn, and he went up and said that they were all busy at the courthouse, and he couldn't have it done at that time, and he called on me again with the same story—that the gentlemen at the courthouse were busy, and that he could not have the deeds fixed, and that I could rest contented." On the very day that he was making these excuses he executed a deed conveying the property to his son—another case of positive fraud.

Petty v. Petty, 4 B. Mon. (Ky.) 215, 39 Am. Dec. 501. In this case the court refused to enforce the antenuptial contract as being within the terms of the statute, but the deeds which the husband had made to his

children a few days before the marriage were set aside as a fraud upon the marital rights of the wife to the extent of her dower interest in her husband's property.

Glass v. Hulbert, 102 Mass. 24, 39, 3 Am. Rep. 418. This case is not in point, but is cited for the following quotation from the opinion:

"The marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irrevocable change of situation, that, if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be, executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute."

It will be noted that, "if procured by artifice," the marriage settlement may be enforced.

The plaintiff also cites *Weld v. Weld*, 71 Kan. 622, 81 Pac. 183, 114 Am. St. Rep. 517. The intended wife being indebted to the intended husband on a note secured by mortgage, the parol agreement was that the marriage should operate as a satisfaction of the note, and the court held that there was no question of part performance, and that the marriage constituted payment, and there was no question of the statute of frauds, the entire contract having been executed.

Also *Knights of Pythias v. Ferrell*, 83 Kan. 491, 112 Pac. 155, 33 L. R. A. (N. S.) 777. Here the parol antenuptial contract was that he would cause the wife's name to be inserted as a beneficiary with his children by a former marriage, and the change was actually made, and the court held that the contract was fully executed and the statute did not apply, and that a subsequent change of the certificate omitting the name of plaintiff as beneficiary, without her knowledge or consent, would not defeat her interest therein.

And the last case cited on this point, *Freitas v. Freitas*, 31 Cal. App. 16, 19, 159 Pac. 611, 613, is to the same effect as *Knights of Pythias v. Ferrell*.

In none of the above cases was it held that the parol contract was taken out of the statute of frauds, except where it was shown that the complaining party was induced to enter into the marriage contract by some artifice and deception; and no case has been brought to our attention holding that the mere failure to keep the promise made in the agreement amounts to artifice or fraud. The case before us presents no fact or circumstance of the character just mentioned which would justify a court of equity in disregarding the statute.

[4] The plaintiff, however, contends that the marriage was not the sole consideration for the contract, and says:

"There was no duty upon Mrs. Fischer to rear and care for the children of Gotthardt Fischer, and her agreement to do so, when

fully performed and carried out, was a sufficient consideration to support the agreement of Gotthardt Fischer to make her child an equal heir with his own children."

And in support of this proposition he cites *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404. But in that case the court held that the contract was fully executed, and therefore not within the statute; the conveyance called for by the contract having been duly executed. If in the instant case the agreement had been that Gotthardt should make a conveyance to plaintiff upon his being born, and such conveyance had been executed and delivered, the case cited would be in point, and the children of Gotthardt would be unable to plead the statute because the contract was fully executed. The court, however, held that, although marriage furnished the inducement for the contract, the consideration for the conveyance of the land by the intended wife was the provision for the support and comfort of the wife, and not the marriage of the parties; but, in view of the undoubted complete execution of the contract by both parties, this holding must be considered obiter. And, moreover, the contrary has been held in the case of *Henry v. Henry*, 27 Ohio St. 122, where the question was squarely presented. See, also, *Dienst v. Dienst*, supra, and *Rowell v. Barber*, supra.

Plaintiff also cites in this connection, 21 Cyc. 1152, to the effect that a husband is under no legal obligation to support the children of his wife by a former marriage, which is undoubtedly correct, barring a great many exceptions, particularly in cases where the children live with their stepfather as a part of his family. Neither is the wife legally liable for the support of the husband's children. But we would be loath to conclude from such premises that a woman marrying a widower with minor children owed no duty of nurture and maternal advice to them. Plaintiff has cited us to no authority supporting such proposition, and we are pleased to say that our researches have revealed none. So long as the widowed with children are permitted to remarry, we think the doctrine contended for would be contrary to natural instincts and public policy. We are clearly of the opinion that the agreement of plaintiff's mother to care for and be a mother to the minor children of Gotthardt Fischer furnishes no good or valuable consideration for the contract; but, if it did, it was so connected with the contract of marriage as to make the contract an entirety, and so may not be considered an outside or independent consideration.

We have assumed that the contract in question is definite enough, and that the plaintiff has a right to sue upon it as having been made for his benefit, and, in view of

our conclusion upon the question of the statute of frauds, it will not be necessary to discuss other matters presented by the briefs.

We conclude that the contract sought to be enforced is void under the statute of frauds, and that the decree of the lower court is right, and is

Affirmed.

GILBERT v. ROTHE et al. (No. 21606.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Action $\S$ 25(2) — Petition held to state cause of action at law.

A petition alleging facts which show that plaintiff was the owner of the merchandise in a store conducted by him, and that he was wrongfully dispossessed by defendants who illegally seized the merchandise and detained the stock five days, thus causing damages in a specific amount pleaded, held to state a cause of action for trespass cognizable in a court of law, notwithstanding an unnecessary plea that defendants acted pursuant to a conspiracy to violate an injunction granted by a court of equity.

2. Sheriffs and constables $\S$ 113(1)—Sheriff levying on wife's property under execution against her husband is liable.

A sheriff who levies on property of a wife under an execution against her husband is liable for resulting damages.

3. Process $\S$ 168—Judgment creditor knowingly advising or ratifying abuse of process resulting in wrongful seizure is liable.

A judgment creditor who knowingly advises or ratifies an abuse of process resulting in a wrongful seizure of personal property to satisfy the judgment is liable as a trespasser.

4. Sheriffs and constables $\S$ 139(1)—Mental suffering is not an element in damage for trespass for seizing merchandise in absence of fraud, malice or other aggravating circumstance.

In the absence of fraud, malice or other aggravating circumstances, mental suffering is not an element of damages for a trespass resulting in a sheriff's temporary seizure of personal property.

5. Sheriffs and constables $\S$ 139(1)—Measure of damage for trespass and seizure of personal property is the actual pecuniary damage caused in the absence of malice, fraud or aggravating circumstances.

In the absence of malice, fraud or other aggravating circumstances, the measure of recovery for a trespass resulting in the seizure and temporary detention of personal property under an execution is the actual pecuniary damage caused by such unauthorized acts.

6. Sheriffs and constables $\S$ 139(1) — On wrongful seizure of merchandise in store, loss of profits and good will are provable as elements of damage.

Where a store is closed by the wrongful act of a sheriff in seizing and in temporarily de-

taining the merchandise therein under an execution, loss of profits and loss of good will are provable as elements of damage in an action of trespass.

7. Sheriffs and constables $\S$ 138(3)—To justify recovery for trespass by seizing merchandise in store, evidence as to loss of good will and profits must contain sufficient data for estimating actual damages.

To justify a substantial recovery for the loss of good will and for the loss of profits in an action of trespass against a sheriff for the seizure and temporary detention of a stock of merchandise in a store, the evidence must contain sufficient data to enable the jury, with a reasonable degree of certainty and exactness, to estimate the actual damages.

8. Evidence $\S$ 474(19)—Owner of merchandise may testify to its value.

The owner of a stock of merchandise may, as such owner, if he knows its value, testify thereto.

Appeal from District Court, Lancaster County; Clements, Judge.

Action by Amanda K. Gilbert against George Rothe and others. From judgment in favor of the plaintiff, defendants appeal and plaintiff files cross-appeal. Reversed and remanded.

A. G. Wolfenbarger, of Lincoln, for appellants.

Ross P. Anderson and R. J. Greene, both of Lincoln, for appellee.

Heard before MORRISSEY, C. J., and ALDRICH, LETTON, ROSE, DAY and DEAN, JJ.

ROSE, J. This is an action by Amanda K. Gilbert, plaintiff, to recover damages resulting from the illegal acts of defendants in seizing the stock of goods in a bookstore owned and conducted by her in Lincoln, in dispossessing her, and in detaining her property five days before returning it to her. The items of damages pleaded are: Injuring and destroying stock, \$1,000; destroying plaintiff's business from October 1, 1918, to October 6, 1918, and injuring it for a year thereafter, \$1,000; "mortification, humiliations, and disgrace," \$1,000; total, \$3,000. Defendant Lorenzo A. Simmons was the sheriff and defendant George Rothe was deputy sheriff. They seized and detained plaintiff's property under an execution issued by direction of defendant Gertrude J. Cooper. The bookstore was formerly owned by David B. Gilbert, husband of plaintiff, but she bought it for \$1,910 in March, 1918, at the foreclosure sale of a chattel mortgage which he had executed. The husband, as principal debtor, and plaintiff had previously executed in favor of defendant Cooper a note for \$2,500 and had secured the debt by a mortgage on a lot in Lincoln. The amount due on the real estate mortgage March 22, 1918,

when a decree of foreclosure was rendered, was \$2,731.47. After the mortgaged lot had been sold at sheriff's sale to satisfy the decree, a balance of \$485.45 due on the secured note remained unpaid. Though plaintiff, the wife of the principal debtor, had not bound her separate estate for the payment of her husband's debt, and was not personally liable therefor, a deficiency judgment was rendered against both her and her husband for \$485.45, August 3, 1918. On this deficiency judgment defendant Cooper caused an execution to be issued to the sheriff August 13, 1918. To prevent proceedings under the writ a restraining order granted by the district court was served on defendant Cooper August 29, 1918. It was while the restraining order was in force that the sheriff dispossessed plaintiff and seized and detained her stock of goods. The judge presiding in the equity court ordered the release of the levy and the return of the goods October 6, 1918. Later the deficiency judgment was set aside in the equity court as to plaintiff herein and a perpetual injunction was granted to prevent defendants herein from proceeding under the execution. In the present case defendants demurred to the petition on the ground, among others, that the action is one to recover damages for the violation of an injunction and cognizable only in the equity court where the injunction was granted. The demurrer was overruled, but was renewed in an answer, admitting that plaintiff was the owner of the stock of goods when seized, and denying that defendants committed any unlawful act resulting in damage to plaintiff. The trial court directed a nonsuit as to the plea for "mortification, humiliation, and disgrace," and instructed the jury that plaintiff, on the admissions and the undisputed evidence, was entitled to recover nominal damages, at least, and such actual pecuniary damages, if any, as she had sustained as a result of the seizure and detention of her property. From a judgment in favor of plaintiff for \$1,000, defendants have appealed.

[1] The litigants do not agree on the nature of the action. Defendants argue that their demurrer should have been sustained, because, under their interpretation of the petition, they are sued for violating an injunction and consequently are answerable only in equity for the wrongs pleaded. Plaintiff calls her case an action at law to recover damages for trespass resulting in the seizure and detention of her personal property. Viewed in that light, she unnecessarily pleaded a conspiracy by defendants to violate the restraining order and to deprive her of her property. The petition nevertheless alleges, in substance, that she was the owner of the stock of goods, that defendants wrongfully dispossessed her and seized her merchandise, and that they il-

legally detained it for five days, thus causing the damages pleaded. Under the liberal construction of pleadings authorized by the code, the trial court properly held that plaintiff stated a cause of action for trespass. With that understanding, the case was tried as an action at law, and defendants have no substantial reason to complain of the overruling of their demurrer or of the action of the trial court in assuming jurisdiction as a court of law.

A more serious question is raised by the contention that there is no competent evidence sufficient to sustain a verdict in favor of plaintiff for \$1,000. The store was wrongfully closed for five days during a busy season and, to the extent of nominal damages, at least, there was no defense to plaintiff's claim. The amount of the actual damages, however, depends on competent evidence. The principles of law applicable to a case of this kind are generally well settled.

[2] A sheriff who levies on property of a wife under an execution against her husband is liable for resulting damages.

[3] A judgment creditor who knowingly advises or ratifies an abuse of process resulting in a wrongful seizure of personal property to satisfy the judgment is liable as a trespasser. *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664.

[4] In the absence of fraud, malice or other aggravating circumstances, mental suffering is not an element of damages for a trespass resulting in a sheriff's temporary seizure of personal property. *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664.

[5] In the absence of malice, fraud or other aggravating circumstances, the measure of recovery for a trespass resulting in the seizure and temporary detention of personal property under an execution is the actual pecuniary damage caused by such unauthorized acts. *Murray v. Mace*, 41 Neb. 60, 59 N. W. 387, 43 Am. St. Rep. 664.

[6] Where a store is closed by the wrongful act of a sheriff in seizing and in temporarily detaining the merchandise therein under an execution, loss of profits and loss of good will are provable as elements of damage in an action of trespass. 12 R. O. L. 996, 997; *Kyd v. Cook*, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661.

[7] To justify a substantial recovery for the loss of good will and for the loss of profits in an action of trespass against a sheriff for the seizure and temporary detention of a stock of merchandise in a store, the evidence must contain sufficient data to enable the jury, with a reasonable degree of certainty and exactness, to estimate the ac-

tual damages. 12 R. O. L. 997; *Kyd v. Cook*, 56 Neb. 71, 76 N. W. 524, 71 Am. St. Rep. 661; *Sessinghaus Milling Co. v. Hanebrink*, 247 Mo. 212, 152 S. W. 354, Ann. Cas. 1914B, 875; *Burckhardt v. Burckhardt*, 42 Ohio St. 474, 51 Am. Rep. 842; *Nightingale v. Scannell*, 18 Cal. 315; *Shaw v. Jones, Newton & Co.*, 133 Ga. 446, 66 S. E. 240.

[8] The owner of a stock of merchandise may, as such owner, if he knows its value, testify thereto. *Jensen v. Palatine Ins. Co.*, 81 Neb. 523, 116 N. W. 286; *Hespen v. Union P. R. Co.*, 82 Neb. 495, 118 N. W. 98; *Neal v. Missouri P. R. Co.*, 98 Neb. 460, 153 N. W. 492.

In the present case there was no foundation for the recovery of damages for "mortification, humiliation, and disgrace," and the trial court properly withdrew that issue from the jury. The other claims for damages were: Injuring and destroying stock, \$1,000, and destroying plaintiff's business for five days and injuring it for a year, \$1,000. There was no proof of the extent to which any particular article of property was injured, or of the value of any missing or destroyed property. There was no evidence to support a finding that any article was either taken from the stock or physically destroyed as a result of seizure and detention. The extent of actual damages depends on the testimony of plaintiff and her husband. Plaintiff was a teacher and had no personal knowledge of the value of her merchandise, but, as owner, she was permitted to testify that the value of the stock, when seized, was \$5,000, and, when returned, \$3,000. Her husband, who had qualified himself as a witness, testified to the same effect. The testimony of both, however, shows that the principal elements of actual pecuniary damages were loss of profits and loss of good will. The proofs contained no direct evidence showing the extent of the loss of profits, or of the loss of good will, or of items comprising either. Both of these elements are susceptible of competent proof directed specifically thereto. For the failure to adduce such evidence no reason is given. The jury were left without sufficient data to enable them, with a reasonable degree of certainty and exactness, to estimate the actual damages based on the loss of profits and the loss of good will. Under the circumstances of this case general opinions of value before and after seizure do not take the place of proper data. The judgment of \$1,000 is not supported by sufficient competent evidence. It is therefore reversed and the cause remanded for further proceedings.

Reversed and remanded.

FELLERS v. HOWE. (No. 21649.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Trial $\S$ 296(2)—If two instructions are so related that if one is upheld the other becomes harmless error, they will be construed together and upheld.

Where exceptions are taken to two certain instructions given by the trial court, and it appears that said instructions bear such relation to each other that if one is upheld the other, at most, becomes harmless error, said instructions will be construed together, and upon sustaining the former the exceptions to the latter will likewise be overruled.

2. Pleading $\S$ 34(4)—Construed most strongly against pleader where no complaint made by either party.

In the construction of certain allegations in a pleading, to the sufficiency of which, in so far as they purport to state the fact intended by the pleader, no complaint is made by either party, the rule that it will be taken most strongly against the pleader will be applied, and the general rule that the allegation of a pleading shall be liberally construed with a view to substantial justice between the parties does not apply.

3. Evidence $\S$ 527—Expert evidence as to effect on health of breach of promise held admissible.

Where, in a breach of promise suit, certain practicing physicians were permitted to testify generally as to what would be the natural effect upon the physical and nervous health of a woman who had experienced the disappointment caused by a broken marriage engagement by her affianced under conditions stated in the hypothetical question set forth in the opinion, held, for reasons stated in the opinion, no error.

4. Breach of marriage promise $\S$ 21—Trial $\S$ 207—Evidence as to defendant's reputation for wealth held admissible and properly limited by instruction.

Where, in an action for breach of promise to marry, evidence is introduced of the defendant's reputation for wealth in the community in which he lives, when, as in this case, it is followed by an instruction to the jury to the effect that such evidence was admitted, not for the purpose of proving the defendant's ability to pay damages, but only as tending to show the condition of life which the plaintiff will have secured by a consummation of the marriage contract, held no error. *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875.

5. Appeal and error $\S$ 1068(3)—Where verdict right, instructions technically erroneous will not reverse.

Although certain instructions of the trial court may be technically erroneous, yet the same will not work a reversal of the case, where the verdict is clearly right on the merits and the only one which could have been reached upon the particular issues involved.

6. Trial $\S$ 233(2)—Recital to jury of allegations not supported by evidence should be avoided.

Recital to the jury of allegations in a pleading to support which no evidence had been offered, although, as in the present case, not always sufficient to require a reversal of the case, is nevertheless bad practice and should be carefully avoided as far as possible.

7. Appeal and error $\S$ 1140((1)—Appellate court may affirm upon remittitur of excessive recovery.

Where the only reversible error appearing in the record is that the amount of the recovery is excessive, but not as the result of passion or prejudice of the jury, this court will affirm the judgment upon the excess being remitted.

(Additional Syllabus by Editorial Staff.)

8. Breach of marriage promise $\S$ 31—\$23,000 held excessive for breach of marriage promise.

In action for breach of marriage promise after an engagement of 20 years to a man worth between \$50,000 and \$75,000, a recovery of \$22,000 held excessive and will be reduced to \$17,000.

Aldrich, J., dissenting.

Appeal from District Court, Richardson County; Raper, Judge.

Action by Jennie Fellers against Louis Henry Howe for breach of contract to marry. Judgment for plaintiff, and defendant appeals. Affirmed on condition.

P. R. Halligan and T. J. Doyle, both of Lincoln, and Kelligar, Ferneau & Gagnon, of Falls City, for appellant.

Dort & Cain, of Falls City, and Stout, Rose Wells & Martin, of Omaha, for appellee.

Heard before MORRISSEY, C. J., ALDRICH and FLANSBURG, JJ., and DICKSON and TROUP, District Judges.

TROUP, District Judge. This is an action brought by Jennie Fellers, appellee, against Louis Henry Howe, appellant herein, to recover damages for an alleged breach of contract to marry. The issues, as contained in the pleadings, may be briefly summarized as follows:

The petition states that the acquaintance and friendship between plaintiff and defendant began when plaintiff was about 14 years of age, defendant being 10 years her senior; that the continuance of this friendship ripened into attachment and courtship and culminated in an engagement to marry in December, 1896; that from time to time from that date to September 7, 1918, defendant reiterated promises and agreement of marriage; that there was reliance thereon by plaintiff until September 7, 1918, and readiness upon part of plaintiff to marry at any time; that plaintiff gave her entire time and

affections to the defendant as to courting, and no attention to any other man, and defendant did likewise; that in contemplation of the marriage defendant gave plaintiff many gifts; that no exact time for the marriage was fixed because defendant stated that his mother was old and she and plaintiff would be unable to get along together, but that he would arrange it and they would soon be married, all of which statements plaintiff believed and relied upon and kept herself ready for the marriage at any time; that upon September 7, 1918, plaintiff requested the fulfillment of said agreement to marry, and defendant then and there, for the first time, refused to fulfil his promise and breached said agreement; that plaintiff had great affection for defendant; was at the time of filing the petition 41 years old, had lost her expectations of advantageous marriage and settlement in life and of maternity; she was injured in her feelings and affections, humiliated and rendered ill and nervous; that defendant during the courtship and engagement consulted with plaintiff, and she assisted, so far as possible, in helping to accumulate his property; that he is possessed of real estate and other property worth \$88,000 and plaintiff prays damages in the sum of \$50,000.

After a denial of all allegations in the petition not admitted the answer of defendant admits that the marriage contract or engagement existed between plaintiff and defendant for several years prior to the commencement of this action, but alleges that by mutual agreement no time was ever fixed for the marriage; that during the time defendant was conducting the farm plaintiff declined to marry defendant because she did not care to live on a farm with his father and mother; that after the death of his father, in 1901, defendant continued to live on the farm and care for his mother, aged 87 years; that plaintiff from time to time declined to marry defendant while he lived with his mother, giving as a reason therefor that she could not get along with his mother, and defendant refused to forego his duty to his mother; that in 1916 plaintiff became afflicted with gaitre and other ailments which permanently affected her health and rendered her an invalid, weak and emaciated in body, and of unsound mind, and unfit for the marriage relation; that she changed from a courteous and affectionate to a discourteous, cold and hostile disposition; and, in fact, plaintiff made it so disagreeable that defendant had no desire to visit or be with plaintiff; that in 1911 defendant was anxious to marry plaintiff and attempted to rent a house, but plaintiff again stated that she would not marry him while his mother was living, and reiterated this statement on various occasions up to and including their last conversation on the subject in September, 1918. The reply of plaintiff, denying all allegations in the an-

swer not admitted, admits plaintiff became affected with gaitre, but that same did not appear until the engagement had subsisted for 20 years, and that said ailment did not incapacitate her for marriage; that defendant at no time disavowed his promise to marry plaintiff, but, on the contrary, adhered to and repeated his promise during the entire period of her ailment; that the affliction was temporary and curable, and had been entirely, radically and permanently cured, as defendant knew, prior to his breach of the engagement September 7, 1918.

A trial of the action to a court and jury resulted in a verdict for the plaintiff for \$22,000. Judgment was rendered thereon, and defendant appeals.

The chief objection by the defendant, and that most urged, both in the oral argument and printed brief, is to the giving of instruction No. 18 by the trial court, whereby it is claimed the court withdrew from the consideration of the jury the averment of the answer: That during the early part of the year 1911 the defendant was anxious to marry the plaintiff; entered into negotiations to rent a home; that plaintiff told the defendant not to rent a home; that she would not marry him while his mother lived, and continually thereafter stated she would not marry him while his mother lived, and so stated in the last conversation in September, 1918. Instruction No. 18 is as follows:

"Touching the allegation of defendant's answer that in the year of 1911 defendant was anxious to marry plaintiff, and that plaintiff then stated to defendant that she would not marry him while his mother was living, you are instructed that this averment, when read in connection with an allegation contained elsewhere in the answer that, by mutual agreement between the plaintiff and defendant, no time was ever fixed when said marriage should take place, does not tender the issue that the plaintiff by her own conduct or statements terminated the contract or engagement to marry in said year."

We are of the opinion that much more importance is attached to this alleged error than the situation warrants. Instruction No. 18 should be considered in connection with instruction No. 16. Instruction No. 16 is as follows:

"You are instructed that it is the law of this state that facts alleged in the petition and admitted in the answer are to be taken as true and need not be supported by evidence. In this connection you are instructed that the plaintiff alleged the existence of a contract between plaintiff and defendant to marry and that defendant's answer 'admits that a marriage contract or engagement to marry existed between the plaintiff and defendant for several years prior to the commencement of this action.' You will therefore accept as true without proof the fact of a continuing 'marriage contract or engagement to marry' between the plaintiff and

defendant for a period of several years prior to the commencement of this action."

That part of defendant's answer to which instruction No. 16 refers is as follows:

"The defendant admits that a marriage contract or engagement to marry existed between the plaintiff and defendant for several years prior to the commencement of this action, but the defendant alleges, by mutual agreement between the plaintiff and the defendant, no time was ever fixed when said marriage should take place."

[1] If instruction No. 16 was properly given, then there was little use or harm in giving instruction No. 18, for the giving of instruction No. 16 virtually superseded the necessity for instruction No. 18. After giving instruction No. 16, then instruction No. 18 was much of the nature of harmless surplusage, and, if error at all, was error without prejudice.

[2] Was there error in giving instruction No. 16? We think not. We believe the well-established rule in construing a pleading, under circumstances similar to those existing under which the point in the case at bar was raised, requires that it be taken most strongly against the pleader. *Gibson v. Parlin*, 13 Neb. 292, 13 N. W. 405, and cases cited; *Duval v. Advance Thresher Co.*, 85 Neb. 181, 122 N. W. 890, 123 N. W. 1022.

The defendant insists that the allegations referred to should be liberally construed, and cites in support thereof: *McArthur v. Clarke Drug Co.*, 48 Neb. 899, 87 N. W. 861; *Hartzell v. McClurg*, 54 Neb. 313, 74 N. W. 625; *Butts v. Kingman & Co.*, 60 Neb. 224, 82 N. W. 854; *Tacoma Mill Co. v. Gilcrest Lumber Co.*, 90 Neb. 104, 132 N. W. 928; and *Keenan v. Sic*, 91 Neb. 582, 136 N. W. 841. It is true these decisions hold as contended for by defendant, but decided, however, apparently in pursuance of section 121 of the Code then in existence requiring the allegations of a pleading to be liberally construed with a view to substantial justice between the parties. This section, however, has been omitted from the Revised Statutes of 1913 apparently, and no longer appears therein, so far as we have been able to discover. Whether this omission occurs by inadvertence or otherwise we do not know; perhaps, however, by inadvertence only. What this court would hold to be the rule if the question was presented under circumstances similar to the cases above cited, in the absence of the statute, we do not now say, nor is it necessary at this time to determine, for the point is made now that the rule applied under the circumstances of the cases above cited, whether with or without the aid of the statute, has no application to the situation in the case at bar, and does not abrogate the rule sought to be applied here. In every one of the above cases cited by the defendant we believe the point was raised on demurrer,

in one form or another, usually after the case had been tried, to the sufficiency of the petition in not stating a cause of action, and no doubt the court very properly held under these circumstances, that a pleading should be liberally construed with a view to substantial justice between the parties.

But that is not the situation here. Plaintiff, in the case at bar, is finding no fault with the part of the defendant's answer in question. There is no claim that it is deficient or that it is other than what it purports to be, and, taking it for what is claimed it plainly purports to be, plaintiff insists that the allegation that the defendant "admits that a marriage contract or engagement to marry existed between the plaintiff and defendant for several years prior to the commencement of this action" is an admission by defendant that the marriage contract continued throughout the period mentioned, and therefore was in existence up to and until the alleged breach of the same by defendant, shortly prior to the commencement of this action, and asked the court so to interpret to the jury this part of defendant's answer, which the court did. If the rule contended for by plaintiff properly applies in this instance, and we think it does, then certainly the defendant cannot complain of the construction placed upon said pleading by the court.

Besides, it must be remembered that before this instruction was given the whole of the evidence in the case had been adduced in the presence and hearing of the court and jury, and we feel perfectly justified in saying that it would be impossible for any one to read the record in this case without being convinced, by the overwhelming testimony, that this marriage contract was never renounced nor abrogated by either of the parties, either in 1911 or at any other time prior to September 7, 1918. Except the paragraph heretofore quoted, all of the defendant's answer seems to proceed upon this theory, and all the evidence, defendant's as well as plaintiff's, except for the bare statement of defendant himself, that plaintiff said she would not marry him as long as his mother lived, which is denied by the plaintiff, tends to demonstrate that such was the fact. The defendant continued thereafter to visit the plaintiff almost daily up to the very day before she started for Rochester to have her operation performed, precisely the same as he had done all the years before, bestowing upon her presents, affection and caresses as only one engaged to be married would be expected to do. It is unbelievable, under the evidence, that either party understood that the marriage engagement had been broken at any time, and that it did not exist at all times prior to September 7, 1918. Even under the defendant's own theory and statement he considered the consummation of

the marriage contract suspended only, for in his cross-examination, after being asked if he did not continue to visit the plaintiff almost daily and bestow presents and affection and caresses upon plaintiff and treat her in all respects, after the incident of 1911, as he had done all the years before, and defendant admitting that he had, he was then asked this question:

"Q. And while you were doing that, when you were doing all of that, did you consider the incident closed? A. I did not. I considered it closed as long as mother lived."

So that, under the defendant's own theory or interpretation, the moment his mother died the marriage contract would be revived in all its original force and effect. It was only by the defendant's own conduct on and after September 7, 1918, by his abandonment of plaintiff and the marriage contract and his refusal to have anything more to do with her, that the marriage contract was broken.

If this be the true situation, as we think it is, then the trial court made no mistake in its construction of that part of defendant's answer contained in instruction No. 16. If there was no error in giving instruction No. 16, as we think there was not, then instruction No. 18 became of little or no consequence, for, at most, it would leave the allegations of defendant's answer referred to in instruction No. 18 as amounting to no more than a specific denial of the existence of the marriage contract after 1911; an allegation directly inconsistent with his admission, as we have seen, in that part of his answer as construed in instruction No. 16, that there did exist "a continuing marriage contract or engagement to marry between the plaintiff and defendant for a period of several years prior to the commencement of this action." And as such inconsistent allegation, of course, it could not stand.

"A pleading should be construed with reference to the general theory upon which it proceeds; and a pleading should not be uncertain as to which of two or more theories is relied on." Phillips, Code Pleading, § 354; Keenan v. Sic, 91 Neb. 582, 136 N. W. 841.

But, again, we think the whole matter involved in instruction No. 18 was effectually disposed of, and any issue that may have been tendered by the allegation of defendant's answer in this respect sufficiently submitted to the jury by the court's first instruction to the jury on the merits of the case and after a statement of the issues. This instruction is designated as No. 12, and is as follows:

"It is admitted by the pleadings and the testimony of both parties that there was an engagement or promise of marriage between them. Now, under the pleadings of this case, the burden is upon the plaintiff to prove by a preponderance or greater weight of evidence that the plaintiff was ready and willing to marry

defendant at all times after said engagement and that upon or about the 7th day of September, 1918, the plaintiff offered to marry him as she had promised and requested him to fulfil his promise to marry her."

By this instruction the trial court virtually told the jury that plaintiff could not recover at all unless she had established by a preponderance of the evidence all of the facts embraced in said instruction, including the fact that "plaintiff was ready and willing to marry defendant at all times after said engagement." The jury, by its verdict for plaintiff, must have found that this last-stated fact was true. If it did, then it perforce must have found that there was no broken engagement in 1911, nor at any other time prior to September 7, 1918.

We are of the opinion that the exceptions to instructions No. 16 and No. 18 are not well taken, and the same are therefore overruled.

[3] Certain medical gentlemen, Doctors Mitchell and Hayes, were called to testify in behalf of plaintiff, and to each was put a question, hypothetical in form, in substance, as follows: In a case where there has been more or less persistent courtship of a girl, beginning at the age of about 16, with an engagement to marry at 19, to a man ten years her senior, and this courtship continued from that period until she reaches the age of 40, she remaining a virgin and unmarried, what would be the natural effect of that experience on such virgin woman, as to her physical and nervous health, of the breaking of the engagement to marry by her affianced and upon being told by him that he would not marry her?

To this question the defendant objected as invading the province of the jury, not a proper matter for expert testimony, and as immaterial and irrelevant. The objection was overruled, and Doctor Mitchell answered as follows:

"I am not an authority on love and courtship, but I do know this: That there isn't anything that would so upset the nervous system as love affairs and a broken engagement, whether in a woman or in a man; I think more in a woman than in a man."

Doctor Hayes, to whom was propounded a similar question, answered, over a similar objection, as follows:

"The effect might be decidedly exhaustive to her nervous system."

The plaintiff then asked the witness:

"Now, what would you say would be the natural tendencies of that experience?"

To which the witness answered, over a like objection by defendant:

"The natural tendency would be that the girl was suffering a depression, nervous depression, and a more or less nervous exhaustion."

The chief objection to these questions, as we view it, is the meagre foundation laid for expert testimony on the subject. We think plaintiff should have been required, first, to show what the actual physical and nervous health of the plaintiff was at the time she received the knowledge of the broken engagement, and then to have asked these witnesses, upon conditions shown, what would be the natural and probable effect on her physical and nervous health of a sudden knowledge of a broken engagement. For it is evident that all persons are not affected alike, under like circumstances. It depends much upon the nature and temperament of the individual as to how such an incident as the one in question would affect such individual. One might be prostrated with grief followed by serious physical and mental illness, more or less enduring, while another might accept it with comparative indifference. Nor does the same cause always produce the same effect upon the same person; it depends many times upon the particular condition of the physical and nervous health of the individual at the time, as also the circumstances under which the incident occurs.

But, with all this admitted, are the answers, as given by the witnesses, prejudicial to the defendant, so prejudicial as to require a reversal of the case? We think not. Conceding, as we may, the meager basis supplied in this instance for the introduction of expert testimony nevertheless we think that it cannot be said the situation was one entirely destitute of ground upon which evidence of this character might be admitted. It is but fair to assume that, by and through his observations and experiences in more or less constantly treating persons who have undergone an experience, or like experiences, indicated by the facts involved in the hypothetical question, a practicing physician must gain some knowledge of the natural and probable effects such an experience would have upon the physical and mental health of such persons, which the average layman would not possess. This is all that is required, under the authorities, to entitle such evidence to be received. It is in evidence also that both these physicians had a long personal acquaintance with the plaintiff; Doctor Mitchell knowing and treating her occasionally ever since she was 2 years old, and Doctor Hayes having a personal acquaintance with her for at least 30 years. With this fact in the minds of the witnesses when they testified, as it doubtless was, the danger of any mistake in their answer, as applicable to the instant case, would be reduced to the minimum. We do not believe such error obtained in the introduction of this testimony as requires a reversal of the case, and the exceptions thereto are therefore overruled.

[4] Complaint is also made that the court erred in admitting evidence of defendant's

reputed wealth. Evidence was received from at least three witnesses as to defendant's reputation for credit and pecuniary wealth in the community in which he lived in September, 1918. But this was followed by instruction No. 25 to the jury:

"That said evidence was not admitted for the purpose of proving defendant's ability to pay damages, but as tending to show the condition in life which the plaintiff would have secured by consummation of the marriage contract."

There was no error in receiving this evidence, when limited, as it was, in its effect and purpose, by the above instruction. *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875, and cases therein cited. Besides, this evidence was followed by further evidence of the same witnesses and other as to defendant's actual wealth, and in no instance, we believe, did the amount of his reputed wealth exceed that given as the amount of his actual wealth, and neither is anywhere materially disputed by the defendant. This assignment must also be overruled.

Upon the assumption that the defendant has properly interposed the alleged existence of plaintiff's physical and mental illness as a defense to this action, he objects to certain instructions given and others refused on that phase of the case. There may be some question as to the theory upon which defendant was entitled to have this phase of his defense considered at all. It is true he recounts at considerable length in his answer the irritability of plaintiff, her physical, nervous and mental illness, unfitting her for the marital relation, and he and others testified to these facts as existing subsequent to and including the year 1916, but he nowhere, at any time, assigned this as a reason for refusing to marry the plaintiff; but the sole and only reason assigned for his refusal, either in his answer or his evidence, up to and including September 7, 1918, the date of the last conversation between them on the subject, is that plaintiff refused to marry defendant so long as his mother lived. So it would seem that the only theory, if any, upon which defendant is entitled to avail himself of the defense of plaintiff's impaired health is a recognition of the present existence of the marriage contract, but that he ought not to be held liable for its breach because of plaintiff's unfit physical condition, and it is upon this theory only we feel warranted in considering this phase of the case.

The chief objections interposed by defendant on this branch of his case are to instructions No. 13 and No. 22, given by the court on its own motion, which may be considered together. Instruction No. 13 is as follows:

"The defendant alleges that the plaintiff, in September, 1918, was afflicted by a disease that rendered her unfit for the marital relation. The burden of proof is upon the defendant to prove

by a preponderance of the evidence that the plaintiff was at that time afflicted by some disease that unfitted her permanently for the marital relation, and unless the defendant has so satisfied you by a preponderance of the evidence you should find against the defendant on such issue."

Instruction No. 22 is as follows:

"In order that an illness of one of the parties to a contract to marry constitute a justification or excuse for the renunciation of the contract or refusal of the other party to consummate the marriage, it is necessary that such illness be permanent and incurable."

[8] At first, we were strongly impressed with the belief that the giving of these instructions, particularly instruction No. 22, was error for which the case must be reversed. Upon mature consideration of the whole case, as reflected by the evidence, however, we conclude that the objections should be overruled. It is contended by the defendant that when the court instructed the jury, in instruction No. 13, that, before the defendant could avail himself of the defense pleaded, it was incumbent upon him to prove that at the time in question the plaintiff was afflicted with some disease which unfitted her *permanently* for the marital relation, and when, in instruction No. 22, the court told the jury that, in order that an illness of one of the parties constitute a justification for the refusal of the other party to consummate the marriage, it is necessary that such illness be *permanent* and *incurable*, is going too far beyond the rule established by the great weight of authority on this question. We think we will agree with the defendant that the court probably erred in requiring it to be shown that the alleged illness of plaintiff was *permanent* and *incurable*. We think the better rule in such case is something like this: Where disease or physical disability rendering it unsafe or improper to marry has developed in either party to the contract, without intervening fault on the part of the other, subsequent to the making of the contract and before its consummation by marriage, such other party will be required to wait a reasonable time for a cure to be effected, and if such disease or disability proves to be of a permanent character, may refuse to carry out the contract. See 9 C. J. 339, § 31, and cases cited. But, as before stated, we think this case should not be reversed because of the error complained of. If with or without these instructions a verdict for plaintiff is the only verdict that could be rendered by the jury under the evidence, the case will not be reversed because of an erroneous instruction. *Stratton v. Dole*, 45 Neb. 472, 63 N. W. 875. The evidence imperatively demands a verdict for plaintiff in some amount, and the instructions referred to could not affect the amount.

In this connection it is perhaps proper to give a brief statement of what the evidence

shows in regard to plaintiff's illness and the facts and circumstances surrounding the same. The undisputed evidence shows that in the spring of 1916, and after the contract of marriage between plaintiff and defendant had existed for nearly 20 years, during which time the plaintiff enjoyed almost perfect health, she became seized with pains in her neck, which gradually grew more severe and which caused her, at times, to be exceedingly irritable and nervous, with more or less loss of appetite, and so continued up to about July, 1918, although at no time, however, was she not able to be "up and about." In attempts to discover the nature of her illness she visited and consulted physicians in Lincoln, Chicago, and the Mayo Brothers at Rochester, Minnesota, but without, at that time, gaining further knowledge of the true cause of her ailment. She then visited California, where she spent some time with the hope that a change of climate would benefit her health, returning, however, but little improved. Some time thereafter it was discovered she was afflicted with goitre, and after advising with defendant what to do, stating that she would do whatever he said, in the month of June, 1918, she returned to the Mayo Brothers at Rochester, where an operation for the removal of the goitre was performed, and where she remained under the doctor's treatment for a period of ten weeks, returning to her home at the end of that time, so runs the evidence, feeling "good and very happy." Doctor Mitchell, having examined the plaintiff after her return, testified that the goitre had been removed so that there was no longer any enlargement of the neck, and that the illness had in no way incapacitated her for the consummation of marriage or the performance of the marriage functions, including maternity.

It is undisputed that during the whole period of her illness, except for the short time plaintiff was absent from home for the purposes above stated, the defendant visited plaintiff almost daily, accompanied her and her sister on their trip to California, corresponding with her in her absence, and treated her with love and endearment in all respects as he had done throughout this especially long engagement, even up to the very evening before her departure for Rochester for the operation, when, as always, he bestowed upon her the embraces and caresses of a lover, yet never once, then or at any other time, intimated that he desired any modification of the marriage contract; but, on the contrary, upon an occasion shortly before her departure for Rochester, the plaintiff, in speaking to defendant of her illness, and stating to him that, if he ever got tired of her or came not to care for her, she hoped he would tell her so and they would fix matters up in some way, the defendant made answer, as testified to by plaintiff, "he said he never

would give me up as long as there was a breath in my body." It was not until plaintiff returned from Rochester "good and very happy," as plaintiff and others testified that defendant manifested a disposition to have no further relations with her and to abandon the engagement. Under these undisputed facts and circumstances, we submit that the only verdict that could be rendered is one for plaintiff, and that being true, the objections to the instructions last referred to will be overruled.

Objections are made to a number of other instructions directed to the merits of the case, but to comment on each separately would extend this opinion to an unnecessary length. Suffice it to say they have all been examined and considered, and we find no error in any or all of them to justify criticism.

[8] Again, objections are made to numerous so-called "instructions," but which, although paragraphed and numbered, consist simply of a recital of facts alleged in the pleadings. Some of these, however, contain averments of the pleadings to support which no evidence was offered. This is not good practice and ought to be avoided, as far as possible, and the court should submit to the jury only such issues in support of which at least some evidence has been admitted.

[7, 8] The final objection of defendant is that the verdict is excessive, and to such an extent as unmistakably shows passion and prejudice on the part of the jury that rendered it. While the amount awarded may be somewhat more than should be permitted to stand, we are not of the opinion that it is excessive to such an extent as indicates passion or prejudice on the part of the jury, demanding a retrial of the case, or that, under the rule, forbids this court from properly adjusting the amount to be awarded.

There is no doubt but the plaintiff is entitled to a substantial sum for the breach of this contract. She gave up more than 20 years of her young life to the defendant's courtship of her, materially aiding him in his business and social life throughout this long period, excluding herself in the meantime from the attentions of all others and the opportunities which might have been hers to contract marriage with another, until now she has reached an age quite beyond the ordinary marriageable age of a maiden. On the other hand, it must be said to the credit of the defendant that throughout all the years of his engagement to plaintiff his relations with her have never been other than honorable, kind and indulgent in every respect until the final breach occurred.

The evidence shows both the reputed and actual wealth of the defendant, at the time of the breach, to be all the way from \$50,000 to \$75,000. The actual wealth of defendant is

by no means the sole basis on which damages in a case of this nature are to be measured, but it is a circumstance which will be considered in fixing a proper amount. We are of the opinion that justice will be fully subserved by a reduction of \$5,000 from the judgment as awarded, leaving a judgment of \$17,000 as the amount to be recovered.

The order will therefore be that, if within 20 days from the filing of this opinion the plaintiff file in this court a remittitur of \$5,000, the judgment so reduced will be affirmed; otherwise, the case will stand reversed and a new trial ordered.

Affirmed on condition.

ALDRICH, J., dissents.

IN RE LAUDERBACK'S ESTATE.

LAUDERBACK v. LOBDELL.

(No. 21672.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Appeal and error $\S$ 907(3)—Correct determination below of fact issues presented by pleadings presumed in absence of bill of exceptions.

In the absence of a bill of exceptions preserving the evidence, this court will presume that the district court correctly determined every issue of fact presented by the pleadings.

2. Husband and wife $\S$ 278(1)—Postnuptial contract, if fair and equitable, will be enforced.

Where husband and wife, because of the misconduct of one of them justifying a legal separation, find it impossible to dwell together in harmony and unity, and enter into a contract for the settlement of all their property rights, and each relinquishes all rights in the property of the other and to inherit from the other, and providing for immediate separation, such contract, if fair and equitable, will be enforced by the court with respect to property rights.

3. Executors and administrators $\S$ 185—Postnuptial contract held to debar survivor from receiving statutory allowances.

A valid postnuptial contract between husband and wife, which provides that each relinquishes all rights to the property of the other and releases and waives all right of each to inherit from the other, if observed by both until the death of one of them, will debar the survivor from receiving from the estate of the other the articles of personal property and allowance which the statute provides for the surviving spouse.

Appeal from District Court, Dawson County; Grimes, Judge.

Proceedings by Reuben Lauderback, widower, to determine the validity of a postnuptial contract between himself and Edith Lauderback, deceased, and for allowances under the statute as surviving spouse. Smith Lobdell interposed a claim. Judgment for claimant, and petitioner appeals. Affirmed.

Cook & Cook, of Lexington, for appellant.

D. H. Moulds and W. A. Stewart, both of Lexington, for appellee.

Heard before LETTON, ALDRICH, DAY, and DEAN, JJ., and GOOD and RAPER, District Judges.

GOOD, District Judge. This action was begun by the appellant, Reuben Lauderback, widower of Edith Lauderback, to determine the validity of a postnuptial contract between him and his late wife, and to have set over to him the specific articles of personalty and allowances which the statute awards from the estate of a deceased spouse to the surviving spouse. His application was resisted by the appellee, Smith Lobdell, father and heir at law of the deceased wife. Appellant was defeated both in the county and district courts, and has appealed to this court.

The parts of the contract that are material to the determination of this case are:

"That the parties hereto are man and wife. That disagreements have arisen between them and they each have decided their future welfare and happiness will be better conserved if they live separate and apart and maintain each himself and herself. In order to make a fair, equitable and agreeable division of their property, both real and personal, the said Reuben Lauderback is to pay to said Edith Lauderback, his wife, the sum of \$4,000. * * * Said Edith Lauderback to have all household goods, groceries, dishes, flour and other household utensils and supplies now in the home of the parties hereto. * * * Said Edith Lauderback being ill and under the doctor's care, and having removed from where the parties hereto have resided to the home of her sister, Mrs. James Beans, all of said property is to be removed from said premises herein described at her convenience and under her directions and at such times as she wishes to remove the same. * * * In consideration of the foregoing the parties hereto agree that from now henceforth and for evermore they will live separate and apart from the other, keep and maintain each themselves, make no claim or demand upon each other on account of the marriage relation and each hereby waives, released and quitclaims each to the other all right of inheritance and agreed to claim nothing from the property each may now have or hereafter acquire, purchase or own in the future. And if either of the parties in the future apply for absolute divorce that this contract and this settlement shall be considered as full payment and settlement of all alimony, court costs or attorney fees that either might ask from the other in a divorce suit."

The contract was signed and duly acknowledged.

[1] 1. Appellant asserts that the contract is invalid because there existed no sufficient grounds to entitle either to a divorce. This is a question of fact that was put in issue by the pleadings, and the evidence upon this question is not preserved in the bill of exceptions. This question cannot, therefore, be inquired into in this court, for it will be presumed, in the absence of a bill of exceptions, that there was sufficient evidence presented to sustain the findings of the trial court in that respect. *Cady Lumber Co. v. Reed*, 90 Neb. 293, 133 N. W. 424.

[2] 2. Appellant further contends that the contract is invalid because it was made before the parties had separated and in contemplation of a future separation of husband and wife. Whether the parties had actually separated before making the contract is a question that is not clear from the record. The contract recites:

"Edith Lauderback being ill and under the doctor's care, and having removed from where the parties hereto have resided to the home of her sister, Mrs. James Beans, all of said property is to be removed," etc.

If the recital in the contract is true, then the parties had separated prior to the entering into the contract. The answer of appellee contains the following averment:

"That immediately upon the execution of said contract, said Reuben Lauderback and his said wife, Edith, separated and lived separate and apart during the remainder of the lifetime of the wife."

This averment would indicate that the separation occurred immediately upon and coincidentally with the making of the contract. Whether the actual separation occurred prior to the making of the contract or immediately upon its execution is, in our view, unimportant. It is difficult to perceive any good reason for holding that such a contract may be valid if entered into after the separation, and that it would be invalid if made at the time of separation. If sufficient grounds for separation existed and the husband and wife found it impossible to live together in harmony and unity, there seems to be no substantial reason for holding that if they first separated they might enter into a contract settling their property rights and providing for living apart, and that they could not make such contract to be followed by an immediate separation. Elliott, in his work on Contracts, vol. 1, § 414, says:

"It is obvious that, notwithstanding the husband and wife are given the power to contract with each other, they cannot enter into an agreement which contravenes the public policy of the state where it is executed. Thus contracts between husband and wife looking to a future separation or to assist in the procurement of a divorce are invalid. However, when

the parties at the time of or after the separation enter into a separation agreement fair as to all parties, it is, with a few exceptions, held valid and enforceable, so far as property rights therein contracted for are concerned."

Judge Field, in the case of *Wells v. Stout*, 9 Cal. 479, 494, says:

"From these authorities, and others to the same effect might be cited, it is clear that, by the settled law in the United States, such agreements are not invalid, because against sound principles of policy, and are upheld and enforced, * * * if followed by immediate separation, or, if separation has previously taken place."

In *Edleson v. Edleson*, 179 Ky. 300, 200 S. W. 625, 2 A. L. R. 689, it is said:

"It has, however, long since been thoroughly established, as an equitable doctrine, that a contract between husband and wife made in contemplation of the continuance of a previous separation, or in contemplation of immediate separation, where disagreements have arisen between them, and the contract has for its purpose an adjustment of their respective property rights, and the making of a provision for the support of the wife, will be enforced, in equity, if fairly made and just."

In *Randall v. Randall*, 37 Mich. 563, Judge Cooley says:

"When a separation has actually taken place, or when it has been fully decided upon, and the articles contemplate a suitable provision for the wife and children, or an equitable and suitable division of the property, the benefits of which both have enjoyed during the coverture, no principle of public policy is disturbed by them; on the contrary, if they are fair and equal, and are not the result of fraud or coercion, reasons abundant may be found for supporting them, in their tendency to put an end to controversies, to prevent litigation, and to give to the wife an independence in respect to her support, which without some such arrangement she could not have under the circumstances."

Many other cases holding to the same effect might be cited from other jurisdictions, but the position that where husband and wife find it impossible to dwell together in harmony, because of the misconduct of one which would warrant a legal separation, decide to enter into a contract adjusting all the property rights, and each relinquish any rights in the property of the other, and providing for the immediate separation of the parties, is valid and will be enforced, is supported by the great weight of modern authorities, and is in consonance with reason and justice. There is nothing in the record in this case to indicate that the contract of settlement and for separation was unfair or inequitable, the parties having freely entered into the same and lived up to it until the death of one of the parties, there appears to be no good reason for not enforcing the same.

[3] 3. Appellant insists that, regardless of the contract, he was entitled to the specific articles of personal property and the allowance provided by statute for the surviving spouse. We think the contract of the parties was intended to settle absolutely and completely all the property rights of the parties, and that each should relinquish any right to an inheritance of the property of the other. We can see no good reason why appellant should be allowed the statutory allowance, any more than he would be entitled to inherit generally from his wife. By his contract he waived and terminated any right to any inheritance or to any part of the property of his wife. We hold that, the parties having made and carried out a contract for the complete settlement of all their property rights, the husband was by such contract debarred from any part of the estate of his deceased wife, and that he was not entitled to the statutory allowance out of the estate of his deceased wife.

The judgment of the district court is Affirmed.

SIMON v. H. J. CATHROE CO. et al. (No. 21936.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by Editorial Staff.)

Master and servant §418(6)—Court's finding on evidence in compensation case conclusive.

A finding of the district court on an issue of fact in a compensation case will not be set aside on appeal, where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the finding is clearly wrong.

Appeal from District Court, Lancaster County; Stewart, Judge.

Claim by one Simon, employee, for compensation under the Workmen's Compensation Act, opposed by the H. J. Cathroe Company, employer, and the London Guarantee & Accident Company, in which compensation was awarded. Subsequently the employee applied for increased compensation on the ground of permanent partial disability through change in condition. Judgment for the employer and the employee appeals. Affirmed.

R. J. Greene, of Lincoln, for appellant.

Kennedy, Holland, De Lacy & McLaughlin, of Omaha, for appellee.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, and ROSE, JJ.

PER CURIAM. This is a claim under the Workmen's Compensation Act. Laws 1913, c. 198. Plaintiff was injured while in the em-

ploy of defendant, H. J. Cathroe Company, and under judgments heretofore pronounced has recovered compensation. The present proceeding is in the nature of an application to have the court declare that there has been a change in plaintiff's condition since the former judgment wherein plaintiff was found to be suffering from permanent partial disability, and the court is now asked to hold that he is suffering from permanent total disability. There was no new question of law presented, and the question before the trial court was one of fact. Plaintiff offered the testimony of men eminent in the profession of medicine and surgery, one of whom had performed the original operation on plaintiff and had testified on a former hearing of the case. Without undertaking to quote this testimony, but giving it the full force that plaintiff claims it is entitled to, we may say that it tends to support plaintiff's claim of permanent total disability. But defendant offered testimony of others, also eminent in the profession of medicine and surgery, and, without setting out their testimony, it may be said that it shows plaintiff is suffering permanent partial disability. On this conflicting evidence the trial court found generally for the defendants.

It is the settled law of this state that a finding of the district court on an issue of fact in a compensation case will not be set aside on appeal where it is supported by sufficient evidence, or where the evidence is substantially conflicting, unless the finding is clearly wrong. *Manning v. Pomerene*, 101 Neb. 127, 162 N. W. 492; *Miller v. Morris & Co.*, 101 Neb. 169, 162 N. W. 417; *Kanschelt v. Garrett Laundry Co.*, 101 Neb. 702, 164 N. W. 708; *Anderson v. Klene*, 103 Neb. 773, 174 N. W. 301; *American Smelting & Refining Co. v. Cassil*, 104 Neb. 706, 178 N. W. 639; *Lincoln Gas & Electric Light Co. v. Crowley*, 104 Neb. 701, 178 N. W. 640; *Christensen v. Protector Sales Co.*, 105 Neb. —, 181 N. W. 146. And this is the general rule. Note to L. R. A. 1916A, 266.

The evidence being ample to sustain the judgment, the issue of fact determined by the trial court will not be disturbed.

The judgment is affirmed.

SHANNER BROS. v. VILLAGE OF PAGE, HOLT COUNTY. (No. 21607.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Municipal corporations §323(3)—Suit to enjoin construction of sidewalk as contrary to ordinance held properly dismissed as not supported by evidence.

In an action by resident property owners to enjoin a village from "further permitting or

allowing" a certain sidewalk to be constructed contrary to an established grade and in violation of an ordinance of the village governing the construction of sidewalks, there being no evidence to show that the village had either authorized the construction of such sidewalk or that it had taken any part in such construction, *held*, that the action of the district court in dismissing the cause at the close of plaintiff's evidence was proper.

2. Injunction §77(1)—Mandamus, not injunction, a proper remedy to enforce performance of duty of municipality.

The remedy, if any, to enforce the performance of a mandatory duty of a municipal corporation is mandamus, and not injunction.

Appeal from District Court, Holt County; Dickson, Judge.

Action by Shanner Bros. against the Village of Page, Holt County, to enjoin the construction of certain sidewalks. Judgment for defendant, and plaintiffs appeal. Affirmed.

H. M. Uttley, of O'Neill, for appellants.
J. A. Donahoe, of O'Neill, for appellee.

Heard before LETTON, DAY, and DEAN, JJ., and CLEMENTS and MORNING, District Judges.

MORNING, District Judge. Action by plaintiffs as residents and property owners of the village of Page to enjoin said Village from permitting certain sidewalks to be constructed in violation of a certain ordinance of said village governing the laying of sidewalks. From a judgment for defendant, plaintiff appeals.

The petition alleges in substance that plaintiffs are residents and property owners of said village, that the village is a municipal corporation organized under the laws of this state, that said village duly and regularly adopted and established a system of grades throughout said village for sidewalks, that said village is causing and permitting a certain designated sidewalk (specifically described) to be constructed without paying any regard to the established grade, over the protest and objection of plaintiffs duly made to the authorities governing said village, and that said sidewalk, so being constructed, by and with the consent of the village of Page, and the trustees thereof, does not conform to the grade established and adopted, "either with reference to its location distant from the property adjacent thereto or with the grade in elevation as adopted by said village." It is further alleged that to permit said sidewalk to be established without regard to the grade will materially and substantially affect the rights of plaintiffs and all other citizens of said village of Page; that no action at law to recover damages for such failure would be adequate, or could be maintained by the dif-

ferent citizens of said village, and that to permit the said village and the trustees thereof to allow sidewalks to be built without conforming to grade would be a serious injury and detriment to the village and all citizens thereof. There was a prayer for an injunction restraining defendant from further permitting or allowing sidewalks to be built in said village unless they conform to the established grade.

At the close of plaintiff's evidence, on motion of defendant, the court dismissed the action at the costs of plaintiffs. The judgment of dismissal was on October 10, 1919. The transcript for appeal was filed in this court on June 21, 1920. On the day the judgment was entered, however, plaintiffs filed in the court below a "motion for rehearing of this cause," which is in the nature of an argument intended to convince the court that the judgment was contrary to law and the evidence and not sustained by the evidence. This motion was not passed upon by the district court until the 29th day of March, 1920, when it was overruled. The appeal to this court was perfected within three months from the date of the ruling of the court on said motion. We have, with some misgiving, concluded to treat this motion as one for a new trial and thus avoid the necessity of dismissing the case for want of jurisdiction to hear it.

If it were not for the allegation of the fourth paragraph of the petition there would be nothing contained in it to indicate that the village is in any way an active party to the construction of the sidewalk complained of. It is there alleged that the village is "causing and permitting" it to be done. The prayer for an injunction is that defendant be restrained "from further permitting or allowing sidewalks to be built in said village of Page unless the same conform to and are in accordance with the established grade." There is a total lack of evidence either offered or received tending to show that the village either authorized or consented to the construction of the sidewalk complained of, or that it in any way actively participated in, or connived at, its construction. Indeed, the plaintiffs themselves proved by the testimony of the village clerk that no action had been taken by the village board authorizing the construction of this sidewalk.

[2] The question, then, is whether a party who can show himself aggrieved by the laying of a sidewalk in a village can maintain injunction against the village without alleging and proving that the village is in some way responsible for the work being done. We think the question must be answered in the negative. If the village owes any active duty to plaintiffs in the matter the remedy is not injunction, but mandamus to compel it to perform that duty. *Moores v. State*, 71 Neb. 522, 99 N. W. 249, 115 Am. St. Rep.

605; *State v. City of Kearney*, 25 Neb. 262, 41 N. W. 175, 13 Am. St. Rep. 493; *State v. City Council of City of Lincoln*, 98 Neb. 634, 154 N. W. 217. But we think there is no duty resting upon the village to maintain an injunction suit against the parties responsible for the improvement, for the protection of aggrieved citizens or complaining parties. If sidewalks are being constructed by private parties in violation of the ordinances of said village, these plaintiffs, if they have a right of action at all, can maintain it themselves against the responsible parties, and are in no position to maintain an injunction suit against the village to restrain it from "further permitting" the work to be done. And we fail to find any convincing or satisfactory evidence in the record that the sidewalk complained of was being built contrary to the village ordinances and not according to the established grade. No surveyor was called as a witness, and the only evidence on the subject of improper grade or location of the sidewalk was of the most vague, indefinite, and conjectural character.

[1] We think the action of the district court in dismissing the petition was right, and the judgment is affirmed.

MILLER v. VANICEK (PIMPER, Intervener). (No. 21664.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser §220—"Bona fide purchaser" defined.

A "bona fide purchaser" of land is one who purchases for a valuable consideration paid or parted with, without notice of any suspicious circumstance which would put a prudent man upon inquiry.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bona Fide Purchaser.]

2. Reformation of Instruments §28—Contract of sale may be reformed to correct mutual mistake as against purchaser chargeable with notice.

Where it is shown by clear, satisfactory, and convincing testimony that a mutual mistake in the description of property in a contract of sale has been made, a court of equity will reform the instrument so as to reflect the real contract between the parties; and this rule will also be applied as against a third party purchaser chargeable with notice of such mistake.

3. Vendor and purchaser §229(1)—Third person held chargeable with notice of mistake in contract, so that it might be reformed as against him.

Evidence examined, and held that the intervenor was not a bona fide purchaser; that he

was charged with notice of such facts as would put a prudent man upon inquiry, and which, if followed up, would have disclosed that there was a mistake made in the contract in describing the land.

Appeal from District Court, Holt County; Dickson, Judge.

Action by Thomas J. Miller against Frank Vanicek, in which Frank J. Pimper intervened. From judgment for plaintiff, dismissing intervenor's petition, he appeals. Affirmed.

Courtright, Sidner, Lee & Jones, of Fremont, for appellant.

J. J. Harrington, of O'Neill, for appellee Miller.

J. A. Donohoe, of O'Neill, for appellee Vanicek.

Heard before LETTON, ALDRICH, DAY, and DEAN, JJ., and GOOD, District Judges.

DAY, J. Thomas J. Miller, the plaintiff, commenced this action in the district court for Holt county, Nebraska, against the defendant, Frank Vanicek, for the purpose of reforming a written contract for the sale of real estate, entered into between the parties on July 8, 1919. The petition alleged that the plaintiff and the defendant entered into a contract whereby the plaintiff agreed to sell, and the defendant agreed to buy, the S. W. $\frac{1}{4}$ of section 5, township 29, range 10, in Holt county, Nebraska; that by a mutual mistake of the parties and the draftsman the land was described as being in range 11 when it should have been range 10. The specific reformation asked was to have the contract read "range 10," instead of "range 11," and to have the purchaser's name spelled correctly.

Frank J. Pimper intervened, alleging that he was interested in the result of the controversy adversely to the plaintiff. He further alleged that on August 28, 1919, he entered into a contract with the defendant to purchase the S. W. $\frac{1}{4}$ of section 5, township 29, range 11, in Holt county, at the agreed price of \$70 an acre, \$1,000 of which was paid at the time of the making of the contract; that at the time he examined the contract between the plaintiff and the defendant, and relied upon the same as containing a correct description of the land purchased by the defendant; that of the \$1,000 paid by him to the defendant \$400 was paid by the defendant to the plaintiff as a part of the purchase price upon defendant's contract with plaintiff. The intervenor prayed that the reformation of the contract be denied, or in the event a reformation was decreed, that the plaintiff be required to pay intervenor \$1,000 with interest from August 28, 1919, and also the further sum of \$1,600 as damages.

The reply of the plaintiff to the petition of intervention alleged that prior to the mak-

ing of the contract between intervenor and defendant, and prior to the paying of any part of the purchase price, the intervenor examined the land described in his contract and ascertained facts sufficient to put him on inquiry, which would have disclosed the mistake in the description of the land.

The trial court found the issues in favor of the plaintiff; entered a judgment reforming the contract as prayed; and dismissed the intervenor's petition. From this judgment the intervenor has appealed.

It appears that on July 2, 1919, the plaintiff contracted to purchase of one C. M. Daly the S. W. $\frac{1}{4}$ of section 5, township 29, range 10, in Holt county; that shortly thereafter the plaintiff entered into negotiations with the defendant to sell the above-described premises. At that time the defendant was shown on a plat the location and description of the land, was informed of the nature of the improvements thereon, and the distance from O'Neill, the county seat. The parties then entered into a contract which was to be left in escrow at the bank until such time as the defendant could examine the property. It further appears that shortly thereafter the defendant examined the land so described in range 10, and expressed himself as being entirely satisfied therewith, and thereupon paid \$600 of the purchase price; that through a mistake of the scrivener the land was described in the contract as being situated in range 11. It is perfectly clear that the plaintiff and defendant in making their contract had in mind only the land located in range 10. No disinterested person can read the testimony without coming to the conclusion that the land which the plaintiff sold and the defendant purchased was the S. W. $\frac{1}{4}$ of section 5, township 29, range 10, and that there was a mutual mistake in describing it as being in range 11. Under the facts shown a court of equity could do no less than to reform the written instrument as between the plaintiff and defendant so as to reflect the real contract between the parties.

[1, 2] We now come to a consideration of the issue presented by the petition of intervention, which turns upon whether the intervenor is to be regarded as a good-faith purchaser. If he was, then, notwithstanding the mutual mistake of the plaintiff and defendant in drafting their contract, a court of equity would refuse to reform the contract, or, if it did order a reformation, would amply protect the intervenor's rights. A bona fide purchaser of land is one who purchases for a valuable consideration paid or parted with, without notice of any suspicious circumstance which would put a prudent man upon inquiry. *Carpenter Paper Co. v. Wilcox*, 50 Neb. 659, 70 N. W. 228. No doubt the general rule is as argued by the intervenor, that a mutual mistake will not be corrected in equity as against the rights of innocent third parties. But it is also the

settled rule that mutual mistakes in the description of land in written instruments will be reformed, not only as against the parties to the contract, but also against subsequent purchasers chargeable with notice of the mistake. *Carpenter Paper Co. v. Wilcox*, 50 Neb. 659, 70 N. W. 228.

[3] Without attempting to quote at any length the testimony, it is fairly shown that intervener resided at Howells, a short distance from Dodge, where the defendant lived. Intervener for several years had been engaged more or less extensively in selling land in Holt county for one McKillip, who had a large quantity of land for sale in that county, and in this manner intervener became familiar with the value and character of land in that county. The defendant, being desirous of selling his land, and learning that intervener was selling land in Holt county, called upon the latter for the purpose of securing his assistance in disposing of defendant's land. At first intervener told the defendant that there was no use trying to sell any land that Miller had sold because he always sold too high. Before parting, however, it was agreed that defendant was to send intervener a description of his land, and intervener then said that the next time he was up in Holt county he would look it up. Upon receiving the description of the land from defendant, intervener examined a plat which he had in Holt county, and immediately wrote to the defendant to send him his original contract for inspection. Upon receiving the original contract he immediately went to Dodge and entered into a contract with the defendant to purchase the land described therein, agreeing to pay an advance of \$5 per acre above the price paid by the defendant. It was agreed that the papers were to be left in escrow at the bank until intervener could personally examine the premises. Shortly thereafter intervener in company with Mr. Hrabak, a banker of Howells, and also a real estate agent who had been selling land for McKillip, and a third party, visited the premises and inspected the land. Intervener ascertained that the W. $\frac{1}{2}$ of the quarter section had valuable improvements thereon, and was in the possession and occupancy of a Mr. Page. In order to satisfy himself of the location, he secured from Mrs. Page a tax receipt which disclosed the location to be the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 5, township 29, range 11. There was a large field of alfalfa growing upon the west 80, and a line fence separated the east and west 80's of the quarter section. It was also shown that the land described as being in range 11 was worth approximately \$120 to \$125 an acre. It also appears that the selling agents of McKillip were each furnished with a plat of Holt county upon which the McKillip land was indicated in dark colors. One of the plats in evidence

shows McKillip to be the owner of the S. E. $\frac{1}{4}$ of section 5, township 29, range 11, and also the east 80 of the S. W. $\frac{1}{4}$ of section 5, township 29, range 11. While the testimony is not entirely clear that the plat which intervener examined was the McKillip plat, the inference is very strong that it was. If it was, he would have seen at once that a part of the land which he was purchasing was owned by McKillip. It is also shown that Mr. Hrabak knew that the S. E. $\frac{1}{4}$ of section 5, township 29, range 11, had been owned by a man residing in Howells, and that a short time prior to this inspection of the land the owner had sold it to McKillip. The intervener thereupon filed his contract for record, and on returning went immediately to defendant, told him that he was satisfied with the land, and paid \$1,000 upon the contract. The defendant thereupon paid the plaintiff \$400 out of this \$1,000 upon his contract.

Without entering further into the details of the evidence, in our view intervener was charged with ample notice which would have put a prudent man on inquiry, and which, if followed up, would have disclosed that there was a mistake in the description of the land.

Under the facts as disclosed by the record, we are convinced that the intervener is not a bona fide purchaser, and that, therefore, the trial court was right in dismissing his petition of intervention.

The judgment is affirmed.

HOLMBERG v. HOLMBERG. (No. 21555.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Divorce $\S$ 83—On death of party within six months after judgment, divorce action abates.

Where a divorce was granted, and one of the parties died before the expiration of six months thereafter, such divorce decree never became effective, and as to such divorce the action abated.

2. Divorce $\S$ 246—Where alimony was paid before death of husband, divorce decree cannot be vacated in that particular.

In such action, where, as a part of the decree, alimony was allowed and fully paid before the death of the party, the alimony judgment was not affected by the death of the party, and the court has no power to vacate the judgment or dismiss the action.

Appeal from District Court, Douglas County; Wakeley, Judge.

Suit by Peter Holmberg for divorce against Augusta Holmberg. Decree for plaintiff.

From an order refusing to vacate the decree, plaintiff having died before expiration of six months, defendant appeals. Affirmed.

Lambert, Shotwell & Shotwell, of Omaha, for appellant.

John W. Battin, of Omaha, for appellee.

Heard before LETTON, DAY, and DEAN, JJ., and GOOD and RAPER, District Judges.

RAPER, District Judge. Peter Holmberg, plaintiff filed in the district court for Douglas county a petition for divorce against his wife Augusta Holmberg. Summons was duly served on the defendant, and she appeared and filed an answer and cross-petition. The cause was tried, and on October 24, 1919, a decree of divorce was entered in favor of plaintiff, with an award of \$450 alimony and \$50 attorney's fees for defendant, which sums plaintiff paid on the day the decree was entered, and the defendant received the same.

The plaintiff, Peter Holmberg, died on the 12th day of December, 1919, before the divorce became operative under section 1606, Rev. St. 1913. Afterwards, and within six months from the date of the decree, the defendant filed a petition in the case, asking that the decree of divorce be vacated and action dismissed. A hearing was had on this petition, and the court found against defendant and refused to vacate the divorce decree or dismiss the action. From this order she appealed.

[1] It is the contention of the appellant that, after the entry of a decree of divorce, the status of the proceedings, within six months, is that of a pending action and abates on the death of either party. Under section 1421, Rev. St. 1913:

"All actions and suits which may be pending against a deceased person at the time of his death may, if the cause of action survives, be prosecuted to final judgment, and the executor or administrator may be admitted" as a party to such proceeding.

The general rule in the United States is that a suit does not abate on the death of either party after a verdict or decision by the court, or of entering of an interlocutory judgment, when the cause of action survives. But where the cause of action does not survive, the action abates as if the death had occurred before the verdict or interlocutory judgment or decision, unless saved by a statute.

An action for divorce does not survive. The purpose of the action being to dissolve the marriage relation, and that relation being dissolved by death, the proceedings after the death of one of the parties would be useless and of no avail. Where, however, property rights are involved and a judgment for

alimony or determining the separate property rights between the parties has been had in the case, the cause generally will survive as to such matters. 1 C. J. 208, § 404; 1 R. C. L. 39, § 35.

[2] The alimony judgment having been duly entered was valid, and, as it was at once satisfied, it is at an end and the court is without power, in a proceeding like this, to modify, vacate, dismiss, or expunge it. There is nothing there to abate or revive.

Section 1606, Rev. St. 1913, provides that the decree of divorce shall not become operative for six months after trial and decision, except for purpose of review or appeal, and if no such proceedings have been instituted the district court may at any time within six months vacate or modify its decree. The cause of action for divorce not surviving, it abated at the death of the husband.

The ultimate purpose of the requested vacation of the divorce decree is to establish the defendant's property rights as the widow of the deceased plaintiff in his estate. All the avenues are open for the determination of such rights in the proper courts, where all the parties affected can be heard, and in such tribunals she can establish her status as the widow of the deceased plaintiff. Chase v. Webster, 168 Mass. 228, 46 N. E. 705; Matter of Crandall, 196 N. Y. 127, 89 N. E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874; Estate of Seiler, 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093.

The action of the district court is affirmed.

STATE ex rel. CITY OF O'NEILL v. MARSH,
Auditor of Public Accounts.
(No. 22121.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Mandamus $\S$ 168(2)—Municipal corporations $\S$ 918(2), 918(3)—Election for waterworks bonds may be ordered by resolution; notice that bond election be held at the regular polling places will be presumed sufficient; presumed in mandamus proceedings that judges and clerks of bond election were either legally appointed or de facto officers.

In a mandamus proceeding brought to compel the auditor of public accounts to register certain waterworks bonds issued under the provisions of section 5119, Rev. St. 1913, as amended in 1917 (Laws 1917, c. 103), held, (1) that such an election may be ordered by the city council by resolution; (2) that a notice of such an election which called for the election to be held "at the regular polling places in said city," in the absence of a showing that it was not so held, will be considered sufficient; (3) that, in the absence of affirmative evidence to the contrary, the court will

presume that the judges and clerks of election were either legally appointed or were de facto officers.

Original proceeding in mandamus by the State of Nebraska on the relation of the City of O'Neill against George W. Marsh, Auditor of Public Accounts of the State of Nebraska. Peremptory writ allowed.

W. J. Hammond, of O'Neill, for plaintiff.
Clarence A. Davis, Atty. Gen., for respondent.

LETTON, J. This is a mandamus proceeding brought to compel the auditor of public accounts to register certain bonds of the city of O'Neill in the sum of \$19,000 issued for the purpose of maintaining and extending the waterworks of the city. The respondent refused to register the bonds for the following reasons: First, that the bond election was called by the council by the adoption of a resolution, and not by the passage of an ordinance. While there have been some slight changes in the statute since the decision in *State v. Babcock*, 20 Neb. 522, 31 N. W. 8, we are convinced that the changes do not materially affect the question presented, that the reasoning of that case still applies, and that the council had power to call the election by resolution. Second, that the notice, which called for the election to be held at "the regular polling places in said city," was defective, and was not sufficient notice to the electors of the locality of the polling place. This identical question was presented in *Hurd v. City of Fairbury*, 87 Neb. 745, 128 N. W. 638, and was decided against the respondent's contention. The decision governs in this case.

Further complaint is made that the history presented does not show the appointment of judges and clerks of election. In the absence of affirmative evidence to the contrary, the court will presume that the judges and clerks were either legally appointed or were de facto officers. A peremptory writ of mandamus is allowed as prayed.

Writ allowed.

SCHUSTER et al. v. NORTH AMERICAN HOTEL CO. (No. 21509.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Corporations §79—Not bound by agent's oral agreement where written contract provided that no other agreements should be binding.

Where an order contract for the purchase of stock in a corporation provided "No conditions, agreements or representations, other than those printed above, shall bind the said

company," and the corporation on the faith of said order, and without knowledge of any oral promises, representations and agreements made by the agent to the purchasers, issued the stock and received payment therefor, the corporation was not bound by any such promises, representations and agreements outside of those contained in the written order.

2. Principal and agent §148(4)—Where agent makes unusual agreement, third person is put on notice and should ascertain authority.

A person dealing with one known to be an agent is held to the exercise of reasonable prudence, and, if an agent makes an agreement, representation or promise so unusual and unreasonable as to arouse the suspicion of a man of ordinary or average business prudence, he is put upon notice and must ascertain if actual authority has been conferred.

Appeal from District Court, Douglas County; Estelle, Judge.

Action by Julius Schuster and Louis Schuster, partners doing business as Schuster Bros., against the North American Hotel Company, a corporation. From a judgment for defendant on motion for directed verdict and a dismissal, plaintiffs appeal. Affirmed.

Will H. Thompson & Son, of Omaha, and Stewart, Perry & Stewart, of Lincoln, for appellants.

Baker & Ready, of Omaha, for appellee.

TIBBETS, C. This is an action brought by plaintiffs against the defendant to recover \$2,000 paid by the plaintiffs to defendant for stock in the defendant company. Trial was had to a jury. At the close of plaintiffs' testimony the defendant moved for an instructed verdict and for a dismissal. The motion was sustained, and judgment was rendered accordingly. Plaintiffs appeal.

The petition alleges that the plaintiffs are farmers and partners in the farming business in Polk county, Nebraska; that defendant is an Iowa corporation; that on or about June 19, 1917, the defendant, by its stock-sales agents, N. E. Blair and Henry Lachnit, solicited plaintiffs to purchase stock in defendant corporation; that plaintiffs informed said agents that they had no knowledge of defendant's company, but knew of the Bankers' Realty & Investment Company, a Nebraska company, at Omaha; that said agents informed plaintiffs that the two companies were one and the same company; that stock in defendant company was in fact stock in the realty company; that the defendant company, if requested, gave a contract to pay back upon a return of the stock certificate the purchase price with 6 per cent. interest thereon, at any time after two months and within ten years from the date of such subscription, and that this would apply to plaintiffs; that on the 19th day of June, 1917,

plaintiffs made and delivered to defendant, through its agent, a written subscription for ten shares of defendant's preferred stock, and plaintiffs paid therefor \$1,000; that on the 3d day of July, 1917, plaintiffs subscribed for an additional ten shares of stock under the same understanding and agreement as was had concerning those purchased previously, and paid therefor \$1,000. Plaintiffs further allege that they were induced to sign said written subscriptions for stock and pay said \$2,000 by reason of the said representations by defendant, through its said agents, coupled with the promise to send to plaintiffs a writing evidencing the written agreement for repayment of the purchase price of said stock after two months and within ten years. Plaintiffs also allege that the defendant and the Bankers Realty & Investment Company are separate and distinct corporations; that the statement by the agent that the stock in the Bankers Realty & Investment Company and in the defendant company was the same, and that the defendant shared in the business and profits of the realty company was untrue; that such representations were the inducements leading them to subscribe for said stock; that they did not learn that such representations were false until about February 1, 1919, when they elected to return to defendant said stock certificates, and tendered the same to defendant and demanded of it the repayment of said \$2,000, which defendant refused to accept; that plaintiffs also offered to return the sum of \$46.96 received by them as dividends January 1, 1918, and pray for judgment for the sum of \$2,000, with legal interest thereon from January 1, 1919.

The defendant, for its answer, admits that it is a corporation, and alleges that the plaintiffs have improperly joined in their petition several causes of action, and files a general denial, except as to those matters which are expressly and specifically admitted, admits all that part of the allegations of the petition relating to the purchase by the plaintiffs from the defendant of the stock in question and signed written contracts of subscription for the same, and alleges that said written contracts were fully explained and understood by the plaintiffs before their signatures were affixed thereto. Defendant, further answering, alleges that said contracts, among other provisions, contained the following clause:

"No conditions, agreements or representations, other than those printed above, shall bind the said company."

Defendant denies that any misrepresentations were made as alleged in the petition. The contracts of subscription contained the following:

"It is understood that said certificate of stock will be issued subject to the constitu-

tion and by-laws of the North American Hotel Company."

And there is nothing in said constitution or by-laws providing for the repurchase of the said stock of said company, except as contained in article 5, section 1, of the by-laws, which was plainly and legally printed on the reverse side of the subscription contract signed by the plaintiffs and was plainly and legibly printed on the face of the certificates of said stock received by the plaintiffs; and further, that no officer, servant, agent or employee of the defendant company was authorized, instructed or permitted to make any contract with reference to the sale of said stock, other than that as printed on the subscription contract signed by plaintiffs, and that said defendant furnished to its agent the said printed form, and that the defendant had no knowledge of any verbal agreement or representations made or entered into by its said agents otherwise than contained in said subscription contracts. Defendant, for further answer, alleges that approximately two years expired between the date of said subscription contracts and the date upon which plaintiffs claimed to this defendant that any of said misrepresentations set forth had been made, or claimed that any such oral contract set forth had been made, or that any notice thereof of any claim had been received by the company, and that by reason thereof the plaintiffs have waived said claims and are estopped from setting up or asserting said claims, and ask that the action be dismissed.

It will be seen that the pleadings summarized would indicate that, under the issues made, the plaintiffs are relying upon the representations as to the relation between the realty company and the defendant, and also that there was an agreement upon the part of the agents to furnish a written contract in reference to the repurchase by the defendants of the stock and the failure so to do, and the defendant is relying upon the contract, in which it is expressly set forth that the company shall not be liable for any representations not included in the contract, and also the question of estoppel.

The plaintiffs in their reply brief say:

"Plaintiffs' action is not as defendant's counsel contend, and action on a contract or for damages on account of deceit in obtaining a contract, but the petition clearly shows that the plaintiffs rescinded the contract for fraud, tendered back the stock received from defendant, and demanded the repayment of the money received by defendant therefor."

The first proposition under this statement of the plaintiffs to which we direct our attention is: Does the plaintiffs' petition bear out the statement? Second, did the representations of the agents, as shown by their evidence, bind the defendant?

[1] As to the first proposition, the fact that

plaintiffs allege in the petition that they were induced by fraud and misrepresentations to purchase the stock in question, and that they tendered the stock back to defendant and made their tender good by bringing it into court, and by their asking that there be returned to them the purchase price thereof, is simply a rescission of the contract on the ground of fraud and misrepresentation. In the case of *First Nat. Bank v. McKinney*, 47 Neb. 149, 66 N. W. 280, it is held:

"A vendor who is induced to part with possession of property through the fraud of the purchasers has his election to rescind the contract and reclaim the property sold, or to ratify the sale and pursue his ordinary remedy by an action on the contract.

"But such remedies are not concurrent, and by electing to pursue one with a knowledge of the facts, he waives his right to the other."

This principle above enunciated was adhered to in the cases of *Pollock v. Smith*, 49 Neb. 864, 69 N. W. 312; *Hawver v. City of Omaha*, 52 Neb. 734, 73 N. W. 217, and *American Building & Loan Ass'n. v. Rainbolt*, 48 Neb. 434, 67 N. W. 493. We are therefore of the opinion that the action was one for rescission.

We now come to the vital proposition arising in this case: Were the representations made by the agent binding upon the defendant? The uncontradicted evidence was that the defendant had no knowledge of such misrepresentation having been made for some considerable time after the transactions between the plaintiffs and the defendant were concluded. The crucial test is, did the agent exceed his authority in making such statements, and did the plaintiffs have such knowledge as would indicate that the agent was not authorized or empowered by the principal to make them. On the face of the subscription contracts appears the following:

"No conditions, agreements or representations, other than those printed above, shall bind the said company."

This was notice to the signers. The order was to the North American Hotel Company, in large print. The certificates of stock were also from the hotel company. Plaintiffs state that they did not read all of the order, but took Blake's word for a considerable part of what it contained. Their negligence could not be attributed to the defendant. The defendant had given all the notice it could give. If plaintiffs had done what the ordinarily prudent business man would and should have done, they would have read the contract, and their failure so to do was at their own peril. The case of *Kaley v. Northwestern Mutual Life Ins. Co.*, 102 Neb. 135, 166 N. W. 256, bears directly upon the proposition arising as to the powers of the agent.

This court held in that case:

"An agent of a life insurance company, the limitation of whose power is set forth in the application for insurance, which limitation is expressly called to the attention of the applicant, cannot vary the terms of the policy by an estimate of results of the policy attached by him thereto."

Another very recent case, that of *Omaha Alfalfa Milling Co. v. Pinkham*, 105 Neb. —, 178 N. W. 910, sustained the same proposition, and it was held in that case that, where the party entering into the contract is informed of the limitation of the agent, if the agent exceeds those limitations, the contract will not be binding upon his principal. This is only in line with former decisions of this court, as in the case of *Wilson v. Beardsley*, 20 Neb. 449, 30 N. W. 529, and *Gregory v. Lamb*, 16 Neb. 205, 20 N. W. 248. And it is in accord with holdings of courts of last resort in nearly all of the states that have acted upon that question. *Holt Mfg. Co. v. Odenrider*, 61 Wash. 555, 112 Pac. 870; *Bybee v. Embree-McLean Carriage Co.* (Tex. Civ. App.) 135 S. W. 203; 21 R. C. L. 909, § 85. In fact, we find no cases holding, under the conditions as they exist in the instant one, contrary to those cited above.

[2] Counsel for plaintiff cite us to a number of decisions where representation made, being fraudulent, would vitiate a contract, but that is not the question at issue here. The question at issue is whether the misrepresentations and fraud were binding upon the defendant, and in nearly all, if not all, of the cases cited by counsel the controversy was between the parties themselves or with agents with general, and not limited, powers. In the instant case, if our conclusions be correct, there were no misrepresentations made of any character that would bind the defendant, as it was expressly provided that any representations should not be binding upon the defendant except those contained in the contract. And some of the cases heretofore cited are conclusive upon that question. We have been cited by counsel for plaintiffs to the case of *Griffin v. Bankers' Realty Investment Co.*, 105 Neb.—, 181 N. W. 169, and that was a case, not upon the representations of an agent, but the representations made by the party itself, and it is therein stated:

"Defendant cannot be heard to say that the sale is valid as far as the contract for purchase of stock is concerned and void so far as repurchase is concerned, since the entire contract is one and indivisible."

That does not apply in the instant case. The contract for purchase was the written contract. The agreement for a contract to repurchase was an unauthorized contract between agent and plaintiffs, just as much so as it would be for a contract between the two parties concerning an entirely different and

separate matter, as the defendant had no knowledge whatever of the representations at that time.

We are compelled to come to the conclusion that the district court was right in sustaining the motion of defendant and rendering judgment for a dismissal, and we recommend that its judgment be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

Affirmed.

KULHANEK et al. v. KULHANEK et al.
(No. 21617.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Pleading ¶387 — Party cannot plead one cause and rely on another.

A party will not be permitted to plead one cause of action and at the trial rely upon proof establishing a different cause. The allegations and proof must agree.

2. Judgment ¶143(3), 435—Statements by third person that action had been settled no ground for vacating defendants' default.

Statements to the defendant in an action by a third person, not a party to the suit, of which the plaintiff knows nothing, to the effect that said action has been settled, because of which statements the defendant fails to appear or to plead and a default judgment is entered against him, do not constitute a ground for setting aside said judgment after the term under the provisions of section 8207, Rev. St. 1913, nor any recognized source of equity jurisdiction.

Appeal from District Court, Douglas County; Sears, Judge.

Action by Frances Kulhanek and another against Emma Kulhanek and Michael Clark, as Sheriff of Douglas County, Nebraska, to vacate and set aside a judgment and sale and to allow plaintiffs to answer in the action in which they were obtained. From a judgment for plaintiffs, defendants appeal. Reversed, and case dismissed.

A. H. Murdock, of Omaha, for appellants.
James E. Bednar, of Omaha, for appellees.

Heard before LETTON, DAY, and DEAN, JJ., and CLEMENTS and MORNING, District Judges.

E. J. CLEMENTS, District Judge. On November 25, 1919, Emma Kulhanek, defendant in the present suit, obtained a judgment for \$2,500 by default in the district court for

Douglas county, Nebraska, against the plaintiffs herein for the alleged alienation of the affections of her husband, Joseph Kulhanek. The plaintiffs are the father and stepmother of said Joseph Kulhanek. An execution issued on said judgment was levied on plaintiff's property and on February 24, 1920, said property was sold by the sheriff to satisfy said judgment. On May 24, 1920, this action was brought to vacate and set aside said judgment and sale and to permit the plaintiffs to answer and make their defense to the action in which said judgment was obtained. The trial court found for plaintiffs and entered a decree setting aside said judgment and sale and granting them a new trial in said case. From said finding and judgment, defendants herein appeal.

In plaintiffs' petition it is alleged that, after the commencement of said alienation action, said Emma Kulhanek agreed with plaintiffs to drop said suit; that, relying on said agreement, plaintiffs paid no further attention thereto; that, in violation of her said agreement, said Emma Kulhanek fraudulently caused said judgment to be entered without any notice to or knowledge of the plaintiffs, and that plaintiffs did not know of the entry of said judgment until after said sale was made. The foregoing is the substance of all the allegations of the petition stating the ground or reason for setting aside said judgment. This is clearly a pleading of "fraud practiced by the successful party in obtaining the judgment or order," which is one of the grounds for vacating a judgment under the provision of subdivision 4, § 8207, Rev. St. 1913. Counsel in their brief also assert that the petition alleges unavoidable casualty or misfortune within the meaning of subdivision 7 of said section, but we find no allegations in the petition which sustain said contention, and, if there were such, the record contains no evidence to support such allegations. Plaintiffs' petition therefore sets up but a single cause of action or ground for setting aside said judgment and sale, and that is the alleged fraud of Emma Kulhanek in procuring the judgment to be entered in violation of her agreement to drop the case. The making of this alleged agreement was denied by the answer and the issue thus joined was decided by the trial court in favor of the defendants.

There is not a scintilla of competent evidence in the record to support plaintiffs' allegation of fraud on the part of the defendant and the trial court rightfully found that said Emma Kulhanek—

"acted in entire good faith in having judgment entered against the plaintiffs, * * * and in causing an execution to be issued and levied by the sheriff on the property of the plaintiffs herein, and was entirely without fraud in any of her proceedings in said action."

This finding for the defendants on the only ground or reason for setting aside said judgment alleged in the petition would seem to compel a judgment in their favor. But the trial court proceeded to make another finding, as follows:

"The court further finds that the plaintiffs herein relied upon the representation made by their son, Joseph Kulhanek, to the effect that he had settled the cause of action so filed against them by the defendant, Emma Kulhanek, and that by reason of their relying upon the representations so made by their son, Joseph Kulhanek, they suffered a judgment to be entered against them."

And it is upon this finding that the judgment for plaintiffs herein is based. The court also found that—

"Emma Kulhanek knew nothing of the representations made by Joseph Kulhanek to the plaintiffs herein."

There is evidence in the record, admitted over the objections of defendants, which supports the above finding in favor of plaintiffs, but there are no allegations in the petition which justify the admission of such evidence or upon which such a finding can be based.

[1] It is an elementary rule of law that the allegations and proof must agree.

"There can be no recovery if there be a material variance between the allegations and the proof." *Elliot v. Carter White-Lead Co.*, 53 Neb. 458, 73 N. W. 948.

"A party is not allowed to allege in his petition one cause of action and prove another upon the trial." *Imhoff v. House*, 36 Neb. 28, 53 N. W. 1032.

"A party will not be permitted to plead one cause of action and upon the trial rely upon proof establishing a different cause." *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027.

The action of the trial court in making a finding of facts not pleaded and basing its judgment thereon was a violation of the foregoing rule and clearly erroneous.

If the evidence on which such finding is based had been introduced without objection, we might permit the plaintiffs to amend their petition to conform to the proof, but as it was all admitted over the defendants' objections this cannot rightfully be done.

[2] But even if the facts so found had been pleaded in the petition the pleadings and evidence would not have been sufficient to support the judgment of the trial court. The facts so found are to the effect that plaintiffs suffered the judgment sought to be set aside to be entered against them because they relied upon the statements of their son, Joseph Kulhanek, that he had settled the action in which such judgment was obtained and that it would be dropped. Joseph Kulhanek was not a party to said action. Although he was the husband of Emma Kulhanek they had been separated for some time and he was living with the plaintiffs

when said statements were made. His wife had begun an action against him for divorce which was then pending. There is no evidence tending to show that he was authorized to act for her as her agent or otherwise, nor that he assumed to do so. On the contrary, his statement to his parents that he had settled said suit indicates that he had assumed to act for and on behalf of the plaintiffs. In making said statements Joseph Kulhanek was not in any sense the agent of Emma Kulhanek and the court specifically found that she knew nothing of them.

Is the fact that a defendant fails to make a defense to an action and a default judgment is taken against him without his knowledge because of his reliance on the statements of his agent, relative or friend, not a party to the suit, that same has been settled, a sufficient ground for setting aside said judgment after the adjournment of the term at which it was entered, where plaintiff knew nothing of said statements? It is obvious that such a state of facts does not constitute "fraud practiced by the successful party" or "unavoidable casualty or misfortune," and is not therefore within any of the provisions of section 8207, Rev. St. 1913, relied upon by plaintiffs. But this is not decisive of the question because such statutory provisions are not exclusive. The right to an independent equitable action to vacate a judgment also exists. *Meyers v. Smith*, 59 Neb. 30, 80 N. W. 273. Such statutory provisions are concurrent with independent equity jurisdiction. *Abbott v. Johnston*, 93 Neb. 726. Such an action for a cause other than those mentioned in said section 8207 must be founded on some recognized source of equity jurisdiction. *Douglas County v. Connell*, 15 Neb. 617, 19 N. W. 591. Do the facts disclosed by the evidence and found by the court constitute a recognized source of equity jurisdiction?

In some of the cases cited in plaintiffs' brief the order setting aside a judgment by default was made in the original action and before the adjournment of the term at which the judgment was rendered. Among these are *Milwaukee Harvester Co. v. Schroeder*, 72 Minn. 393, 75 N. W. 606; *Board of Education v. National Bank of Commerce*, 4 Kan. App. 438, 46 Pac. 36, and *Reiley v. Kinkead*, 181 Iowa, 615, 165 N. W. 80. Cases of this character are not authority on the question involved herein.

In many of the cases cited the defendant's failure to defend the action was occasioned by the acts, statements or representations of the plaintiff in said action or his attorney, which the courts have quite generally held constitute constructive if not actual fraud. Such were the facts and the holding of this court in *Klabunde v. Byron Reed Co.*, 69 Neb. 126, 95 N. W. 4, 98 N. W. 182, and *Arnout v. Chadwick*, 74 Neb. 620, 104 N. W. 942, which are cited and relied on by plain-

tiffs herein. Since there is no evidence in the instant case that Emma Kulhanek was guilty of either active or constructive fraud, such cases have no bearing upon the question under consideration.

The only authorities cited by counsel which appear to sustain the judgment of the trial court are Minnesota cases, among which are *Flannery v. Kusha*, 179 N. W. 902, and *Glaesser v. City of St. Paul*, 67 Minn. 368, 69 N. W. 1101, but an examination of said cases shows that they were brought and decided under a statute of Minnesota which provides that—

"The court * * * at any time within one year after notice thereof, in its discretion, may relieve a party from any judgment * * * taken against him through his mistake, inadvertence, surprise, or excusable neglect." Gen. St. 1913, § 7786.

Under this statute the court is expressly authorized, in its discretion, to set aside a judgment because of the plaintiff's own mistake, inadvertence or neglect. There is no such statute in Nebraska, and this court, in *State v. State Journal Co.*, 77 Neb. 771, 111 N. W. 118, held that the discretion of the court to set aside a judgment ends with the term at which it was rendered. The Minnesota cases cited cannot therefore be considered as authority in Nebraska.

From a careful examination and consideration of the authorities cited in the briefs and many others we have reached the conclusion that the facts disclosed by the evidence and found by the court do not constitute any statutory ground for setting aside the judgment in question or any recognized source of equity jurisdiction, and that the court erred in holding otherwise and in entering judgment for plaintiffs herein.

The judgment and decree of the trial court is therefore reversed and the case dismissed at plaintiffs' costs.

Reversed and dismissed.

ALBIN et al. v. CONSOLIDATED SCHOOL DIST. NO. 14 OF RICHARDSON COUNTY et al. (No. 21782.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Constitutional law § 281—Eminent domain § 167(2)—Condemnation act invalid for failure to provide for notice of meeting of appraisers.

Chapter 244, Laws 1919, is unconstitutional for failure to provide for notice to the property owner of the time and place at which the appraisers would meet for the purpose of making their assessment.

2. Courts § 37(1)—Where proceedings were beyond jurisdiction of court, owner did not waive objections by appealing.

The proceedings being without jurisdiction, the owner did not waive his objection thereto by appealing from the award.

3. Constitutional law § 43(1)—Eminent domain § 185—Owner's actual knowledge cannot invalidate proceedings under condemnation act, invalid because it did not provide for notice.

Actual knowledge of the owner of the appointment of the appraisers under an unconstitutional act cannot operate as a substitute for notice required by due process of law.

Dean and Aldrich, JJ., dissenting.

(Additional Syllabus by Editorial Staff.)

4. Constitutional law § 251—"Due process of law" construed.

Although the term "due process of law" is not subject to accurate definition, in a general sense it means the right to be heard before some tribunal having jurisdiction to determine the question in dispute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

Appeal from District Court, Richardson County; Raper, Judge.

Action by Frank Albin and another against Consolidated School District No. 14 of Richardson County, Neb., and others to enjoin defendants from taking possession of land sought to be condemned for school purposes. From a judgment for plaintiffs, defendants appeal. Affirmed.

John Wiltse, of Falls City, and Jackson B. Chase, Asst. Atty. Gen., for appellants.

Kelligar, Ferneau & Gagnon, of Falls City, for appellees.

Heard before MORRISSEY, C. J., DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ., and ALLEN and REDICK, District Judges.

REDICK, District Judge. This is an action in equity brought by appellees to enjoin the school district, appellant, from taking possession of a tract of five acres of land sought to be condemned for a school site under chapter 244, Laws 1919, and is submitted upon an agreed statement of the case, wherefrom it appears that, on May 1, 1920, the school board, having passed the required resolution declaring the necessity of appropriating the tract in question, filed its petition in due form in the county court of Richardson county, reciting its inability to purchase the land by agreement with the owners, and asking that three freeholders of the district be appointed to assess the damages to such owners by reason of the taking. The county judge thereupon appointed three appraisers and ordered them to report for duty May 7, 1920,

at 10 o'clock a. m. Notice of such appointment was served upon the appraisers May 3, 1920, requiring them to appear at the time stated, and to make their report thereafter in writing on or before May 20, 1920. On May 3, 1920, there was served upon appellees a writ, duly issued under the hand and seal of the county judge, notifying them of the filing of said petition, and that "three appraisers which are appointed by the court will make report of the damages sustained by the said Frank Albin and Ida M. Albin on or before May 20, 1920, and that said matter is set for hearing in the county court room, at Falls City, Nebraska, on May 20, 1920, at 1 o'clock p. m."

The appraisers, having taken the oath as required, made their appraisal, assessing the damages at \$300 an acre, or \$1500. No notice of the time and place of meeting for the purpose of assessing the damages was served upon appellees, but it appears that they knew who the appraisers were, and were well acquainted with them, and learned that an appraisal had been made some time before May 20, the day set for the hearing; and on that day appellees each filed objections to the proceedings, alleging that their property was sought to be taken without due process of law, and that said act is unconstitutional. On the same day the school district filed its acceptance of the appraisal and deposited \$1500 in court subject to order of appellees. At the hearing appellees offered evidence that no notice had been served of the time and place of the assessment of damages, which was received on May 23, to which the hearing had been adjourned. They also offered evidence as to the interest of appraisers, and value of the land taken, to which objection was sustained. The court thereupon overruled all objections of appellees, and in August, 1920, when appellant was about to take possession of the land, this action was brought, resulting in a permanent injunction against the condemnation proceedings, and the school district appeals.

[1] The constitutionality of the act is attacked on the ground that it does not provide any notice to the landowner of the time and place of meeting at which the appraisers will assess the damages, and therefore no opportunity was afforded appellees to be heard upon that question before filing of the report. The act in question, after providing for the filing of a petition with the county judge, proceeds as follows:

"Section 3. Thereupon notice shall issue, under the seal of the county court, to the persons interested in the property sought to be taken, of the filing of the petition and of the time and place fixed for a hearing thereon. Such notice shall be served by delivering to each of the persons interested, when his residence is known, a certified copy thereof, and the service shall be proven by affidavit. * * * The hearing on the petition may not be had for at least ten days after the completion of service.

"Section 4. At the time the petition is filed, the county judge shall appoint three disinterested free holders of the school district in which the real estate is situated, who, after being duly sworn to perform the duties of their appointment with fidelity and impartiality, shall assess the damages that may be sustained by reason of the taking of the property and on or before the day set for the hearing file a report in writing with the county judge."

Section 5 then provides that upon payment of the amount of the appraisal the district may take immediate possession. And section 6 provides:

"If the assessment shall not be satisfactory to the board, other and different appraisers may, on application of the board be appointed to assess the damages."

It will be noted that the only notice required to be served upon the property owners is "of the filing of the petition and of the time and place fixed for a hearing thereon," and that the appraisers are to be appointed at the time of the filing of the petition, and are to make their report assessing the damages to the property owners on or before the day set for the hearing. Neither the statute nor the notice fixes any time or place where the appraisers shall meet for the purpose of assessing the damages.

The precise question for determination, therefore, is whether or not the failure of the statute to provide notice to the owner of the meeting of the appraisers, and thus give him an opportunity to be heard before the filing of the report, renders the act obnoxious to section 3 of the Bill of Rights, providing:

"No person shall be deprived of life, liberty, or property, without due process of law."

[4] A precise definition of the term "due process of law" has not been attempted by the courts, and wisely so, for the reason of the multifariousness of its application; but, although its limitations are not subject to accurate definition, the courts are of one mind upon the proposition that in a general sense it means the right to be heard before some tribunal having the jurisdiction to determine the question in dispute, and has its most complete and vigorous application to proceedings in their nature judicial. The point in issue has been before this court a number of times, and we will proceed to examine some of the cases relied upon to sustain appellee's contention that the act is unconstitutional.

The case of *McGavock v. City of Omaha*, 40 Neb. 64, 58 N. W. 543, was an action to recover damages for a change of the grade of the street. The charter of the city of Omaha, under which such change of grade was attempted to be made, required the appointment of appraisers to assess damages, and provided for an appeal from the award which should be the exclusive remedy, but contained no provision for notice to the property

owner, with reference to which legislation Harrison, J., remarked:

"Here is conferred the power and authority to one party to appoint or form the tribunal or body, take, hear or examine the evidence, and assess the amount of recovery, without any notice to other parties concerned, or any provision for them being in any manner represented in the proceedings, and providing for an appeal from an adjudication of their rights about which they can have no knowledge, and making the remedy by appeal exclusive. Can this be done? We are satisfied it is within the inhibition of the provisions of the Constitution, as an attempt to appropriate or damage property 'without due process of law,' and will not bar parties of the right to an action for the damages sustained, and the fact that the legislature has failed to provide for any notice cannot bar the right to compensation."

The court, however, as noted by Letton, J., in *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121, on page 143, 138 N. W. 171, restricted their holding to the proposition that in such case an action for damages would not be barred.

In *Wilber v. Reed*, 84 Neb. 767, 122 N. W. 53, the validity of a portion of section 8605, Ann. St. 1907, was under consideration. By that section the city of Beatrice and others of its class were authorized to appropriate private property for the purpose of public parks, after providing for the appointment of appraisers, and notice to the owners of the time of making the assessment for damages, and contained the following:

"At the next regular meeting of the council after such assessment, the council may vacate such assessment, if unjust, and, if so vacated, or in case of a failure to obtain the assessment, for any cause, the council by resolution may appoint three other assessors; and, in that case, such new assessors shall, on the day following their appointment, without further notice, meet at the place fixed by the ordinance for meeting of the assessors, and * * * shall proceed as provided for the first board of appraisers."

The matter proceeded to the point where the appraisers met for the purpose of making their appraisal, when they were restrained by an order of the district court. Subsequently the restraining order was dissolved, and the council proceeded under that part of the section above quoted to appoint three other appraisers, who made the appraisal, and thereafter plaintiff brought the action to enjoin the officers of the city from taking possession of the property upon the ground that quoted portion of said section was unconstitutional in failing to provide notice to the property owner of the time and place of meeting of said appraisers, and such was the holding of the court; citing *People v. Tallman*, 36 Barb. (N. Y.) 222; *Rathbun v. Miller*, 6 Johns. (N. Y.) 281, and other cases.

These cases are sufficient to show that

this court is committed to the proposition that, before the property of a citizen may be taken for public use under the power of eminent domain, the owner is entitled to such notice of the proceedings as will give him an opportunity to be heard upon the questions involved.

For the purpose of determining the legislative interpretation of "due process of law," we have examined the other enactments on the subject of eminent domain as contained in the Annotated Statutes of 1913, and find that, in 23 out of 25 such enactments, notice to the property owner of the time and place of the meeting of the appraisers is required, either by specific direction or by reference to other enactments where such notice is required. It is contended, however, by the appellant that the provision for the issuance of notice by the county court satisfies the requirement of due process of law. It has been held that the appraisers in condemnation proceedings, in determining the value of the property taken, or the amount of damages, exercise judicial functions (In re Appraisal of Omaha Gas Plant, 102 Neb. 782, 160 N. W. 725); in other words, that upon this question the proceeding is in its nature judicial, and therefore, in determining whether or not the notice provided is sufficient, the principle governing such proceeding should govern.

The notice in question advised the property owner that a petition was filed, and appraisers appointed May 1, and that the hearing on said petition would be had May 20. In the meantime the appraisers had taken the oath, determined the question of damages, all without notice to the property owner until the report was filed, not later than the day of hearing. We are unable to perceive how this can be looked upon as due process of law. The property owner, when he comes into court on the day of hearing, finds the only question upon which he has a right to be heard at all already determined, and the only remedy afforded him is an appeal, to get the benefit of which he must give bond, and probably incur the expense of employing counsel. Furthermore, what is this hearing to which he has been invited? Certainly not upon the question of damages which shall be awarded him, because the act confers no authority upon the county judge or court to alter the appraisal in any way. In fact, the only peril in which the appraisalment stands is of being rejected by the school board, a right granted it by section 6 of the act in case the assessment is not satisfactory; while, if satisfactory, section 5 merely requires the board to signify its acceptance thereto in writing, and deposit the amount thereof in court, when a fee-simple title will vest in the district. The only matters upon which the owner can be heard are those referred to in section 8; i. e., that more than ten acres are sought to be

taken, or where the property constitutes an orchard, garden, or public park, or, if outside the corporate limits of a city or village, that it lies within 20 rods of a residence with no highway intervening. In the respect now under discussion the act is not unlike one which should provide that, in all actions brought before a justice of the peace, the defendant should have notice of the hearing, but that judgment should be rendered for the plaintiff, from which the defendant might appeal. If the analogy is perfect, we hardly think it would be contended that such a proceeding constituted due process of law.

[2, 3] The case of *Sterritt v. Young*, 14 Wyo. 146, 82 Pac. 946, 4 L. R. A. (N. S.) 169, 116 Am. St. Rep. 994, contains a very full and learned discussion of this question, citing a number of cases in support of their conclusion, among others *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, quoting from the opinion of Earl, J.:

"I am of opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

McGavock v. Omaha, supra, is also cited. The case is on all fours with the one at bar and involved the validity of a statute under the power of eminent domain. See, also, *People v. Tallman*, 36 Barb. (N. Y.) 222, *Anderson v. Tuberville*, 46 Tenn. (6 Cold.) 150, *Dodd v. Hart*, 8 Del. Ch. 448, 68 Atl. 397, and *Burns v. Multnomah R. Co.* (C. C.) 15 Fed. 177. The last two cases are cited by appellant, but they hold the reverse of his contention.

For the purpose of sustaining the constitutionality of the statute in question, appellant cites the case of *Branson v. Gee*, 25 Or. 462, 36 Pac. 527, 24 L. R. A. 355, a case, strictly speaking, referable to the police power, rather than power of eminent domain. The statute permitted the road supervisors to enter upon private property adjoining the road and take therefrom gravel and materials for the purpose of making repairs, and provided that the owner might file his claim with the county court and have his damages assessed. The action was brought against the road supervisors, and the court held that the remedy of the plaintiff was that provided by the statute, and, the proceedings being instituted by the state, no notice was required before the taking, and that the remedy to the property owner was

adequate. In *Hood River Lumbering Co. v. Wasco County*, 35 Or. 498, 57 Pac. 1017, however, the court held that a statute providing for the taking of private property under the power of eminent domain containing no provision for notice to the owner is void; and Judge Bean distinguishes the case of *Branson v. Gee*, supra, remarking:

"The decisions of this court upon the validity and constitutionality of acts providing for the assessment of property and levy of taxes for general purposes, or for assessments for opening or improving streets in municipalities, or the laying of sewers, or the taking of material by road supervisors for the repair of public highways, are not authority in the present case, except in so far as they may illustrate the application of the doctrine of due process of law to a given state of facts. * * * It was held in these cases that the city charters were constitutional and valid, although they made no provision for notice to the property owners; but this holding was expressly put upon the ground that 'the city is a miniature state—the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for, when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council.' Mr. Justice Brewer, in *Paulson v. Portland*, 149 U. S. 38, 13 Sup. Ct. 753."

The failure to distinguish between the police power, the power of taxation, and the power of eminent domain, has led to some confusion in the cases upon the question of due process of law, as was noted by Post, C. J., in *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 565, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557. Such distinctions are thoroughly pointed out and discussed in 20 C. J. 517, § 5, consideration of which will explain many of the cases holding that notice to the property owner affected may be implied; for example, *Enterprise Irrigation District v. Tri-State Land Co.*, 92 Neb. 121, 138 N. W. 171, which was a case involving the exercise of the police power, and *State v. Several Parcels of Land*, 83 Neb. 13, 119 N. W. 21, L. R. A. 1916E, 1, a tax case.

The case of *Buckwalter v. School District*, 65 Kan. 603, 70 Pac. 605, also cited by appellant, was an action in ejectment against the school district, which by mistake had built a schoolhouse upon the land of plaintiff. A statute covering such situations permitted the district to apply to the county judge to appoint freeholders to appraise the value of the land, and thereupon title should vest in the district, but omitting to provide for notice of such application to the owner. It was held that ejectment could not be maintained, that compensation need not be made before the taking, but that the owner was not bound by the amount of the assess-

ment, and might either appeal therefrom, or bring an action to recover the value of the land; the court saying, 65 Kan. at page 607 (70 Pac. 607):

"Notice to the citizen of the taking of his property for a public purpose is of no concern to him, for the right to take exists, independently of notice. It is only when compensation for such taking comes to be considered that the owner of the condemned property becomes interested, and only of proceedings to determine that question is he entitled to notice, for upon that question only has he a right to be heard. The taking precedes the assessment of damages. The title passes upon the taking of the property."

It seems to us that a distinction may be made between cases where the property has been taken and improvements made upon it and the only question remaining is the compensation to be paid the owner, and cases like the one at bar where the objection is made to the proceeding itself by which the land is sought to be condemned. In the former the court would be justified in holding that the requirement of due process of law was satisfied, while in the latter the proceedings should be required to conform to the Constitution.

The last remark is also applicable to the case of *Appleton v. City of Newton*, 178 Mass. 276, 59 N. E. 648, where the land had been taken and water pipes laid therein before the bill in equity to remove the cloud upon the title caused by the recording of the condemnation proceedings had been filed; no notice of such proceedings to the owner being provided in the statute. However, that case is authority for the proposition:

"It is enough if there is such a notice as makes it reasonably certain that all persons interested who can easily be reached will have information of the proceedings, and that there is such a probability as reasonably can be provided for, that those at a distance also will be informed."

The cases cited to support that holding fail to do so. *Huling v. Kaw Valley Railway & Improvement Co.*, 130 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045, merely holds that notice by publication is sufficient to a nonresident owner, and *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, *McMillen v. Anderson*, 95 U. S. 37, and *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, were all cases involving assessment of a tax. Furthermore, it appeared that the proceedings were in December, 1889, and the plaintiff had notice of them as early as January 1, 1890, by personal correspondence with the engineers in charge, and took no action until December, 1897; and the bill might well have been dismissed on the ground of want of equity. In any event we cannot approve of the reasoning in that case, which rests the validity of the

statute upon the mere probability that the owner may have notice.

The case of *Lancaster v. Augusta Water District*, 108 Me. 137, 79 Atl. 463, Ann. Cas. 1913A, 1252, also cited, merely holds that the owner is not entitled to notice of the condemnation proceedings, but the statute provided for notice of the assessment of damages.

The case of *State v. Grand Island & W. O. R. Co.*, 31 Neb. 209, 47 N. W. 857, is also relied upon by appellant. The railroad had taken possession of the land in question without condemnation proceedings, and the owner called an inquest for the purpose of determining the damages, as permitted by the act, before the county judge, and notice thereof was given to the railroad company, and this action was an original application for mandamus to compel the company to deposit the damages so found with the county court. The statute in question provided for ten days' notice to the property owner of the assessment, but did not provide for any notice to the railroad company in case the owner initiated the proceedings, and the court held, as it appeared from the record that notice was given to the railroad company, it was sufficient. The proceeding in that case was a statutory substitute, however, for an ordinary action for damages, and was a judicial proceeding, and the notice given was all that was required in such cases to constitute due process of law.

In *St. Joseph v. Geiwitz*, 148 Mo. 210, 49 S. W. 1000, also cited, the summons issued in the proceedings notified the owner that "on the day therein named commissioners *would be appointed*" to assess the damages. In the instant case the notice given was that the appraisers had been appointed and would file their report on or before May 20. The distinction seems obvious.

Appellant claims notice was waived by appellee's actual knowledge of the proceedings and by taking an appeal from the award. We think no act of appellee could operate to give vitality to an unconstitutional statute, any more than consent may confer jurisdiction upon a court, which the law has not conferred. The entire proceedings are void for want of jurisdiction. Of course, if appellee had accepted the award, he could not be heard to object, but in such case the title of appellant would rest upon the estoppel, rather than the statute. *Abney v. Clark*, 87 Iowa, 727, 55 N. W. 6.

Appellant refers to five other statutes to which it is claimed the same objection as urged here applies. Only three of them are, apparently, defective, and we do not deem it necessary to discuss them, as all other acts we have examined provide for notice, and the fact, if true, that our holding invalid the act under consideration would affect other statutes should not deter us from declaring the law in the instant case.

We are constrained to hold the act unconstitutional, and therefore the judgment of the district court is right and is affirmed.

ALDRICH, J., dissents.

DEAN, J. (dissenting separately). The present case does not present a controversy between private persons. It is a controversy between private persons and a consolidated rural school district, an arm of the sovereign government that functions under its authority, whose officers are charged with the responsibility that pertains to the elementary education of the youth of the district. It is conceded that plaintiffs were without actual notice of the appointment of the appraisers until three days thereafter, namely, May 3, 1920.

The point that plaintiffs stress the most is technical. They argue with great force that they were not formally notified of the time when nor the place where the appraisers were to meet. Questions pertaining to the value of the land and to the damage suffered, if any, are treated as of no concern, but firm reliance is placed upon the failure of formal service of notice.

The same principle is involved in *McGavock v. City of Omaha*, 40 Neb. 64, 58 N. W. 543. In that case, as here, the question of notice was involved, and we held:

"A notice must be given by a city of proceedings to assess the damage to property which will be caused by a proposed change of the grade of a street in said city and of the time and place where the appraisers appointed for the purpose of assessing such damages will meet, in order that the owner of the property so damaged may have an opportunity to be heard in his own behalf. * * * If the notice is not given, the appraisal proceedings will not exclude the party of any remedy, but such party may commence an action at law to recover damages caused by such change of grade to property of which he or she is the owner."

Plaintiffs had an adequate remedy at law. As in the *McGavock* Case they were without notice, but their remedy was to "commence an action at law to recover damages," if any they suffered beyond the amount of the appraised value. If plaintiffs' remedy at law was adequate, further inquiry, under the weight of authority herein noted, should cease with respect to the constitutionality of the act.

Pawnee County v. Storm, 34 Neb. 735, 52 N. W. 696, is in point. The opinion is by Maxwell, C. J. That case had to do with the location of a public highway over the land of a nonresident owner. The usual statutory notice was published. The owner, as in the present case, was without actual notice of the proceeding until after the time for filing claims for damages had expired. The court held that the right of the owner to compensation was not forfeited, and that he might recover the value of the land so taken

within a reasonable time after he had actual notice. The remedy there pointed out would doubtless require the owner to file a claim with the county board, though the opinion is silent on that point, and it is presumed that body would do its full duty. In the present case plaintiffs forfeited no property rights. True, they could not be heard before the appraisers after the report was filed with the county judge, but plaintiffs were not remediless, as pointed out in the *McGavock* Case and in the *Storm* Case.

In 2 *Lewis, Eminent Domain* (3d Ed.) § 568, the *Storm* Case is cited. The text reads:

"In Nebraska it has been held that, while notice by publication will give the tribunal jurisdiction and enable the land to be bound by its judgment, the landowner, who does not receive actual notice of the proceedings in time to make his claim pursuant to the published notice, may present it afterwards and will be entitled to have it allowed."

For other reasons plaintiffs are not in position to question the constitutionality of the act. The question of value is not referred to in the evidence, nor is it pleaded in the petition that the five-acre tract exceeded \$1,500 in value or that plaintiffs were damaged in excess of that sum. With respect to value they have pleaded only conclusions. On this point the petition reads:

"Plaintiffs further allege that the defendants have deposited with the county judge the condemnation money and are now plowing said land preparatory to putting in fall wheat thereon, and if the defendants are permitted to take possession of said tract of land they will suffer irreparable injury, for which they have no adequate remedy at law."

In 21 R. C. L. 440, § 5, it is said:

"It is a well-settled rule that legal conclusions are not to be pleaded, for it is the duty of the courts to declare the conclusions, and of the parties to state the premises. The allegations of a conclusion of law raises no issue, need not be denied, and its truth is not admitted by a demurrer to the complaint containing it."

Having failed to plead or to prove damages, plaintiffs cannot be heard to complain of the act on constitutional grounds. *Cram v. Chicago, B. & Q. R. Co.*, 85 Neb. 586, 123 N. W. 1045, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170, and 228 U. S. 70, 33 Sup. Ct. 437, 57 L. Ed. 734. See note L. R. A. 1917C, 142. It may be noted incidentally that the *Cram* Case was affirmed on appeal to the Supreme Court of the United States. In the *Cram* Case it is said:

"Until defendant is shown affirmatively to have been injured, he cannot be heard to complain that the act under which the suit is brought is unconstitutional." 85 Neb. 586, 123 N. W. 1045, 26 L. R. A. (N. S.) 1028, 19 Ann. Cas. 170.

Unless this appears he has not been deprived of due process.

In *Coley, Constitutional Limitations* (7th Ed.) at page 232, it is said:

"Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it."

In *Clark v. Kansas City*, 176 U. S. 114, 20 Sup. Ct. 284, 44 L. Ed. 392, Mr. Justice McKenna cites with approval the foregoing language of Judge Cooley, and adds:

"We concur in this view, and it would be difficult to add anything to its expression."

State v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252:

"Statutes are not to be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions. * * * We cannot set aside the acts of the Legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others."

In *Wellington*, Petitioner, 16 Pick. (Mass.) 87, 26 Am. Dec. 631, the court, speaking by Shaw, C. J., says:

"Where an act of the Legislature is alleged to be void, on the ground that it exceeds the limits of legislative power and thus injuriously affects private rights, it is to be deemed void only in respect to those particulars, and as against those persons, whose rights are thus affected."

If plaintiffs were damaged in excess of \$1,500 by the appropriation of their land, they should have so alleged in plain and unmistakable language. Or if the tract, by reason of location or because of contiguity to other lands of plaintiffs, or for any other good and sufficient reason, caused them to be damaged in a sum exceeding that allowed by the appraisers, they should have pleaded the facts.

With respect to the judicial annulment of a legislative act, I adhere to the views expressed in the dissenting opinion in the non-partisan judiciary case entitled, *State v. Junkin*, 85 Neb. 1, at page 11, 122 N. W. 473, wherein the following authorities are cited: Cooley, *Constitutional Limitations* (7th Ed.) p. 227; Professor Wigmore, 23 Am. Law Review, 719; *City of Topeka v. Gillett*, 32 Kan. 431, 4 Pac. 800; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; *Hoover v. Wood*, 9 Ind. 296.

The delicate duty of declaring that a legislative act is void is an assumption of judicial authority that should not be exercised except upon the clearest grounds. An attack against an act of the legislature on alleged constitutional grounds should be the last resort of the litigant. To hold an act invalid should be the last resort of a court. When a litigant presumes to raise his hand against the validity of a legislative act he should first plead facts showing clearly and affirmatively that his rights will be injuriously affected by an enforcement of the act. In the

present case neither the equities nor the law are with the plaintiffs. In brief, it appears that a law has been declared unconstitutional at the suit of "a party whose rights it does not affect" and who "merely assumes to champion the wrongs of others." A slender judicial thread is it not upon which to hazard the validity of a legislative act?

McSHANE v. MURRAY et al. (No. 21682.)
(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. *States* §191(1)—State's constitutional immunity from suit cannot be waived by voluntary general appearance by Attorney General.

Where by its Constitution the state is immune from suits against it except as the Legislature otherwise provides, the immunity thus provided cannot be waived by a voluntary general appearance in the case and a participation in the trial thereof upon its merits by the Attorney General in an unauthorized action brought against the state.

2. *States* §212—Decree against state in unauthorized suit void.

A decree rendered against the state under the circumstances above stated is void as against the state, and upon appeal to this court will be vacated and set aside in so far as the same seeks to bind the state.

3. *Dismissal and nonsuit* §42—Dismissal of state held not to affect action against other defendants.

Such dismissal of the state from the litigation, however, does not affect the action against other defendants against whom the plaintiff had a right to maintain a suit.

4. *Boundaries* §37(3)—Evidence sustaining finding as to location of government quarter corner.

In a dispute arising between plaintiff and defendants as to the true boundary line between their adjoining lands, the sole question depended upon the genuineness of a certain alleged original government quarter corner. The trial court found for the plaintiff and established the corner as contended for by the plaintiff. Evidence examined, and held to support the decree of the lower court.

Appeal from District Court, Sheridan County; Westover, Judge.

Suit by Barney McShane against John Murray, the state of Nebraska, and another. Decree for complainant, and defendants appeal. Decree vacated as to the State, and as to the other defendants affirmed.

Clarence A. Davis, Atty. Gen., and Mason Wheeler, Asst. Atty. Gen., for appellants.

J. H. Edmunds, of Rushville, and J. E. Gilmore, of Hay Springs, for appellee.

Heard before MORRISSEY, C. J., ALDRICH, FLANSBURG, and ROSE, JJ., and DICKSON and TROUP, District Judges.

TROUP, District Judge. This is a suit for an injunction. Plaintiff is the owner and in possession of the southeast quarter of section 25, township 32, range 46, and defendant, Cornelius Murray, is the lessee and in possession of the north half of section 36, same township and range, and all in Sheridan county, Neb.; the latter description being a part of the school land owned and leased by the state of Nebraska and coming to the defendant Murray, in 1911, through mesne assignments of the lease, and lying immediately south of said section 25.

A dispute having arisen between the plaintiff and defendant, Murray, as to the location of the true boundary line between the two sections, and plaintiff claiming that the defendants were undertaking to enter upon and cultivate a portion of the land lying within the disputed tract, but which plaintiff alleges belongs to him, instituted this action in April, 1917, to enjoin the defendants from so doing. Upon presenting plaintiff's petition to the judge of the district court for Sheridan county, a restraining order was issued against the defendants accordingly, and the same remained in force and effect until the final decree in June, 1920.

At the commencement of the action, Cornelius Murray and John Murray, only, were made defendants. A year thereafter, however, but without leave of court to make additional parties defendant or to issue summons therefor, a summons was issued against and served upon the state of Nebraska, commanding it to answer it in the usual time thereafter.

None of the defendants having answered, on February 5, 1920, the court entered an order requiring all defendants to answer the petition of the plaintiff on or before March 8, 1920. Without interposing any objection to the action thus taken by the plaintiff in seeking to bring the state into the litigation, on February 20, 1920, the state filed its answer, setting out the fact that the state was the owner of the land referred to in section 36; that it had leased the same to its codefendants herein and put them in possession thereof; that it had theretofore caused said land to be surveyed, and that the disputed tract falls within the boundaries of section 36, and asked that plaintiff's action be dismissed. At about the same time the defendants Murray filed their joint answer, in which they set forth substantially the same facts as contained in the answer of the state. The plaintiff, replying, denied all new matters set forth in the respective answers.

A trial was had to the court, and on June 17, 1920, a final decree was rendered by the court, finding generally for the plaintiff and

against all the defendants; found the boundary line between the two sections to be as claimed by the plaintiff; found the corner designated in the evidence as the "McShane" corner to be the location of the original government quarter corner, and established the same as such by the decree, and made the restraining order theretofore granted a perpetual injunction. The defendants appeal.

The appellants first contend that the plaintiff has no lawful right or authority to sue the state in an action like the present one and was without authority or legal right to make it a party to the litigation, and cites authorities in support thereof. We are constrained to hold that the position of the state on this point is well taken and must be sustained. Section 22, art. 6, of the Constitution of Nebraska, provides:

"The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought."

[1, 2] Under this provision, of course, no action can be brought against the state unless and until the Legislature has so provided. The Legislature of the state has acted in pursuance of this provision of the Constitution and has specified certain classes of actions which may be brought against the state. Rev. St. 1913, § 1177. In the case of *State v. Stout*, 7 Neb. 89, this court held that the section of the statute above referred to "covers all the various claims and demands on which the state may be sued." See, also, *State v. Mortensen*, 69 Neb. 376, 95 N. W. 831, 5 Ann. Cas. 291. It is quite evident that the action at bar is not one within any of the classes mentioned in said section of the statute, and we are not cited to, nor are we aware of, any other provision enacted by the Legislature since, which would authorize the maintenance of an action in the nature of the one at bar against the state. Indeed, judging from the entire silence of plaintiff's brief on the subject, we assume that plaintiff is not resisting this claim made on the part of the state. Of course, if the plaintiff had no authority or legal right to make the state a party to this action or maintain this suit against it, the voluntary appearance by the Attorney General in behalf of the state and his failure to object to the jurisdiction of the court over the state did not, and could not, in any wise bind the state so as to make the decree rendered against it of any validity. The exception of defendants in the particular stated is therefore sustained, and so much of the decree of the lower court as purports to adjudicate the matters in suit against the state is vacated and set aside and the action as against the state dismissed.

[3] However, a dismissal of the state from the litigation does not affect the action as to the other defendants. The plaintiff would still have the right of action against them

personally to restrain them from taking possession of premises already in the possession of plaintiff. And this brings us to a consideration of the case upon its merits.

[4] In 1882 a government survey was made of the two sections involved in this controversy and adjacent sections, at which time the section corners and some, perhaps all, of the quarter section corners were located and marked. This dispute as to the location of the true boundary line having arisen, the defendants Murray, in the year 1914, applied to the state commissioner of public lands and buildings to have the correctness of the former survey of section 36 tested, in pursuance of the provisions of sections 5563, 5564, and 5566, Rev. St. 1913. In pursuance of the authority conferred by these provisions of the statute, the commissioner of public lands and buildings delegated one E. C. Simmons, then deputy state surveyor, to make a retracement survey of these lands with a view of definitely establishing the boundary line between the two sections. In March, 1914, Simmons made a retracement survey and filed his report thereof accompanied by a blueprint or diagram of the premises; a copy of which, with the various notations thereon, being attached to the record herein. The chief and about the only point of contention now is which one of the two points shown upon this plat is the original government quarter corner, that marked by a red letter "A" and designated in the evidence as the "McShane" corner, or the one marked by the red letter "B" and designated in the evidence as the "Simmons" corner. As before stated, the court found the "McShane" corner to be the true one and so decreed. Deputy State Surveyor Simmons in his retracement survey in 1914 rejected the McShane corner as not being an original government quarter corner, and established what he claimed should be the original government quarter corner at "B" or Simmons corner. The statute above referred to (section 5564) provides that, when such survey shall have been made and properly approved, filed and recorded, it "shall be prima facie evidence of the correctness thereof." Is the prima facie case thus made, together with such other testimony introduced tending to support it, overcome by direct and positive evidence against its correctness? We think it is.

The plaintiff testified that in the year 1885 (three years after the original survey was made) he, with other members of the McShane family, first went into possession of the southeast quarter of section 25 as homesteaders and has occupied it ever since; that some time in July, 1895, he first discovered the now so-called "McShane" corner, has been familiar with it ever since, and described it as consisting of two pits and a

mound, just the same as all the other government corners and corresponding in line with other government corners to the west; that they built their house about 20 or 30 rods north of this quarter corner; that a number of years later one Ball, the then county surveyor of Sheridan county, was engaged by them to do some surveying in that vicinity, and at that time they had him build up this corner a little more and dig out the pits to do it with, and that Ball at that time put a brick in the mound, but, with this exception, left it just the same as it was before and as it has been since. John McShane, brother of the plaintiff, corroborated the plaintiff in his evidence in all material respects. Witness Sage testified that in the year 1887 he leased the school section in question for a horse pasture, and, in endeavoring to locate its boundaries in company with the plaintiff, the plaintiff at that time showed him the quarter corner now called the "McShane" corner, that he examined it and took it to be a government corner, but because it was a short section he abandoned the lease.

Witness Linden testified that his homestead was just east of the school section, where he had lived since 1884; that he was acquainted with the boundary lines and section corners in that vicinity; that he first saw what is called the "McShane" quarter corner in 1885, and that it looked to him like all the rest of the quarter corners around there, and was in line with the rest of the corners to the west, but not with those to the east.

Surveyor Simmons called in behalf of the defendants, testified that he had been a surveyor and civil engineer since 1875 and had done a great deal of retracement of old lines; that he had made the retracement of the boundary line of section 36 in this case; that, after locating the four original government section corners, he went to and examined the corner now called the "McShane" quarter corner, which he said seemed to have been recently built, and had two large pits and a mound with a brick in it, which he said compared with other corners established by former county surveyors, and that the government did not use bricks in establishing its corners. Upon being asked: "Did the physical marking of the McShane corner differ in any other way from the markings of government corners?" he answered: "I don't know as it does, I don't recall any special features." Being of the opinion that the quarter corner called the "McShane" corner, marked "A" on the plat, was not the original government corner, Simmons rejected it and located the quarter corner at the point marked "B" on the plat and called the "Simmons" corner.

Witness McCarthy testified that he had

been a surveyor since 1868, and is the present county surveyor of Sheridan county; is familiar with the corners of section 36; first saw the McShane corner about ten years ago; consisted of two pits and a mound with a brick in it; pits were large and were in northeast and southwest direction, and, after making some measurements respecting it, thought something peculiar about it and could not give it credit for being the original corner.

Cornelius Murray, one of the defendants, testified that he had lived in Sheridan county for 35 years, and on section 36 since 1911; is familiar with the government corners of 36; first saw the McShane corner about 1900; in June 1885, he and the plaintiff herein, having located the northwest government corner of 36, secured a surveyor's chain and chained pretty straight west for half a mile to locate the quarter corner, but could not find it, although they hunted all around, and is positive it was not there in June of that year.

Three other witnesses testified on behalf of the defendants. One who had lived in the vicinity since 1884 said he first saw the McShane corner in 1890, but could not say it was not there before. Another who lived in the neighborhood since 1905 said he first saw it about ten years ago. Another who had lived in the vicinity since 1887 first saw the McShane corner some time in the nineties. This closes the testimony on the subject except for a few field notes which will be referred to presently.

Of course, the testimony of these witnesses who say they did not see the McShane corner until a greater or less number of years after 1885, but who had never endeavored to see it and had no interest in its discovery or location, avails little or nothing as against the positive evidence of persons who actually did see it in 1885 and have been familiar with its existence ever since that time. So it seems to us that we are compelled either to find that the four witnesses—the plaintiff, his brother, Sage, and Linden—swore falsely, or accept as a fact conclusively established that the McShane corner, such as it was, was in existence at the point claimed by the plaintiff as early as 1885 at least. If so, what proved fact or even suspicion under the evidence justifies a finding that said corner is not a genuine government corner? The defendants have introduced certain field notes of the 1882 survey which they claim are in corroboration of their theory. It is doubtful whether in this case

recourse may be had to the field notes to contradict the genuineness of the McShane corner as established by the evidence. The case of *State v. Ball*, 90 Neb. 307, 133 N. W. 412, seems to announce the correct rule in this respect:

"Monuments erected by the government surveyor to mark the section corners according to his survey will control, although in conflict with his field notes. If the monuments have been obliterated, but their location can be ascertained from a consideration of the testimony of witnesses who know and testify to the fact, the site thus established will control. If the monuments have been destroyed and their original location cannot be established by other proof, recourse may be had to the field notes of the original survey."

The McShane corner was discovered in the summer of 1885, but three years after the original survey, and at the time when and by the first settlers who went upon that land and all described it as looking like all the other government corners. It has never been obliterated or destroyed, but has been a known corner ever since. Under the rule above stated it would seem that the field notes cannot be permitted to displace a fixed corner thus established. Besides, the field notes are not corroborated by the discovery of a monument of any character, pits, mounds, sandstone or anything else in the vicinity of the so-called "Simmons" corner, although no doubt diligent search has been made for the same. It is true that the line connecting the McShane corner with the northwest and northeast corners of the section is not a straight line, and that, to our minds, is the strongest evidence against the genuineness of the McShane corner, but neither will courses and distances be allowed to prevail over original government corners convincingly established by evidence. We have much respect for the opinions of the witnesses Simmons and McCarthy as practical and experienced surveyors and believe they honestly entertain a doubt that the so-called McShane corner is the true original government corner, but we think the evidence does not support such doubt. We think the decree of the lower court, as to the defendants other than the state, was right and should be affirmed.

As before stated, so much of the decree of the lower court as purports to adjudicate the matters in suit against the state of Nebraska is vacated and set aside and the action as against the state dismissed. As to the other defendants, the decree is affirmed. Judgment accordingly.

JONES v. THOMAS et al. (No. 20727.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Attorney and client $\S$ 151—Attorneys engaged for contingent fee will be held to share equally, in the absence of agreement.

Where several attorneys engage in the prosecution of litigation for a contingent fee, in the absence of any other agreement, they will be held, upon the successful result of the suit, to share equally in the distribution of the fee.

2. Attorney and client $\S$ 151—Under agreement that one attorney shall cease action and another receive extra compensation, latter is entitled to reasonable sum for additional services, and former to reasonable value of services as measured by ultimate fee realized.

But this principle may be varied by a subsequent agreement between the parties, and where it is afterwards agreed between counsel that one of them shall take no further steps in the case, and that another shall receive extra compensation for carrying on the litigation, the latter is entitled to a reasonable sum for such additional services, and the former is only entitled to the reasonable value of his services up to the time of the agreement as measured by the ultimate amount of the fee realized.

Flansburg and Aldrich, JJ., dissenting.

Appeal from District Court, Seward County; Good and Corcoran, Judges.

Bill by Harry T. Jones against John J. Thomas and others to determine the apportionment for distribution of a fund. From the judgment John J. Thomas and certain others appeal. Modified and affirmed.

E. A. Coufal, of David City, B. F. Good, of Lincoln, Thomas, Vall & Stoner, R. R. Schick, and H. D. Landis, all of Seward, and Stewart, Perry & Stewart, of Lincoln, for appellants.

Jacob Fawcett, of Lincoln, for appellee and cross-appellant Burr.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

PER CURIAM. This appeal is concerned mainly with a controversy between attorneys with respect to the division of fees.

The Capital National Bank of Lincoln failed in 1893. Afterwards certain actions were begun by different creditors of the bank against the directors seeking a recovery from them for neglect of duty, violation of the National Bank Act, and other wrongful acts committed by them in their official capacity. The actions were begun in 1895, the litigating creditors being the Jones National Bank, the Bank of Staplehurst, the Utica Bank, Thomas Bailey, and Isaac Holt. The

firm of Biggs & Thomas were attorneys for the Jones National Bank and the Bank of Staplehurst. The firms of Pound & Burr and Norval Bros. & Lowley represented the other creditors named. The contract between the several attorneys and their clients provided for a contingent fee of one-third of the gross receipts. For some years the attorneys each aided and assisted the others in the legal work and in the general prosecution of the actions, except as hereinafter mentioned. There is a conflict as to whether a specific agreement was made as to this, but the direct evidence, the course of conduct of these attorneys during a long series of years, the signing of their names to papers and briefs and legal documents, and their appearance in the cases of other than their nominal clients, all convince us that the several cases were prosecuted by them as a joint adventure. Comparatively early in the litigation recovery was had of over \$20,000 collected from Stuart, one of the directors. The suits proceeded as to the others. Many vicissitudes occurred in the litigation during the long series of years. Finally a judgment for plaintiffs was obtained in the district court for Seward county, which was afterwards reversed by this court, following, as the court thought, former decisions of the Supreme Court of the United States. Jones Nat. Bank v. Yates, 93 Neb. 121, 139 N. W. 844, 1135. Afterwards the judgment of this court was reversed by the Supreme Court of the United States, 240 U. S. 541, 36 Sup. Ct. 429, 60 L. Ed. 788, and the cause remanded, with directions to affirm the judgment of the district court, which was done. Afterwards all the judgments were sold to one Mullen for \$95,000. This was paid to Harry T. Jones as trustee for the interested parties. Jones filed a bill of interpleader, asking the court to apportion the amount due to each of the attorneys. The trial court held that the proceeds of the Stuart judgments should be divided in four equal parts, of which Burr is entitled to one-fourth, Thomas one-fourth, Norval Bros. one-fourth, and the estate of George W. Lowley one-fourth. The court also found that, after the reversal of the judgment in this court, agreements were made between Burr and Thomas, and between Norval Bros. and Thomas, with the consent of the clients, that Thomas should receive additional compensation for extra services in the further conduct of the case; that after that time "Norval Bros. performed no more than nominal services," but the court also found that they did not withdraw as attorneys in the case; that the reasonable value of such extra services of Thomas was \$9,500; and that, after the payment of \$9,500 to Thomas, the remainder of the fee arising from the sale of the judgments to Mullen

should be divided into three equal parts, one-third to Thomas, one-third to Burr, and one-third to Norval Bros., or their assignee.

Mr. Thomas appealed, mainly from the allowance of any compensation to Norval Bros. derived from the Mullen sale, urging as a ground for reversal:

"That the contract of the clients with Norval Bros. was an entire and indivisible contract for compensation contingent upon success in the litigation; that, having abandoned their contract prior to its completion and permitted its execution to be taken over by Thomas under a new agreement with the clients, Norval Bros. forfeited all right to demand compensation thereunder."

The evidence establishes that, after the judgments had been reversed by the Supreme Court of this state, Norval Bros., who had performed many and valuable services, and had expended much time and labor in the prosecution of the several suits, became convinced that the judgment of this court could not be reversed, and that further prosecution of the actions would be fruitless, and so expressed themselves to the other attorneys, and that thereupon the agreement with Thomas was made. Mr. Lowley had died before the recovery of the judgment in the district court.

We think that neither the evidence nor the law justifies fully the contentions made by Mr. Thomas. While Norval Bros. are entitled to share in the distribution of the proceeds, we are convinced from the testimony as to the labor performed and time expended by Mr. Thomas that the amount awarded to Norval Bros. by the district court should be reduced, and that awarded Mr. Thomas and Mr. Burr increased. The evidence shows that the determination to take the case to the Supreme Court of the United States the second time after the adverse decision in this court was largely brought about by the energy and persistence of Mr. Burr. However, the greater part of the work, after this conference and agreement between the attorneys, was performed by Mr. Thomas, and he should have, as the district court found, the larger portion of the compensation.

[1] Appellant Burr contends that in such an enterprise no one attorney is entitled to greater compensation than another; that the alleged contract between the attorneys as to the appeal to the Supreme Court of the United States is void for want of consideration, is so uncertain and incomplete as to be unenforceable, and had not been established by the evidence, and that no extra compensation should be allowed Thomas. We are satisfied with the decision of the district court upon these points. We agree with appellant that, in a controversy between attorney and client as to fees, an attorney employed on a contingent fee basis is en-

titled to nothing if he abandons the case and recovery is finally procured by another attorney. No client is complaining, and the principle is not applicable. The relations to be examined are those existing among the attorneys themselves who were engaged in a joint enterprise and occupied a special partnership relation. Under the general principles of law applying to the division of fees between attorneys who are associated together in the conduct of litigation, and in the absence of any special agreement, each is entitled to an equal share of the fee. *Underwood v. Overstreet*, 188 Ky. 562, 223 S. W. 152, 10 A. L. R. 1352, and cases cited in note on page 1357. Also see *Lamb v. Wilson*, 3 Neb. Unoff. 496, 92 N. W. 167, and *Lamb v. Wilson*, 3 Neb. Unoff. 505, 97 N. W. 325.

[2] In view, however, of the peculiar circumstances of the case, and of the facts in evidence in regard to the nonparticipation by Norval Bros. in the later conduct of the case, and the agreement between the attorneys, we are satisfied that Norval Bros. are entitled to no compensation for services performed after this agreement was made. They should, however, be allowed the reasonable value of their services before that time, the value to be based in proportion to the services rendered, and the amount of the ultimate recovery from the sale of judgment to Mullen. The district court awarded \$8,165.32 to the assignees of Norval Bros. From this amount we deduct \$3,000, and award \$2,000 thereof to Mr. Thomas, in addition to the sum awarded him by the district court, and \$1,000 thereof to Mr. Burr, in addition to the amount awarded him by the district court. The remainder, \$5,165.32, is awarded to the assignees of Norval Bros. in the proportion as their interest appears under the assignment of Norval Bros.

As to the cross-appeal of Mrs. Lowley, we are convinced that under the evidence the district court properly found that the estate of George W. Lowley was not entitled to any share of the proceeds of the Mullen sale.

Burr was made a party to the appeal by Thomas. He afterwards dismissed his appeal as to Burr. He now contends that Burr is not entitled to appear as a cross-appellant in the case, and that the decree is final as to him. We are convinced that, where the relations between the parties, the issues, and the facts are so interwoven as in this case, the appeal of Thomas brought up the whole question as to the proper distribution of the fund, and that Burr has a right to appear.

With respect to the cross-appeal of Bailey, we find that the book of accounts kept by Jones, trustee, is not fairly subject to the animadversions made upon it by Mr. Burr. It is true that the entries in the book are made with pencil, but the items except in a few instances follow consecutively, and the

trustee testifies they were made in accordance with the facts. Much is said about the payment of certain money to Mr. E. T. Wade, of Washington, D. C., but we think there is sufficient evidence to justify the expenditure to him for his services in procuring evidence.

The trial court found in favor of the trustee upon the items set forth in the book, and we believe no sufficient ground has been shown for setting the same aside. Its judgment in this respect, therefore, is affirmed.

The judgment of the district court, except as modified by what has been said with reference to the compensation of Norval Bros., and the distribution of the money on hand after deducting \$3,000 from the amount awarded their assignees, is affirmed, and the cause remanded, with directions to enter judgment in accordance with this opinion. It is further ordered that all costs, except briefs in this court, be paid from the common fund, and each party shall pay the costs of his or its own briefs.

Judgment accordingly.

FLANSBURG, J. (dissenting). The suits in which the attorney's fees, here in controversy, were earned were brought by several plaintiffs, the Jones National Bank, the Bank of Staplehurst, the Utica Bank, and Thomas Bailey and Isaac Holt, in February, 1896. The firm, of which Mr. Thomas was a member, originally represented plaintiffs, whose claims amounted to more than 63 per cent. of the total amount claimed by all. This firm originally represented the Jones National Bank and the Bank of Staplehurst. The firms, of which Mr. Burr and Mr. Norval were members, represented the other plaintiffs. The cases involved identical questions of law, and there was, therefore, a common interest and object among the several plaintiffs, and it seems, according to the conclusions of the trial court, that after the prosecution of the cases had commenced, the attorneys for the various clients reached an understanding that the prosecution of the several cases should be carried on jointly, that the fees recovered should be pooled, and that a division of the fees should be made between the three firms.

The cases were pending in court, from the time of filing until their final conclusion, some 25 years. They were, at first, won in the trial court, and those judgments were affirmed in the Supreme Court, but reversed by the United States Supreme Court. On a second trial in the district court judgments were again recovered, and, on appeal to the state Supreme Court, the judgments were reversed and the cases dismissed. That was in 1914.

After this reversal, and when it appeared that the chance for winning by a second appeal to the United States Supreme Court was a desperate one, if not entirely hopeless,

a meeting was had by the attorneys, Mr. Thomas, Mr. Norval, and Mr. Burr, at which meeting Mr. Jones, of the Jones National Bank, was present, and Mr. Norval, as the trial court found,

"stated in substance and effect that he did not think the Capital National Bank cases could be won, and that he was opposed to prosecuting said cases further, and that he was unwilling to devote any more time to said Capital National Bank cases, and, in substance, stated that he was not willing to have anything further to do with said Capital National Bank cases."

It is further shown by the record that Mr. Norval then advised his client to make no further expenditure in the matter, and his client thereupon sold and assigned his claim to the Jones National Bank. From that time forth it appears that Mr. Norval had nothing whatsoever to do with these cases, as an attorney, and that he utterly abandoned any further participation in them and gave no further assistance in their prosecution. The trial court found that from that time on "Norval Bros. performed nothing more than nominal services." If the trial court, by that recital, meant to infer that Norval Bros. did perform "nominal services," I do not believe that finding is sustained by the record. Such a finding could have been based upon one isolated fact only, and that is that Mr. Thomas casually met Judge Norval, a member of the firm of Norval Bros. & Lowley, but not the Mr. Norval who had been actively participating in the cases, and suggested to him a proposition as to whether or not findings by the Supreme Court in the case could be treated as independent and original findings of fact by that court, or whether they should be treated simply as a review of ultimate findings of fact by the trial court, and Judge Norval, as attorneys are accustomed to do, in a casual way expressed some opinion upon that question. It does not appear that this was done with any idea or intention, on the part of Judge Norval, to render it as an attorney in the case, and, in fact, it seems to me clear that Norval Bros. considered their connection with the case definitely terminated immediately following that conversation, which took place after the reversal and dismissal by the Nebraska Supreme Court in 1914. From that time forward Mr. Burr and Mr. Thomas appear to have been the only attorneys representing the interests opposed to the Capital National Bank. From that time forward they appeared as the only attorneys of record. They prepared the briefs and did all the work necessary for the final appeal and presentation of the cases to the United States Supreme Court, and all the work necessary for an ultimate and favorable decision from that court.

Upon this condition of the record, the trial court concluded, *as a proposition of law*,

that Norval Bros. had not withdrawn as attorneys in the case. With that conclusion of law I cannot agree. The legal effect of the facts, as above set forth, seem to me, conclusively and unequivocally, to establish a definite and complete severance of their relation as attorneys from all further connection with the litigation.

The contract, such as was found by the trial court, for a pooling and division of fees between the various attorneys connected with the litigation, was an entire contract, by which it was necessarily understood that each should take his remuneration from funds which were entirely contingent upon their joint efforts, and that the joint service of all should contribute to the ultimate result. Under such an agreement, no one of them would be entitled to recover from the other what he believed, or even what he might be able to prove, his own services were reasonably worth. The services of each contributed to a common cause, and the value of those services, which value was not determined by any agreement between the parties, was not apportionable. It was an entire and not a divisible contract for services, and the services rendered were not of such a kind that the value of the service of one could, by any definite standard of value, be measured in comparison with the value of the services of the other associates in the enterprise, as would be the case, for instance, where a man is hired to plow a field, or husk corn, and where each hour's work brings its direct benefit to the employer in results, and where its value and its benefits may be measured by a common and well-recognized standard of wages per hour, or per day. If an attorney could not recover the reasonable value of his service should he have remained in the case, he certainly cannot be privileged to have that recovery because of the fact that he has voluntarily and, as it proves, wrongfully withdrawn from the case. In order that any one of these attorneys should be allowed to recover upon the final outcome of the cases, in the event of victory, it was necessary that he should, throughout, perform his part and share in the undertaking. When any one of them threw up his hands and abandoned further prosecution, voluntarily and of his own volition, and without excuse or justification, because he believed the case hopeless and because he was unwilling to participate further and share in the burden of continuing in the performance of his agreement, and because he was unwilling to see his client expend further moneys in what he considered a hopeless venture, it certainly must be that he should be held to have withdrawn entirely from the arrangement, and to have precluded himself from ever sharing in the profits and remuneration earned by those attorneys who remained steadfast to their task, and who successfully carried forth the work to its

final and, favorable conclusion. It seems to me that neither in law nor as a matter of abstract justice is Mr. Norval, or the assignee, to whom he has transferred his interest in this lawsuit, entitled to any recovery.

The controversy, however, yet to be determined, is between Mr. Thomas and Mr. Burr. It must be conceded that Mr. Thomas was always very actively engaged in the work of prosecuting these cases, that, as time went on, he assumed more and more a larger burden of the work, and that continuing from the time the case was reversed by this court in 1914 he has performed much the greater part of the work, and has assumed the larger control in the prosecution and presentation of the case on final appeal to the United States Supreme Court. This was done, as the trial court finds, by an understanding with Mr. Burr, by which it was agreed that Mr. Thomas should assume the major portion of the labor of the continued prosecution of the cases. It appears that Mr. Burr always had faith in a favorable outcome of these cases, and that, when Mr. Norval withdrew, he urged the further prosecution of them, and that Mr. Thomas agreed to continue with him. Mr. Burr was willing, not only to continue with his services, but to furnish expense money, and it was the finding of the trial court that an arrangement was made between Mr. Burr and Mr. Thomas, whereby Mr. Thomas, by reason of his agreed added service, should receive also extra compensation out of the fees to be recovered ultimately. Mr. Thomas and Mr. Burr are not in accord as to just what that agreement was, but Mr. Burr by his testimony shows that Mr. Thomas was to receive something extra. He testified that he had agreed that Thomas should take Norval's share of the fees; that is, the share that Mr. Norval would have recovered, had he remained in the case. There is also a letter in evidence, wherein Mr. Burr wrote Mr. Thomas as follows:

"I feel we have further cast the burden of this case upon you, and I sincerely hope that some day, not so far away, you will receive the lion's share of remuneration for all your extra labors in these cases."

It is contended by Mr. Burr that, even though the trial court has made a finding of fact that there was an agreement between himself and Mr. Thomas, whereby Mr. Thomas was to receive extra compensation for his services, such an agreement would be wanting of any consideration and, therefore, unenforceable. It is argued that Mr. Thomas was already obligated to his clients to do everything that his good judgment dictated toward attaining a successful result, and that when, in the opinion of Judge Thomas, it appeared to be possible and probable that a successful outcome of the cases might re-

sult by a further appeal to the United States Supreme Court, then it became his positive duty to conduct and prosecute such an appeal, by reason of an obligation owing to his clients to do whatever his judgment might dictate should be done for their best interests. His agreement to assume a larger proportion of the work, since Mr. Norval had withdrawn from the case, necessarily increasing the burden to be borne by the two remaining attorneys, would seem to have been a good consideration for the alleged agreement made with Mr. Burr. When Mr. Norval withdrew from the joint employment and left the two attorneys alone to conduct the further prosecution of the cases, they were entitled to arrange between themselves for a distribution of the increased burden. The arrangement, therefore, by which Mr. Burr and Mr. Thomas agreed to continue the prosecution of the cases alone, and Mr. Thomas to assume a larger proportion of the work, not theretofore assumed by him, was, it seems to me, not lacking of consideration and should be held to be legal and binding between the parties.

According to Mr. Burr's statement, it appears that he was willing, at one time at least, that Mr. Thomas should take the share of the fees which would have been allotted to Mr. Norval, had he maintained his relations as attorney in the cases. This would have been one-third of the total contingent fee recovered. It also appears that Mr. Thomas was the representative originally of clients, who had some 63 per cent. of the total amount claimed by all the plaintiffs, taken together. Had his employment continued to be several, he would have recovered, then, 63 per cent. of the total contingent fee available. It seems to me, under the circumstances, that this court can arrive at no fairer distribution of the fund than to allow to Mr. Burr one-third of the fee and to Mr. Thomas two-thirds.

It is therefore my judgment that Mr. Burr should be given \$10,643.18, and Mr. Thomas \$21,286.37.

The amount available as attorney's fees from the Stuart judgment of \$7,302.08 should have been equally divided between the three firms mentioned.

ALDRICH, J. (dissenting). The issue involved in this case is whether or not the contract between the attorneys was an entire contract requiring full services to be rendered by an attorney in order to entitle him to recover anything for services done and performed. From the nature of the case the contract for services was entire and the fees were contingent.

It appears that the firm of Norval Bros. abandoned the case and rendered no service after April, 1914. Their duties devolved upon Mr. Thomas and Mr. Burr. The issue presented is whether or not Norval Bros.

are entitled to recover any fees after having abandoned the case.

It is the rule of this state, as said in *McMillan v. Malloy*, 10 Neb. 228, 4 N. W. 1004; 35 Am. Rep. 471:

"One Malloy entered into a contract with one McMillan to thresh his entire crop of wheat and oats at forty cents per acre. After threshing about one-third of the crop he refused to thresh the remainder, and after the time limited for the completion of the contract brought an action to recover the value of his services. *Held*, first, that the entirety of the contract having been severed by part performance, beneficial to the employer, the employee was entitled to recover the value of his labor over and above the damages sustained by a breach of the contract; second, when a contract has been established, the measure of recovery in each case is the price agreed upon in the contract less the damages sustained by the employer by the breach of the same."

In this case just cited some benefit accrued from services rendered by the plaintiff, while there was no benefit arising from services rendered by Norval Bros. Norval Bros. are subject to the general rule that, while a special contract remains open or unperformed, the one whose part of it has not been performed cannot recover for what he has done until the whole contract has been completed. Norval Bros. under this rule cannot recover. In *McMillan v. Malloy*, supra, some equity was done by those threshing grain. A contract was made to thresh a certain number of acres of grain at 40 cents an acre. When plaintiff threshed about one-third of the grain he rendered service to the defendant for which he should pay on the doctrine of quantum meruit, but in the instant case the whole basis of the position of Norval Bros. is on services rendered, but from the nature of the transaction it follows they could not render any services. The case of *McMillan v. Malloy*, 10 Neb. 228, 4 N. W. 1004, 35 Am. Rep. 471, has no application to the instant case and is not to be considered in determining the issues herein. *McMillan v. Malloy* was based upon the famous case of *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713. The books show that the case has been criticized by the court which rendered it. It was distinguished and modified by Massachusetts. The Supreme Court of Ohio said:

"The case of *Britton v. Turner* is itself an innovation upon the long-established principles governing entire contracts, lessens the sanctity of agreements, and tends to encourage their violation." *Larkin v. Buck*, 11 Ohio St. 561.

As further elucidating the doctrine of entire contracts see *Johnson v. Fehsefeldt*, 106 Minn. 202, 118 N. W. 797, 20 L. R. A. (N. S.) 1069. The court castigates in substance the rule laid down by the court in the following language:

"It would be obviously inconsistent with common justice that plaintiffs should recover pro tanto on the contract which they had substantially violated. They were in the wrong. They were not in a position to say to the defendant: 'We will perform the contract we have agreed to if it prove profitable. If we find it unprofitable, we will abandon it.' That would be to contradict the contract. Such reasoning is forbidden by its terms. Defendant did not agree in advance to a breach of the contract and to accept in lieu of performance the requirement that he pay plaintiffs for what they had done under the contract and for the balance, to accept the right to try damages before a jury."

In fact this quotation is in line with the great weight of authority and follows the majority of the cases. We should follow the rule of the courts that one who breaches his contract cannot base an action thereon against the other party thereto. The decisions are practically unanimous in holding that neither in entire contracts nor in the units into which divisible contracts can be divided can there be any recovery on the contracts themselves when such entire contracts or units of divisible contracts have been only partly performed at the time of abandonment. This is on the theory that part performance is a condition precedent to the right of demanding anything on the contract. See note L. R. A. 1916E, 790, 795. It is said in *Hibbard v. Kirby*, 38 Ark. 102:

"The rule seems to be that if the contract of the servant to labor, be for a specified period of time, and payment is to be made, either expressly or by implication of law, at the end of the period, and the servant leaves the service of his master improperly, without sufficient cause, and without his consent, before the expiration of that time, he can recover no compensation for his services, either on the contract or on a quantum meruit."

Then again, in *Badgley v. Herald*, 9 Ill. (4 Gilman) 64, it was said that a contract to work for six months for \$8 a month is an entire contract, and where the employee abandons the service before the expiration of that time he cannot recover for the services rendered. This meets the issue of the instant case, as does *Hofstetter v. Gash*, 104 Ill. App. 455, and has the approval of the great weight of authority. It has been universally held that a contract to work a stated period at a specified rate per month is entire, and that the employee cannot, upon abandoning his employment without excuse or justification before the termination of the period, recover upon the contract compensation for his part performance. *De Camp v. Stevens*, 4 Blackf. (Ind.) 24; *Larkin v. Buck*, 11 Ohio St. 561; *Davis v. Maxwell*, 12 Metc. (Mass.) 286.

In the principles of law laid down in *Huyett & Smith Co. v. Chicago Edison Co.*, 167 Ill. 233, 47 N. E. 384, 59 Am. St. Rep. 272,

it was stated that a contract to put in and complete a ventilating system for a given sum of money, all of which is to be paid in in 30 days after acceptance of the work, is an entire contract. It is also a rule that, if the subject-matter of an entire contract has been destroyed by fire or otherwise without the fault of either party before the contract is fully performed, there can be no recovery on a quantum meruit or otherwise for a part performance. This is the rule supported by the overwhelming weight of authority. It has been followed and seems to render precise justice in the instant case. *Norval Bros.* abandoned their contract and plaintiffs were forced to procure other attorneys to carry out what *Norval Bros.* had undertaken. That would be unjust and inequitable.

In *Fazon v. Mansfield*, 2 Mass. 147, it was held that one who abandons the contract for the construction of a barn before the completion thereof cannot recover any part of the compensation which under the contract he was not entitled to receive until the barn was done. *Cronin v. Tebo*, 71 Hun, 59, 24 N. Y. Supp. 644; *Jennings v. Camp*, 13 Johns (N. Y.) 94, 7 Am. Dec. 367. There can be no recovery on an entire contract to do an entire piece of work for a specified sum unless the work is performed; and it is evident that, when a conclusion is reached as to what constitutes an entire contract, there is little left for the court to determine. *Norris v. Harris*, 15 Cal. 226.

The entirety of a contract depends upon the intention of the parties, as well as upon the fact that the consideration is single. The divisibility of the subject-matter or the mode of receiving the price does not affect the question. The covenants of the contract are of course mutual and dependent according to the intention and meaning of the parties. It was the manifest intention to employ *Norval Bros.* in their work on this case to continue until they got results. Without cause or reason on their part they arbitrarily quit the employ of their clients because they thought they could not recover. *R. S. Norval* said that he knew a lawsuit when he saw it, knew when he had enough, and that he had done his full duty by his client, and did not believe they could win and was ready to quit. This was said in April, 1914, at Mr. Burr's office, and from then on Burr and Thomas made a new contract and entered into new employment with respect to these cases. In support of these propositions laid down we cite *Pollak v. Brush Electric Ass'n*, 128 U. S. 446, 9 Sup. Ct. 119, 32 L. Ed. 474, and *Morris v. Wibaux*, 159 Ill. 627, 43 N. E. 837. In this connection it is the general rule of law, deduced from the cases recorded and gleaned as a result of our reading, that while a special contract remains open or unperformed the one whose part of it

has not been performed cannot recover until his whole contract is completed. *Dermott v. Jones*, 23 How. (U. S.) 220, 16 L. Ed. 442; *McClurg v. Price*, 59 Pa. 420, 98 Am. Dec. 856; *King v. Mason*, 42 Ill. 223, 89 Am. Dec. 426. A discussion of the principle is found in a note to *Sargent v. McLeod*, 52 L. R. A. (N. S.) 381, and is as follows:

"It is well settled that an attorney employed on a contingent fee, who, without any fault on the part of his client, neglects or refuses to perform the contract of employment, and abandons or withdraws from his client's case, thereby forfeits all his rights under the contract. *Morgan v. Roberts*, 38 Ill. 65; *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233, affirming 27 Jones & S. 130, 13 N. Y. Supp. 614; and he cannot, after the client has succeeded in the case through another attorney, recover the fee contracted for. *Potts v. Francis*, 43 N. C. (8 Ired. Eq.) 300; nor, in the absence of good and sufficient cause or excuse for his withdrawal, can he recover any compensation for the services which he has rendered. *Houghton v. Clarke*, 80 Cal. 417, 22 Pac. 288; *Parish v. McGowan*, 39 App. D. C. 184, writ of certiorari denied in 227 U. S. 679, 57 L. Ed. 700, 33 Sup. Ct. Rep. 462, appeal allowed in 228 U. S. 312, 57 L. Ed. 849, 33 Sup. Ct. Rep. 462; *Johnson v. Clarke*, 22 Ga. 541; *McDonald v. De Vito*, 118 App. Div. 566, 103 N. Y. Supp. 508; *Southern Nat. Bank v. Curtis* (Tex. Civ. App.) 36 S. W. 911; *Farwell v. Colman*, 35 Wash. 308, 77 Pac. 379."

The principle of law has been well set forth in the following statement:

"If an agent or attorney, having undertaken to collect a debt for a certain share of what he may recover, finally abandons further effort as useless, and at a subsequent period, the principal receives payment through new instrumentalities, or from causes with which the agent has no connection, the latter cannot claim the share to which his contract would have entitled him if payment had been secured by his efforts." *Scoville v. Trustees*, 65 Ill. 523.

This same principle is well stated in 6 C. J. 743, 744, §§ 818, 819. Also it is held in L. R. A. 1916E, 790 et seq., that recovery cannot be had on such a contract by one who has abandoned without just cause or excuse, nor can such a one recover on a quantum meruit. Also for a complete discussion of these matters see the note generally, L. R. A. 1916E, 790. There can be no doubt from these authorities cited that this was an entire contract. Also, as further elucidating the same principle, see *Potts v. Francis*, 43 N. C. 300, *Cahill v. Baird*, 70 Pac. 1061, Id., 138 Cal. 691, 72 Pac. 342, and *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233. The contract of an attorney to perform legal services in a litigation is entire and he cannot recover if he abandons without justifiable cause. *Halbert v. Gibbs*, 16 App. Div. 126, 45 N. Y. Supp. 113; *Cary v. Cary*, 97 App. Div. 471, 89 N. Y. Supp. 1061. Where one

continues for an indefinite time until a part service is accomplished, he cannot recover where he willfully and without cause abandons the work before the expiration of the time for the performance of the service; and this is especially applicable to the engagement of attorneys with their clients. *Blanton v. King*, 73 Mo. App. 148. On the theory that an attorney under such circumstances cannot recover on the principle of quantum meruit, see note L. R. A. 1916E, 790, 800. There we find the rule laid down as follows:

"According to the rule adopted by the majority of the courts, there can be no recovery upon the common counts for the value of work and labor performed by a servant or person engaged to perform certain work who has, without excuse, abandoned the service of his employer, or person who engaged him."

We should heartily concur and give our assent to this rule. It states the law with reference to the intention of the parties who made this contract and elucidates the idea that contracts of retainer of attorneys are entire, especially where the fee is contingent upon the result of the action. In support of this proposition see *White v. Wright*, 16 Mo. App. 551; *Blanton v. King*, 73 Mo. App. 148; *McDonald v. De Vito*, 118 App. Div. 566, 103 N. Y. Supp. 508; *Houghton v. Clarke*, 80 Cal. 417, 22 Pac. 288. These cases well establish and maintain the propositions contended for. They give application to the true utterance of what is right and just under the facts herein admitted. *Norval Bros.*, as appears of record, abandoned this case and did not further appear after April, 1914, and yet their services would have been helpful to a successful termination of this long and tedious litigation. The kind of contract they were working under appears to be what is known in the law as an entire contract, and it clearly was the intention of the parties that they should stay in the case until it was successfully terminated before they got their pay, and having abandoned it before its successful termination they cannot be counted in on the final payment for services rendered. As a condition precedent to getting their pay it is obvious from the great weight of authority, quoted and cited, that it is necessary for them to stay to the end. Such being the undisputed state of facts, we should adhere to the rule almost universally held that one to reap the advantages of his labor must do as he agrees and stay to the finish of his contract, and not abandon his clients when half way across the stream.

I am therefore compelled to come to the conclusion that the decree, so far as it finds in favor of *Norval Bros.*' assignees, should be reversed. But in this connection it should be borne in mind that *Norval Bros.*' assignees obtained \$8,165.32, and that \$7,443.18,

was realized upon the judgments obtained after Norval Bros. abandoned the cases. In the division of the fees derived from the Stuart judgment in the settlement made by the attorneys among themselves, Mr. Thomas received less than one-third, while the decree of the court reduced it to one-fourth, thus requiring him to refund a part of the fees paid him in 1902 and 1903. We should reverse as to the fees allowed Norval Bros.' assignees for services from judgments obtained after the abandonment and affirm as to the fees obtained before abandonment. The record shows that Norval Bros. rendered no service to their clients herein after April, 1914. That service was rendered in the Supreme Court of Nebraska in April, 1914, is not supported by the evidence. The contract under which Norval Bros. were working was an entire and indivisible contract and no recovery could properly be had thereon without conferring a corresponding benefit, and it is in recognition of that principle that we should allow Norval Bros. to retain the fee they received in the Stuart case, and this also applies to the services rendered by Judge Lowley. It has been conceded by Norval Bros. and Mr. Burr that Mr. Thomas took the laboring oar, expended the nervous energy and industry necessary to win this case, and that he should have the "lion's share" paid in fees necessary to win the case and for labor and services performed. I concur in that view of the case, and hold that Thomas should receive two-thirds of the fee granted and allowed to Norval Bros.' assignees, and Burr should have the remaining one-third added to his fee. In all other respects the decree of the court should be affirmed.

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NYE-SCHNEIDER-FOWLER CO. v. NEBRASKA LUMBERMEN'S MUT. INS. ASS'N. (No. 21729.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

Insurance §494.—Where property on one lot was destroyed, the other lot will be considered as a separate place for application of the average clause.

In an action on an insurance policy to which an average clause is attached covering a stock of lumber, coal and such other merchandise as is usually carried and kept for sale in a retail lumber yard, also the buildings used in the business, and where a part of the insured property is situated on one block and the balance on another block, the blocks being disconnected and separated by a street, and there being no designation in the policy where any particular property insured is situated, *held*, that the property insured was situated in one

general location, and that the property situated on one block will be regarded as one of the premises or places mentioned in the average clause, and the other property disconnected therefrom on the other block will be regarded as a separate premises or place within the terms of the policy. *Mangold v. American Ins. Co.*, 99 Neb. 656, 157 N. W. 632.

Appeal from District Court, Dodge County; Button, Judge.

Action by the Nye-Schneider-Fowler Company against the Nebraska Lumbermen's Mutual Insurance Association. From a judgment dismissing the action, plaintiff appeals. *Affirmed.*

Courtright, Sidner, Lee & Jones, of Fremont, for appellant.

O. C. Flansburg, of Lincoln, for appellee.

Heard before MORRISSEY, C. J., DAY, and ROSE, JJ., and DICKSON and TROUP, District Judges.

DICKSON, District Judge. The facts in this case are not in dispute. From the record it appears that appellee, defendant below, issued to the appellant, plaintiff below, its policy of insurance for \$3,000, on its stock of lumber, lath, coal and other merchandise usually kept in retail lumber yards. The policy contained, among others, these conditions or stipulations:

"The words 'premises occupied' are to be understood to mean the land owned, leased or otherwise occupied by the assured in not more than one general location in handling their business. * * * It is understood and agreed that, where the property covered by this policy is located in more than one place, the amount insured by this policy shall attach in each of the premises occupied in proportion to the whole amount insured that the value of the property covered by this policy contained in each of the places occupied shall bear to the value of the property contained in all of the premises occupied."

It further appears that the insured property was situated on the south half of block eight and the south half of the block immediately west. On block eight plaintiff had its office and kept its stock of lumber and building material of all kinds, and on the block west thereof its coal shed and elevator, there being a street between these two half blocks of the usual width. A loss occurred which destroyed all of the property on the south half of block eight, but none on the west half across the street. The insurance company complained that it should pay such percentage of the face of its policy as the amount of the loss bore to the value of the property burned and unburned, and this amount it paid; plaintiff's contention being that it was entitled to recover the full amount of the

policy, leaving in dispute \$643.46, for which sum suit was brought in the district court for Dodge county, there tried without a jury, and plaintiff's action dismissed.

The question to be determined is the amount of defendant's liability under its policy. It conceded it was liable for \$2,353.57, which it paid. If we place the construction on the policy contended for by plaintiff, then it has not discharged its full liability. On the other hand, if we construe the policy as did the trial court, the judgment was right and affirmance must follow.

The appellee contends that the defendant's liability has been determined by this court in *Mangold v. American Ins. Co.*, 99 Neb. 656, 157 N. W. 632. The defendant in this case was a party defendant in that case, and contended there, as it does here, as to the construction that should be placed upon the policy, and its contentions in that case were sustained. The appellant insists that the *Mangold* Case is not analogous or decisive of the case under consideration, and that the question in the *Mangold* Case was not whether there was one or two locations, but whether there was two or five locations. The record does not warrant this contention. It is true that in that case the adjusters for a part of the insurance companies arbitrarily undertook to, and did, divide the property into five different premises, and on that basis they reached the conclusion set forth in the opinion in that case. But it was the contention of the appellees, as is contended in this case by the appellee, that there were two premises, places or risks, not five, covered by the policy, and the trial court took the view contended for by the defending insurance companies, and the judgment was affirmed by this court. In the *Mangold* Case the average clause does not differ from the policy in suit. They are substantially the same. To construe one is to construe the other. The question involved in the case under discussion was fully discussed and decided by this court in the *Mangold* Case. Chief Justice Morrissey, in the opinion, says:

"Appellees contend that the main yard [lots 6, 7, 8 and 9], which constituted a single inclosure was one 'premises' or risk. * * * The [trial] court took the view contended for by appellees, and after a careful examination of the record we are constrained to believe that this yard or inclosure is not susceptible of the arbitrary division which the adjusters attempted to make."

The appellee in this case makes the same contention; that is, that the property insured and destroyed on block eight was one premises or risk, and that the insured property across the street and not destroyed constituted another premises or risk. The trial court in the *Mangold* Case adopted the theory

of the appellees that lots six, seven, eight and nine constituted one premises or risk, and that the property disconnected therefrom and lying across the street constituted another premises or risk, and that the property covered by the policy in that case was located in more than one premises or place.

The proper construction to be placed upon the policy in suit is that the appellee should pay only such percentage of the face of the policy as the amount of the loss bore to the value of the property insured. Any other construction would not give effect to the average clause as clearly expressed in the policy. This case presents for consideration the same question considered and decided in the *Mangold* Case, and the holding in that case controls this case.

The judgment of the district court is right and is affirmed.

SJOGREN v. CLARK et al. (No. 21688.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Principal and agent —33—Agency may be revoked where not coupled with interest.

"Where an agent is vested with a mere naked authority, not coupled with an interest, his principal may revoke that authority before performance." *Staats v. Mangelsen*, 105 Neb. —, 180 N. W. 78; *Hallstead v. Perrigo*, 87 Neb. 128, 126 N. W. 1078.

2. Appeal and error —197(7)—Variance not objected to not available on appeal.

Record examined, and held that the issue of rescission of the agency contract was, without objection, limitation or restriction, fully tried out in the district court, and that objections made in this court for the first time that a rescission of the contract was not pleaded in the court below will not be considered as a ground of reversal. *Boyd v. Lincoln & N. W. R. Co.*, 89 Neb. 840, 132 N. W. 529.

3. Principal and agent —40—Evidence held to establish revocation of agency before sale.

Evidence examined, and held to sustain decree of the lower court.

Appeal from District Court, Polk County: Corcoran, Judge.

Action by Frank O. Sjogren against Liberty Clark and another and Jay Hastings. From a judgment for plaintiff, defendant Hastings appeals. Affirmed.

Mills, Beebe & Mills, of Osceola, for appellant.

E. E. Stanton, of Stromsburg, and J. C. Martin, of Central City, for appellee.

Heard before MORRISSEY, O. J., FLANSBURG and ROSE, JJ., and DICKSON and TROUP, District Judges.

DICKSON, District Judge. From the record it appears that the appellees, plaintiffs below, were owners of a quarter section of land in Polk county; that on the 17th day of May, 1919, they executed and delivered to the appellant, Jay Hastings, defendant below, an agency contract, authorizing and empowering him to sell this land; that on the 13th day of June following, the appellant, as agent for the appellees, entered into a contract for the sale of the land with Liberty Clark, defendant below. In October following, this action was commenced by appellees against Liberty Clark, the alleged purchaser of the land, Jay Hastings, their agent, and J. J. Peters, a tenant of the claimed purchaser, Clark.

It is alleged in the petition, in substance, that the appellants are the sole owners and entitled to the possession of the land; that on the 17th day of June the defendants caused to be placed of record the contract of sale to Clark; that they never executed or authorized the execution of the contract by Hastings, and that the same casts a cloud upon the title, and prays for a cancellation thereof and the quieting of the title in the appellee, Frank O. Sjogren.

The appellant Hastings filed his separate answer and cross-petition, setting forth what he claims to be a copy of the contract of sale with Clark, which does not materially differ from that set forth by the appellees, also, attached is a copy of the agency contract between him and the appellees, and states that, in pursuance of the terms thereof, he sold the property to Clark for \$18,400, he paying \$2,400 in cash, the balance to be paid March 1, 1920, and that of the money paid to him by Clark he tendered \$1,000 to the appellees, which they refused to accept; that Clark was ready, willing and able to perform all of the terms of his contract, but that the appellees refused to complete the sale and had brought an action to cancel the contract that he made with Clark as their agent, and that they were indebted to him in the sum of \$1,400 as commission, and prays judgment therefor. To this answer the appellees replying deny all of the allegations, save only such allegations of the answer as admit allegations of the petition.

In view of the fact that Clark and Peters have not appealed from the decree of the trial court, it is unnecessary to notice their pleadings except to say that Clark pleaded the contract made by Hastings on behalf of the appellees, and that Hastings was authorized by the contract in writing to execute for the appellees the contract of sale, and that he stood ready to and had the ability

to perform said contract. The defendant Peters also, in a general way, answers the petition, and alleges an oral lease with Clark for the land. Replies were filed to the answers of Clark and Peters which are similar to the reply filed to the answer of Hastings. A trial was had which resulted in a decree finding generally for the plaintiffs and against all of the defendants, and the Clark contract of sale was set aside and canceled, the title quieted and confirmed in the appellee, Frank O. Sjogren, and Hastings' cross-petition was dismissed. Hastings filed a motion for a new trial, which was overruled, and he only appeals to this court.

The record presents for consideration two questions: First, that the attempted sale of the land by appellant was not upon the terms of the agency contract and within the scope of his authority granted thereby; that is, that the contract of sale made other and different terms and provisions from those granted to Hastings in his contract. Second, that the appellant had no right or authority to proceed to act as agent for the appellees at the time he executed the Clark contract; in other words, that the agency contract had been revoked before the alleged sale agreement had been entered into with Clark.

[1, 2] A consideration of the first question is unnecessary if we find for the appellees on the second proposition. This requires an examination of the record. The pleaded contracts of agency and sale are not in dispute; that is, the appellees admit executing the contract of agency, and the contract of sale made by Hastings to Clark was not controverted except in so far as Hastings had authority to enter into the same and bind the appellees. It is urged by appellant, Hastings, that rescission is an affirmative defense and must be pleaded if relied upon as a defense; while the appellees contend that one of the issues tried and determined by the lower court was whether or not the contract of agency executed by the appellees had been revoked prior to the making of the claimed sale to Clark by Hastings. A careful examination of the record shows that the question of rescission was fully gone into by the parties without objection. The appellees testified that a short time after the making of the agency contract, and before the making of the Clark sale, they told Hastings that they had decided not to sell, and that he told them he would not as he had plenty of land to sell. This was denied by Hastings. Both offered evidence in support of their contentions. This question of fact was fully, and without objection, limitation or restriction, tried out before the court and determined. The rule is well settled in this state that—

"Upon appeal the same cause must be presented in this court that was tried in the court

below. If an issue is there tried by both parties, and without objection from either that the issue is not sufficiently pleaded, such objection will not be considered in this court as ground for reversal." *Boyd v. Lincoln & N. W. R. Co.*, 89 Neb. 840, 132 N. W. 529.

This now brings us to the question, Did the appellees have the right to revoke the agency contract before sale? The right of rescission before sale is also well settled in this state. The court said in *Hallstead v. Perrigo*, 87 Neb. 128, 126 N. W. 1078, and *Staats v. Mangelsen*, 105 Neb. —, 180 N. W. 78:

"Where an agent is vested with a mere naked authority not coupled with an interest, his principal may revoke that authority before performance."

[3] Was there a rescission of the contract before sale? The evidence is conflicting upon this question. The appellees both testified that, before the Clark contract was executed by Hastings, they told him, in substance, that they had decided not to sell, and the record shows that when the Clark contract was presented to them for signature by W. O. Mickey, Hastings' partner, they refused to sign, and assigned as a reason that they had told Hastings not to sell. Yet, with full knowledge of their refusal to sign or authorize the contract, Hastings undertakes to bind his principals by signing the contract for them, which was an unusual thing for an agent to do. Instead of going out and ascertaining why they refused to sign the contract, he proceeded to sign the same disregarding their wishes. Such conduct has the appearance of bad faith, to say the least, and to ask its enforcement in a court of equity is expecting much under the circumstances disclosed by the record. While the revoking of the agency contract is denied by appellant, Hastings, and some evidence is offered by him tending to show that there was no rescission, yet, after a careful consideration of all the evidence, we do not hesitate to find and say, independent of the findings of the lower court, that the decree is sustained by ample and sufficient evidence. The contract of agency having been rescinded before sale, the appellant could not maintain this action against the appellees. The appellant having an exclusive agency, the appellees might, in a proper action, be liable to the appellant in some amount, but such liability is not presented by the pleadings and evidence. *Hallstead v. Perrigo*, supra.

The agency contract having been revoked before sale, and that issue of fact having been tried by both parties without objections, and the other assigned errors being without merit, it follows that the decree of the trial court must be and it is affirmed.

WIDENER et al. v. SHARP et al.
(No. 21647.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Insurance §697 — Delegates to regular quadrennial session of supreme legislative body of benefit society cannot serve at special session two years later.

Delegates elected to serve at a regular quadrennial session of the supreme legislative and governing body of the Royal Highlanders, a fraternal beneficiary association, cannot lawfully serve at a special session two years later, where no provision is made for electing delegates to a special session.

2. Insurance §696 — Fraternal beneficiary society held without power to legislate or adopt new table of rates.

The record examined, and held that the Royal Highlanders, a fraternal beneficiary society, was without power to legislate or to adopt the new table of rates that is complained of by plaintiffs.

3. Insurance §719(3) — Enforcement of rates not validly adopted by fraternal beneficiary association will be enjoined.

Where the executive officers of a fraternal beneficiary society are about to enforce certain rates that have been adopted at a special session of the supreme governing body of the society, and it appears that no provision has been made by the society for electing the delegates who adopted the rates, such executive officers will be enjoined from enforcing such rates on application by a member of the society who is aggrieved.

Appeal from District Court, Lancaster County; Clemets, Judge.

Action by William Widener and others against W. E. Sharp, Most Illustrious Protector of the Royal Highlanders, and others. From a judgment for defendants, denying injunction, plaintiffs appeal. Reversed and remanded, with directions.

J. C. McReynolds, of Lincoln, for appellants.

Hainer, Craft & Lane, of Lincoln, for appellees.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

DEAN, J. This is a suit for an injunction. Plaintiffs are members of the Royal Highlanders, a fraternal beneficiary association organized under the laws of Nebraska. It is required by statute to have a representative form of government. It has a lodge system with a ritualistic form of work. Its lodges are called "castles" and its laws "edicts." Its lawmaking body meets in regular session quadrennially. It raises funds to pay bene-

fits and expenses by requiring members to pay assessments and dues. Defendants are its principal administrative officers and its executive committee. The purpose of the suit is to perpetually enjoin defendants from enforcing a new table of rates adopted by the supreme legislative and governing body of the association at a special session held at Denver in October, 1919. The new rates increase the assessments of plaintiffs and are alleged to be void. On issues raised by the pleadings the parties were heard by two district judges who dismissed the suit. Plaintiffs have appealed.

The decisive point in the case is this: Did the representatives who were elected in 1917 as delegates to the quadrennial session of the supreme executive castle of the Royal Highlanders for that year, and who, on the call of the executive committee, attended a special session of the executive castle in 1919, have the power at that session to adopt the new table of rates, then adopted, of which complaint is made by plaintiffs? If the delegates were not clothed with such power the judgment should be reversed and the injunction be made perpetual, and if for that reason reversed, further discussion of other contested features is needless.

The lodge system of the Royal Highlanders is composed of tributary castles, representative castles, and the executive castle. The tributary castles, many in number, are the local lodges and they elect delegates to 25 representative castles. The latter elect delegates to the executive castle which is the supreme legislative and governing body of the association. The statute and the edicts require a session of the executive castle as often as once in four years.

Judged by an edict that the Royal Highlanders adopted in 1901, and that was in full force and effect in 1919, it seems clear that the called special 1919 session of the Royal Highlanders that met at Denver and adopted the rates and made the changes that are in issue here was without power to do so. The edict in question provides generally that the power of the "representative castles" with respect to the election of representatives shall be:

"To elect representatives to the executive castle to serve at the next session thereof, and to elect alternates for such representatives to serve in the event of the inability of the representatives to attend." Section 70, Original Edicts 1901.

Section 70 was effective continuously from the date of its adoption in July, 1901, until and including October, 1919, when the representatives who were elected to serve at the regular quadrennial session of the executive castle in 1917 were called by the executive committee to assemble in special session in 1919. In October of that year the representatives, so called in special session, went

through the form of amending the edicts and of adopting the rates in question here and of which complaint is made by plaintiffs. Under section 70 it seems clear that the official terms of the representatives who attended the special session in 1919 expired with the adjournment of the preceding regular quadrennial session in 1917, to which they had been elected. It follows, as we have seen, that the delegates were therefore without power at the called special session to perform any legislative or executive function or to adopt a new table of rates. The defendant society argues to the contrary.

[1, 2] An edict was adopted by the defendant society in 1897 that, but for the fact that it was amended in 1901, or perhaps superseded is a better term, would have given to the representatives in 1919 the power to amend the rates. The 1897 edict provides generally that the delegates to the executive castle shall be elected from the membership of each respective district, "to represent such district at the following regular convention of the executive castle, and all special conventions of the executive castle, until their successors are elected and qualified." Section 94, Original Edicts 1897.

It will be noted that section 70, that is in effect amendatory of section 94, merely provides that the representatives shall be elected "to serve at the next session," and that it omits the following words that are found in the repealed section 94, namely, "and all special conventions of the executive castle."

There must have been, there doubtless was, a reason for adopting the 1901 amendment. Why it was adopted is perhaps not necessary to inquire. It is sufficient that the amended edict was adopted and that it was in full force and effect in 1919. It appears too that at least three quadrennial sessions of the Royal Highlanders were subsequently held and section 70 of the 1901 Original Edicts remained unamended and unrepealed. By the adoption of section 70 a material change was deliberately made, with respect to the duration of the official term of office of the elected representatives, that did not theretofore exist. It follows that the society, and the defendants, were bound by its provisions until it was lawfully changed. Clearly it was the intention of the authors of the amendment that the former rule, with respect to the holdover privileges of elected representatives, should no longer obtain. It is evident that the adoption of the amended section was not an accident.

It may be observed in a general way, and merely as illustrative of the point, that a litigant in a law action, for obvious reasons, might not care to have his case tried to a jury that had been selected two years, or even two weeks, before his case is to be called for trial. And doubtless, by the same token, and for obvious reasons too, the representatives to

the 1901 executive castle deliberately concluded that four continuous official years of the same representatives in office, with power unlimited for special sessions of the executive castle, might not inure to the good of the order.

Had edict number 94 not been supplanted by edict number 70, plaintiffs would have had no cause for complaint with respect to the legality of the 1919 session. The fact is apparent that the 1917 representatives in 1919 attempted to effect a vital change in the policy of the Royal Highlanders under authority of a repealed edict that had not been in force for about 16 years. It seems clear that the executive committee was without authority to summon the representatives who were elected in 1917, for the convention of that year, to meet in special session in 1919. The delegates who responded to the call in 1919 could not lawfully serve at that session, for the reason that direct and explicit authority to do so was long before repealed.

With respect to the status of the 1919 executive castle, and its authority to adopt the rates in question, defendants draw attention to section 7 of the 1913 Original Edicts. So far as applicable here it reads:

"The executive castle shall have jurisdiction over all members of the fraternity and over all representative and tributary castles instituted and governed by its laws, and the term of its existence shall be perpetual."

In their brief defendants contend that the following words in section 7, namely, "and the term of its existence shall be perpetual," negative the assumption that the term of office of the representatives of the executive castle of 1917 terminated upon the adjournment of the regular session in that year. They argue:

"If such adjournment vacated the offices of the executive castle representatives, the existence of the executive castle would not be perpetual, as is provided in said section 7 of the edicts."

It will be presumed that the ordinary and usual meaning of the word "perpetual" in section 7 was intended. Following is a standard definition:

"Never-ceasing, continuing forever or for an unlimited time; unending; everlasting; continuous." Webster's New International Dictionary.

Another definition of "perpetual" follows:

"Continuing forever in future time; destined to continue or to be continued through the ages; everlasting; as, a perpetual statute." Century Dictionary and Cyclopedia, vol. 7.

It is, of course, common knowledge that, as applied to corporations generally, a by-law that purports to provide for perpetuity cannot insure perpetuity. To illustrate: A common expression in the organization of

corporations is that they shall continue for a designated number of years. But it does not follow that the continued existence of the corporation is thereby assured for the designated length of time.

Section 31, Original Edicts for 1896, provided for the calling of special conventions "by the most illustrious protector at any time and place, when requested to do so by a majority of all tributary castles." That section was amended in 1897 by the adoption of section 28, so that under it the most illustrious protector of the Royal Highlanders could call a special convention "when requested to do so by the high prudential chiefs." The edict, as now in force, and which was in force in 1919, was again amended in 1901, and provides:

"Special sessions of the executive castle shall be called by the most illustrious protector at any time and place, when he deems it necessary to do so, or upon the request of two-thirds of the executive committee; such special sessions to have all the powers of regular sessions, except as herein restricted." Section 11, Original Edicts 1901.

There is, however, no edict providing for the election of representatives to a special convention. It follows that section 11 is without force. Standing alone, as it does, it is ineffective for any purpose. In this respect, and as illustrative merely, it may be likened to a constitutional provision that is not self-executing and that requires an act of the Legislature to make it operative. Again to illustrate: A penalty could not lawfully be imposed for the violation of a criminal statute unless the Legislature fixed a penalty for such violation. Whether under section 11 representatives could lawfully have been elected at a special election to serve as representatives at a special convention, under a call duly made by the most illustrious protector of the Royal Highlanders, is not presented by the record, nor is it discussed in the brief. We do not therefore decide the question. The authorities cited by defendant with respect to the holdover privileges of those who are elected to office generally, and for the most part to public office, to which no successor has been elected or appointed, do not, in view of the record and of the premises, seem to be applicable to the facts before us.

We conclude that the delegates elected to serve at a regular quadrennial session of the supreme legislative and governing body of the Royal Highlanders were not, under the edicts of the society, clothed with authority to serve at a special session holden two years later, where no provision was made for election of delegates to a special session. That the Royal Highlander society was without power to legislate or to adopt the new table of rates that is complained of by plaintiffs sufficiently appears.

[3] Where the executive officers of a fra-

ternal beneficiary society are about to enforce certain rates that have been adopted at a special session of the supreme governing body of the society, and it appears that no provision has been made by the society for electing the delegates who adopted the rates, such executive officers will be enjoined from enforcing such rates on application by a member of the society who is aggrieved. Other questions are presented by the briefs that, in view of our conclusion, we do not find it necessary to discuss, nor to decide.

The judgment of the district court is reversed and remanded, with directions that the injunction be made perpetual.

Reversed, and remanded with directions.

BAUGHAN v. SCHNELKE. (No. 21716.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Reformation of Instruments ¶47—Equity may retain case for full relief.

Where the plaintiff properly brought an action before a court of equity for the reformation of a written instrument, and in the same action sought to recover a money judgment against the defendant upon said instrument so reformed, and the defendant objected to the jurisdiction of the court and moved that the case be transferred to a law docket and the defendant be awarded a jury trial, but without making any offer to consent that the instrument in question might be corrected as requested, but, on the contrary, opposed it by objections and exceptions thereto, *held*, that the court, having properly acquired jurisdiction over a subject-matter peculiarly cognizable before a court of equity, might lawfully retain the case for all purposes and proceed to a final determination of all matters, whether legal or equitable, arising out of the issues presented by the pleadings before it.

2. Brokers ¶8(3)—Evidence held insufficient to sustain defenses as to expiration of contract and revocation of contract before production of purchaser.

In a suit by a real estate broker for commissions alleged to have been earned by virtue of a written contract between himself and the owner of the land listed, one of the defenses was that the contract had expired by limitation of time, and another that it had been expressly revoked before the plaintiff produced a purchaser for the land and the trial court found against the defendant upon both points. *Held*, upon a review of the testimony, the court was justified in so finding and the same should be sustained.

3. Lost Instruments ¶22—Where instrument was destroyed after action brought, *held*, that amending to declare upon lost instrument was not necessary to permit secondary evidence.

Where the original written instrument sued upon was in existence and in the possession

of plaintiff's counsel at the time the suit was commenced, but afterwards became lost or destroyed, without the fault of, and by means unknown to, any one having the same in custody, and its loss or destruction is accounted for to the satisfaction of the court, it is not necessary for the plaintiff thereafter to amend his petition so as to declare upon a lost instrument as a prerequisite to proof of the contents of such instrument by secondary evidence.

Appeal from District Court, Lancaster County; Morning, Judge.

Action by John T. Baughan against Richard E. Schnellke. Judgment for plaintiff, and defendant appeals. Affirmed.

R. J. Greene and Hugh C. Wilson, both of Lincoln, for appellant.

Burkett, Wilson, Brown & Wilson, of Lincoln, for appellee.

Heard before MORRISSEY, C. J., and FLANSBURG and ROSE, JJ., and DICKSON and TROUP, District Judges.

TROUP, District Judge. The plaintiff, as a real estate broker, claiming to have a written contract with defendant authorizing him to find defendant a purchaser for certain land belonging to defendant, on certain specified terms, for which service plaintiff was to receive a certain specified commission, and further claiming that at a time within the life of the contract upon producing a person able, ready, and willing to purchase defendant's land on the terms specified, defendant refused to sell and likewise refused to pay plaintiff his commission, and plaintiff thereupon preparing to bring suit for his commission discovered that his broker's contract was defective in that, by mutual mistake of the parties, a misdescription of the land had been inserted, instituted this action in equity for a reformation of the contract in that respect, and at the same time and in the same action asked to recover his commission upon the contract so reformed. The defendant objected to a trial to the court upon the right of plaintiff to recover commission and demanded a jury for the trial of that issue. Upon the demand being overruled, the defendant answered denying that he ever entered into the contract set forth in plaintiff's petition or agreed to the terms therein specified. Upon a trial of the case the court found generally for the plaintiff, reformed the contract in the particular required, and rendered judgment for plaintiff for his commission. The defendant appeals.

[1] It does not appear that at any time, either before or after plaintiff's action was instituted in the equity court, the defendant agreed, or offered to agree, that the contract in question might be corrected or reformed as plaintiff desired. Whether the misdescription in the contract of the property listed with plaintiff for sale would have greatly

embarrassed, if not entirely defeated, plaintiff in an action at law upon the contract, as it stood without reformation, was something which plaintiff could not foretell. At all events the plaintiff was not obliged to take any chances in that respect. It was certainly plaintiff's right to go into a court of equity to have his contract corrected according to the fact and the manifest intention of the parties. It does not appear that the defendant had an opportunity, before plaintiff's action was commenced, to consent that the desired correction in the contract might be made. But even after suit had been instituted in the equity court, if the defendant had frankly agreed, or offered to agree, in open court or by written admission, that the correction in the contract might be made as requested, without contest or trial upon that issue, and then appealed to the court to transfer the case to a law docket for a jury trial, it is the opinion of the writer, at least, that this court might well have held that the trial court would have erred had it not granted the request. But such is not the case here. The attitude of the defendant from the very beginning, as disclosed by the record, was to deny everything. He not only denied the right of plaintiff to reform the contract, but he denied the very existence of the contract itself and vigorously contested its reformation by objections to the evidence upon almost every point. Under these circumstances it is impossible to say that the plaintiff did not act both lawfully and wisely in seeking a reformation of his contract in a court of equity. The plaintiff having a right to bring the action in the court he did, and the court having properly acquired jurisdiction over the parties and the subject-matter, it had the right to retain the case for all purposes and proceed to a final determination of all matters, whether legal or equitable, arising out of the issues presented by the pleadings before it. This rule is so well and universally established, and the reported decisions show that the right under the rule has been exercised in almost every variety of case, that it would seem needless to cite authorities in its support. A few only must suffice: *Bank of Stockham v. Alter*, 61 Neb. 359, 85 N. W. 300; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 868; *Bell v. Dingwell*, 91 Neb. 699, 136 N. W. 1128; *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431; *Union Central Life Ins. Co. v. Phillips*, 102 Fed. 19, 41 C. C. A. 263; 18 Cyc. 106-109.

[2] Upon the issue as to plaintiff's right to recover for commission, the defendant claims that the time in which plaintiff was given to produce a purchaser was limited to 10 days from the listing of the property, and that the clause appearing in the written contract giving plaintiff 6 months in which to do so was inserted by the plaintiff without the knowledge or consent of the defendant. We think there is no merit in this conten-

tion. In the first place, it is altogether improbable that any real estate broker would go to the trouble of entering into a written contract for the privilege of producing a purchaser for land with only a 10-day period in which to do so. Certainly this would seem to be true unless the broker already had a purchaser in view who was, or at least was supposed to be, ready, able, and willing to make the purchase without delay. But no such circumstance appears in this case, nor in our opinion was it contemplated by either party. More than 5 months elapsed after the signing of the contract before the plaintiff was able to produce a purchaser for defendant's farm. It is in evidence that the plaintiff had more or less negotiations with the defendant respecting the sale of his farm during a period of 3 years prior to entering into the contract in question. The plaintiff, upon being asked how it came that the present contract was entered into, testified:

"Mr. Schnelke came into my office with reference to selling his place, and I told him that he had his place pretty high, and that he changed his mind so often on it that I wouldn't handle it any longer unless he would give me a written contract. He says, 'I will give you six months on it at \$200 an acre;' and I says, 'Will you sign a contract?' and he says, 'Yes;' and the result was he signed a contract on it for six months time at \$200 an acre."

The defendant himself testifies that the contract was read over to him at the time it was prepared, and that he signed it, and he does not claim that any fraud or deception was practiced upon him, either in the drafting or the reading of said contract, or, if he does, there is no evidence to support such claim.

Nor do we think the defendant's claim that he revoked the contract before plaintiff had produced a purchaser is supported by the weight of evidence. Indeed, it would seem that the weight of the evidence is against such claim. The defendant testifies that in May, a month before plaintiff produced a purchaser for the farm, he told plaintiff that his place was not for sale. This is expressly denied by the plaintiff. Resting thus, it would seem to be a question of veracity between the plaintiff and defendant as to which one was speaking the truth in this respect, but circumstances occurring in subsequent events lead us to believe that the defendant is mistaken upon this point. In June when the plaintiff and the proposed purchaser were at defendant's home, first for the purpose of looking over the farm, at which time they agreed with the plaintiff to take it, and three days later, for the purpose of completing the purchase, the defendant at no time placed his refusal to consummate the sale on the ground that plaintiff's contract to find a purchaser had expired or been revoked. Nor did this fact

seem to be mentioned or referred to. On the first occasion, upon being told by the plaintiff that he had the Munns out looking at the farm with a view to selling it to them, the defendant said, as testified to by plaintiff, "He didn't care much about selling the farm now." Upon being told by plaintiff that, if he did not care to sell, it was all right with him, and he would take 1 per cent. for his commission, instead of 2 per cent. called for by the contract, but if the Munns bought he would have to pay 2 per cent., the defendant replied, according to plaintiff's evidence, "I will take my chances, I do not think they will buy it." The defendant denies making the latter statement. On the second occasion the defendant became a little more emphatic, and upon being told that Mr. Munn, the proposed purchaser, had come over to complete the purchase of the farm, the defendant testified, "He can't have it," that the farm was not for sale—"absolutely, it wasn't for sale," but at no time on these occasions did defendant claim to plaintiff or the proposed purchaser that plaintiff had no authority to negotiate for a sale of his farm. It is true that in this connection the defendant testified that he had told the plaintiff, on a previous occasion, that his farm was not for sale, which is denied by the plaintiff, but the point, as bearing upon the credibility of the defendant's claim in that respect, is that he did not make that claim known on either of the occasions in June when it was incumbent upon him to assign a reason for his refusal to sell.

These parties were both before the court in person, the judge heard their testimony and witnessed their manner of testifying and was best able to determine the probable truth of their respective statements. The court resolved the disputed question of revocation in favor of plaintiff, and we are of the opinion that the evidence justifies the finding.

[3] It appears without serious dispute that the original contract sued upon was in existence and in the possession of plaintiff's attorneys at the time they prepared and filed plaintiff's original petition in the case, to wit, August 13, 1919, and to which they attached what purported to be a true copy of the card form of said contract, and also at the time plaintiff's amended petition was prepared and filed, November 8, 1919, in which is set forth what purports to be the contents of said contract, and also, apparently, attached to said amended petition a card copy of said contract. Thereafter, and some time before the trial of said case, it appears that the original contract became lost or destroyed. No fraud or deception was charged or attempted to be proved against either the plaintiff or his counsel as a reason for withholding or concealing the original contract, and without the slightest doubt it was a

bona fide case of where the instrument had disappeared beyond recovery without the intentional act or fault of any one who had its custody.

At the trial, and after accounting for the loss or destruction of said instrument to the satisfaction of the court, plaintiff was permitted to introduce secondary evidence as to its contents by oral testimony and by the use of the card form copy above referred to. The defendant objected to the introduction of secondary evidence to prove the contents of the contract without first requiring the plaintiff to amend his petition so as to declare upon a lost instrument, and that a resort to such evidence constituted a material variance between the allegations of the petition and the proof. We do not believe this point is well taken. It is true that the case of *Chamberlain v. Sawyer*, 19 Ohio, 360, cited by the defendant, and the only one in point, seems to sustain the defendant's contention. But this case cannot overcome the long and uniformly established practice in this country to the contrary. The Ohio court evidently based its decision upon the old English case of *Smith v. Woodward*, 4 East (Eng.) 585, the only case cited in the opinion, and in doing so we think must have overlooked the case in our own country of *Renner v. Bank of Columbia*, 22 U. S. (9 Wheat.) 581, 6 L. Ed. 166, in which the Supreme Court of the United States announced a contrary doctrine. The case last cited was a suit upon a promissory note which appeared to have been lost, although perhaps not destroyed, and secondary evidence was admitted as to its contents. In speaking of the exceptions taken by the defendant to the ruling of the trial court in this respect, Justice Thompson, in delivering the opinion of the Supreme Court of the United States, said:

"It is objected, lastly, that secondary evidence was not admissible, without a special count in the declaration upon a lost note. The English practice on this subject has not been adopted in this country, so far as our knowledge of it extends, and to require a special count upon a lost note, would be shutting the door against secondary evidence, in all cases where the note was lost, after declaration filed. We do not think any danger of fraud is to be apprehended, from the admission of such evidence, under the usual count upon the note; and the practice in the court below not requiring a special count in such cases, no error was committed in the admission of the evidence."

The case of *Board of Supervisors of Livingston County v. White*, 30 Barb. (N. Y.) 72, was a suit upon the bond of a defaulting county treasurer for the sum of over \$28,000. The defendant denied the execution and delivery of the bond sued on. It appeared that the bond had been lost some time before the trial, and secondary evidence was admitted to prove its contents. At the close of plaintiff's testimony the defendant moved

(184 N.W.)

for a nonsuit on the ground, in substance, of a failure of proof to sustain plaintiff's cause of action. The motion was overruled and judgment rendered against the defendant. On appeal to the Supreme Court of New York that court said:

"It was not necessary to allege in the complaint the loss of the bond, to entitle the plaintiff to prove its loss and give secondary evidence of its contents. Under the former system of pleading, in cases like the present, profert of the bond, or an excuse for the omission of profert, in the declaration, was required, and if the declaration contained the usual statement of profert, and the defendant pleaded non est factum, the production of the bond at the trial could not be excused by proof of its loss previous to declaring; but the doctrine of profert has no place in the present system of pleading, ample provision otherwise existing for the production and inspection of papers. Independent of profert, there never was any necessity or reason for saying anything about the loss of the bond, in stating the cause of action."

The above decisions undoubtedly, state correctly the rule of practice that generally prevails in this country on the point in issue as it arises in cases under circumstances similar to those existing in the cases last above cited, and which rule in all its force applies to the case at bar.

Having covered all of the points complained of in appellant's brief, and finding no reversible error in the record, the decree of the district court is affirmed.

FOOTE et al. v. CHITTENDEN et al.
(No. 21495.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Pleading $\S$ 387—Party cannot plead one cause of action and recover on another.

A party will not be permitted to plead one cause of action and upon the trial rely on proof establishing a different cause. The allegations and proof must agree.

2. Courts $\S$ 36—County courts of Nebraska are courts of record and there are the usual presumptions of regularity.

In Nebraska, county courts are courts of record. They have exclusive original jurisdiction of guardianship and probate proceedings, and as to such matters they are courts of general, superior, and not inferior, jurisdiction. Their records import verity and their proceedings possess, as a rule, the same presumptions of jurisdiction and regularity possessed by courts of superior common-law jurisdiction. All matters necessary to give the court jurisdiction, upon which the record is silent, are presumed.

3. Guardian and ward $\S$ 107—Failure to give nonresident minors notice of appointment of guardian will not render sale by guardian void.

The failure to give notice to nonresident minors of an application made to a county court of Nebraska for the appointment of a guardian to take charge of and conserve their property located in this state is not such a jurisdictional defect as will render a sale of the property of such minors made by the guardian so appointed, under a license issued by the proper district court, void or subject to collateral attack.

Appeal from District Court, Buffalo County; Hostetler, Judge.

Action by Eleanor I. Foote and others against George R. Chittenden and others. From judgment for defendants, plaintiffs appeal. Affirmed.

John N. Dryden and N. P. McDonald, both of Kearney, for appellants.

H. M. Sinclair and John A. Miller, both of Kearney, Rinaker, Kidd & Delehant, of Beatrice, and Fred A. Nye, of Kearney, for appellees.

Heard before LETTON, DAY, and DEAN, JJ., and CLEMENTS and MORNING, District Judges.

E. J. CLEMENTS, District Judge. This is an action to determine adverse claims to two city lots situated in Kearney, Nebraska. The plaintiffs claim title through the will of Sarah B. Leffingwell, who died February 17, 1896, seized of said property. The defendants claim title to or interest in said lands from the same source, under a sale by the guardian of the plaintiffs, who were then nonresident minors, under a license from the district court for Buffalo county, Nebraska. Walter W. Barney, the guardian who made the sale, was appointed by the county court of said county on July 23, 1903, at which time plaintiffs were aged five, ten, and fourteen years, respectively, and resided in the state of Pennsylvania. The plaintiffs assail the validity of the appointment of said guardian by the county court, but stipulate in the record that the proceedings in the district court with reference to said guardian's sale were complete and regular in all respects; that said sale was confirmed and the guardian was ordered to and did execute a deed to the purchaser, Samuel J. Fair; that said purchaser took possession of said premises under said deed on May 10, 1904, and he, his grantees, and those subsequently succeeding to his right and title therein, including the defendants herein, have ever since remained in peaceable and adverse possession thereof; that they have made valuable improvements on said premises and have paid all the taxes and assessments levied against same.

There is nothing in the record which tends to show that the appointment of Mr. Barney as guardian, or the sale of said property so made by him, was unnecessary, or that same was not made in good faith for the purpose of protecting the interests of the minors; nor that the price paid by the purchaser for said lots was not all they were worth. No one questions the good faith or honesty of the guardian in anything he did. It appears that all the proceedings of the courts and acts of the guardian were for the best interests of the plaintiffs and that the purchaser at the guardian's sale and all subsequent grantors claiming through him are purchasers for full value, without any actual knowledge of any defect in any of said proceedings or in their title to said property. Under these circumstances there appears to be no reason, which appeals to a court of equity, which is a court of conscience, why all of said proceedings should be declared void and the property in question taken from the defendants by plaintiffs in an action commenced more than fifteen years after said sale, more than eleven years after the eldest, and more than two years after the youngest of the plaintiffs became of age. Plaintiffs come into a court of equity and insist that they are entitled to recover, not because of any wrong or injury which has been done them, but because they contend that a technical rule of law has been violated which gives them the legal right to do so. If their contention be correct, plaintiffs must prevail, for courts of equity, as well as courts of law, are bound by legal principles; but the law will not be construed so as to work injustice if such a result can be avoided without the violation of established legal principles or rules.

In their petition plaintiffs plead only two grounds or reasons for their claim that the appointment of Mr. Barney as guardian is void, which are: (1) That no notice was given to plaintiffs of the application for such appointment; and (2) that the bond in the proceedings for the sale was approved by the clerk, and not by the court. The second of these grounds has been wholly abandoned and only the first remains. No other is presented or argued in plaintiffs' original brief herein; but, in their reply brief, counsel for plaintiffs have attempted to introduce and insist upon two other asserted grounds or reasons, viz., (1) that the application for the appointment of said guardian was not made by any one authorized to do so; and (2) that said application failed to state that plaintiffs were minors, were residents of Buffalo county, or had real estate therein.

[1] The rule is elementary that the allegations and the proof must agree. "A party is not allowed to allege in his petition one cause of action and prove another upon the

trial." *Imhoff v. House*, 36 Neb. 23, 53 N. W. 1032. "A party will not be permitted to plead one cause of action and upon the trial rely upon proof establishing a different cause." *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027. Counsel's attempt to present to this court for the first time in their reply brief causes of action not pleaded in their petition nor presented to the trial court is a violation of such rule and is not entitled to consideration. We will therefore confine ourselves to the consideration of the cause of action presented by the pleadings.

[2, 3] In the record of the county court of Buffalo county in said guardianship proceedings, introduced in evidence by plaintiffs, is an instrument labeled, "Order for Hearing and Notice," in which order the time for hearing of the application for guardianship of plaintiffs is set, and said order concludes with these words, "and that no notice herein be given, the same being waived."

County courts in Nebraska have exclusive original jurisdiction of guardianship and probate proceedings. They are courts of record, and as to such matters they are courts of general, superior, and not inferior, jurisdiction. *Scott v. Flowers*, 61 Neb. 620, 85 N. W. 857; *Genau v. Roderick*, 4 Neb. Unoff. 436, 94 N. W. 523. Their records import verity, and their proceedings possess, as a general rule, the same presumptions of jurisdiction and regularity possessed by courts of superior common-law jurisdiction. Where a county court possesses general jurisdiction of a given class of subject-matters, the possession of jurisdiction assumed to be exercised in a particular case falling within that class is, in a collateral proceeding, presumed. All matters necessary to give the court jurisdiction, upon which the record is silent, are presumed. *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136; *Shroyer v. Richmond*, 16 Ohio St. 455. The reasons for the foregoing rule are clearly stated in *Davis v. Hudson*, supra, which case is cited in plaintiffs' brief on another point. Of course, such presumptions will not be permitted to contradict statements in the record which, as we have seen, import verity.

That part of the record above quoted therefore shows that no notice of the hearing on said application was given for the reason that the same was waived. The record being silent as to who waived notice and how it was done, we must, under the foregoing rule, presume that all parties who were entitled to notice waived same and that such waiver was in the form and manner required. This presumption applies to the father, mother, and all persons sui juris to whom notice should have been given. The right of such a person to waive notice of any proceeding to which he is entitled is unquestioned. The Nebraska statutes pro-

vide that no receiver shall be appointed until after notice of the time and place of the application is given to all parties to be affected thereby, and that "every order appointing a receiver without such notice shall be void." Yet this court has repeatedly held that such notice may be waived. *Farmers' & Merchants' Bank v. German Nat. Bank*, 59 Neb. 229, 80 N. W. 820; *Vleth v. Ress*, 60 Neb. 52, 82 N. W. 116; *Murphy v. Fidelity Mut. Fire Ins. Co.*, 69 Neb. 489, 95 N. W. 1022; 34 Cyc. 125.

As the plaintiffs were then minors they did not have capacity to make a valid or binding waiver of any of their legal rights, and, if it were necessary to give them notice before the guardian could be legally appointed, then such appointment was invalid. Counsel's contention that such notice to them was required is based upon section 1661, Rev. St. 1913, which provides that the court may appoint a guardian for a nonresident minor "after notice given to all persons interested, in such manner as the court shall order, and after a full hearing and examination." In their brief counsel for plaintiffs say that in *Davis v. Hudson*, 29 Minn. 27, 11 N. W. 136, "it was held, under a statute identical with ours, that the court could not exercise its jurisdiction until the provision respecting notice had been complied with;" and that "the manner of notice is committed to the discretion of the judge, but some notice is indispensable." This is the principal authority relied upon to sustain plaintiff's contention, but neither in this case, nor in any other that we have been able to find, involving a like statute, is it said that such notice must be given to the nonresident minors themselves. The record of the guardianship proceedings under consideration in the *Davis* Case did not show that notice had been given to any one, but the court held that, "the record being silent upon the matter of notice of the application for such appointment, such notice is presumed in a collateral proceeding," and the guardian's sale was sustained.

In a later case, *Kurtz v. St. Paul & D. R. Co.*, 48 Minn. 339, 51 N. W. 221, 31 Am. St. Rep. 657, the same court passed directly on the identical question under consideration. In that case the plaintiffs were minors residing in Wisconsin with their mother and owned land in St. Louis county, Minnesota. Their next of kin were their mother and a married sister. The mother applied to the probate court of St. Louis county for letters of guardianship. Notice was served on the married sister personally, and the court held that the mother had notice by being herself the petitioner. It was contended that, as no notice was given to the minors themselves, the appointment of the guardian and

the sale of the minors' property made by her as such were void. In the opinion it is said:

"Notice of the hearing for such appointment is not a constitutional prerequisite to the jurisdiction to name a guardian. Appointing a guardian deprives no one of his property, and does not change or affect the title of it. Letters of guardianship are merely a commission which places the property of the ward in the care of an officer of the court as custodian, and in its effect is not essentially different from the appointment of a receiver, or temporary administrator, a jurisdiction which can be and frequently is exercised before service of any process. The matter of notice of an application for the appointment of a guardian is, therefore, purely a matter of statutory requirement. * * * The statute clearly commits it to the sound discretion of the judge to decide how and in what manner notice shall be given, and to fix the kind of notice most likely to serve the ends of justice, and protect the interests of the infants. Similar provisions in similar statutes are quite common, and it is agreed, with one accord, that the purpose is to give notice to relatives or next of kin who are naturally interested in the infants or their estates, so as to give them an opportunity to attend, if they desire, for the purpose of giving the probate court the requisite information as to the nature and value of the estate of the infant, and as to the propriety or impropriety of the appointment, as guardian, of the person named in the petition. *Underhill v. Dennis*, 9 Paige, 202; *White v. Pomeroy*, 7 Barb. (N. Y.) 640; *Ex parte Dawson*, 3 Bradf. Sur. (N. Y.) 130. Notice to the infants is not the important or essential thing, for the very necessity for appointing a guardian for them arises out of the fact that they are incapable of managing their own estate, or of determining for themselves what is for their own interests. If they are of very tender years, and strictly non sui juris, notice to them would be an idle ceremony, and utterly useless. Hence we conclude that the notice contemplated by statute does not necessarily require or include notice to the infants themselves, but that it is left to the sound discretion of the probate judge to order such notice to persons interested as natural guardians and next of kin as he shall deem most likely to inform them of the application, and thus, through their attendance, advise him of the extent and condition of the infants' estate, and of the expediency of the appointment prayed for."

We have quoted thus at length from the opinion in said case because the reasoning and conclusion therein appear to be sound and right and meet with our approval.

We therefore hold that the failure to give notice to plaintiffs in the case at bar of the application for the appointment of a guardian to take charge of their property in Nebraska did not render such appointment void and make it subject to collateral attack. As this is the only defect pleaded, which is relied upon, it follows that this conclusion is decisive of the case, and

other questions discussed in the briefs will not be considered.

We find no prejudicial error in the record, and the judgment of the trial court is therefore affirmed.

**FARMERS' STATE BANK OF STELLA v.
HOME STATE BANK OF HUMBOLDT.**
(No. 21719.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Trusts §35(1) — Subsequent mortgages held trustee for prior mortgages.

Where a bank, with knowledge of a prior mortgage indebtedness on personal property, takes a mortgage thereon, it being agreed between the mortgagor, the owner of the property, and the bank that the property is to be sold and the proceeds deposited in such bank, and out of the proceeds the bank shall first pay the prior mortgage indebtedness against the property, *held* that, upon deposit of the proceeds of the property in such bank, the bank becomes trustee of the fund and holds the same in trust for the prior mortgagees. And in an action in equity by one of the prior mortgagees to subject the trust fund to the payment of a balance due on one of the prior mortgages (the proceeds of the property being sufficient to pay the entire prior mortgage indebtedness against it), the fact that the bank had applied a part of the trust fund in liquidation of the mortgagor's indebtedness to the bank by his direction before or at the time of the application, thereby reducing the trust fund to an amount insufficient to pay the prior mortgages, would not constitute a defense to such an action; *held*, further, that the relation of debtor and creditor did not exist between the mortgagor and the bank, except as to any amount remaining after the payment of the prior mortgages, and that the bank must restore so much of the trust fund as is necessary to pay the balance due the prior mortgagee bringing the suit. The principle stated in *Alter v. Bank of Stockham*, 53 Neb. 223, 73 N. W. 667, that, "where a mortgagor of chattels converts the same into cash, at their full value, and deposits the money with his agent, who has notice of the mortgage lien, an action will lie at the suit of the mortgagee against such agent, for the proceeds of such property," followed.

2. Trusts §44(1)—Evidence held sufficient to establish a trust by a subsequent chattel mortgage in favor of a prior mortgage.

Evidence examined, and *held* to sustain the judgment of the trial court.

Appeal from District Court, Richardson County; Raper, Judge.

Action by the Farmers' State Bank of Stella against the Home State Bank of Humboldt. From a judgment for plaintiff, defendant appeals. Affirmed.

Dort & Cain, of Falls City, for appellant.
Lambert & Armstrong, of Auburn, for appellee.

Heard before MORRISSEY, C. J., FLANSBURG and ROSE, JJ., and DICKSON and TROUP, District Judges.

DICKSON, District Judge. In October, 1919, W. D. Elmore purchased from W. H. Powers 26 head of steers at the agreed price of \$3,570.25, and purchased from J. D. Roliff 20 head, for which he agreed to pay \$2,551.35, and gave them his notes secured by mortgages on the cattle. Powers sold his note and mortgage to the appellee, Farmers' State Bank of Stella, and Roliff sold his to the bank of Steinauer; neither mortgage was placed of record. The cattle were fed by Elmore at Humboldt until the last days of December, and were then shipped by him to Kansas City and sold for \$7,150. The appellant bank received of the proceeds \$7,100, which it placed to the credit of Elmore. During December Elmore became indebted to the appellant bank in the sum of \$1,190.91, and about the 23d of December gave the bank his note and secured it by a chattel mortgage on the cattle purchased from Powers and Roliff, it being agreed that the cattle should be shipped and the proceeds deposited in the appellant bank, and out of the proceeds Elmore's indebtedness to the bank would be paid; the bank, however, agreed that it would first pay the mortgage debt against the cattle. The note given by Elmore to the appellant bank was to take up certain checks given principally for feed, which the bank had carried as cash items and overdrafts, and was taken more as a matter of form than as security, the bank seemingly relying on the assurance of Elmore that he would be able to take care of his indebtedness to the bank out of the proceeds of the cattle when sold, as he had done on other occasions. There was an unusual delay in getting cars, and in the meantime the price of cattle dropped from \$2 to \$3 a hundred pounds, an unexpected happening, and the proceeds were insufficient to pay the purchase-price mortgages and Elmore's indebtedness to the appellant bank.

The real question involved is whether the appellant bank, when it took its mortgage on the cattle, had knowledge of the existence of the purchase-price mortgages, or notice of facts sufficient to impute notice to it of them. If it had, the judgment of the lower court is right.

[1] There is little, if any, controversy as to what was said at the time of giving the mortgage to the appellant bank. Elmore, responding to the question, "Well did you tell them how much you owed on the cattle?" answered, "No, sir." Being asked the further question, "Anything said about your having given a mortgage on the cattle?" he said:

"Nothing, only the time I signed that mortgage, I told him the paper on the cattle must be paid first, whichever I said."

And again, on rebuttal, referring to the chattel mortgage note, he said:

"When I went to give them the note, they drew out the note, before I seen [signed] it, I says to them, I says, 'Now, boys, these cattle have got to be settled for first.'"

Glenn D. Jenkins, one of the officers of the appellant bank, referring to the conversation with Elmore at the time of the giving of the bank's mortgage, said:

"Well, there was nothing said except as he went to sign the note, he said to us, he says, 'Now of course there is a mortgage against those and that will have to be paid, but there will be plenty of money.'"

Otto Kotouc, another officer of appellant bank, when asked:

"What did Elmore say relative to there being a first mortgage on these cattle at that time (referring to the time of the giving of the note)?" answered:

"Just as we were drawing up the note, why he said that there was a mortgage against the cattle, and of course that would have to be paid first."

J. M. Wright, cashier of the appellee bank, testified that, at the time he went to Humboldt to take up with the appellant bank the matter of the payment of the check given by Elmore in settlement of the Powers note, Mr. Linn, an officer of the appellant bank, said:

"He knew there was a mortgage on the cattle, but did not know where it was at."

These questions and answers fairly reflect the evidence on the question of the bank's knowledge of the existence of the purchase-price mortgages on the cattle.

As showing the agreement between Elmore and the appellant bank concerning the payment of the mortgage indebtedness on the cattle, Glenn D. Jenkins, an officer of the bank, testified on cross-examination as follows:

"Q. You understood you were to take what he owed you irrespective of what the first mortgage might be, did you? A. No, sir. Q. You understood, then, what the mortgage was against—incumbrance had to be first paid? A. We understood that there was a mortgage against it; yes, sir. Q. And you understood also that it should be paid out of the proceeds before you would get yours, didn't you? A. Yes, sir; we did."

As to what happened after the cattle were sold and the money received by the appellant bank, there is practically no dispute. Elmore accompanied the shipment to Kansas City, and returned by way of Stella, and advised the appellee bank of the shipment of the cattle and the amount received therefrom, and that the money had been deposited in the ap-

pellant bank, and on that day, December 31st, gave to the appellee bank his check for \$2,602.27, drawn on the appellant bank, in payment of the Powers mortgage. The appellant bank refused payment of this check January 7, and the next day Mr. Wright, cashier of the appellee bank, went to Humboldt and took the matter of the payment of this check up with the appellant bank. At this time Elmore had to his credit in the appellant bank \$1,362.50, and this amount Mr. Wright obtained on the check of Elmore, the bank having previously charged to Elmore's account a check of \$3,643.95 given by him in payment of the Roliff mortgage, together with other items of indebtedness (notes and checks), leaving the stated balance. Among the items that the appellant bank had charged to the account of Elmore was a note amounting to \$538.35. This note had been given prior to the giving of the second mortgage note, and was secured by other personal property still in the possession of Elmore, and the bank arranged with Elmore to carry this note, and later sent \$522 of the \$538.35 to apply on the debt of the appellee bank, which reduced its indebtedness to \$720.80.

The appellant claims that the appellee knew and permitted the sale of the cattle, thereby waiving its lien. The only evidence tending to show that the appellee bank had any knowledge that the cattle were to be shipped was such an allegation in its original petition. This was sworn to by the cashier of the bank, Mr. Wright. In explanation of this he says that, upon learning of the allegation, he called Judge Lambert's attention to it, and that an amended petition, omitting the allegation, was filed. Wright testified positively, as did Elmore, that the appellee bank had no knowledge the cattle were to be shipped, and both say that the first knowledge the bank had of the shipment and sale of the cattle was when Elmore returned from Kansas City to Stella.

This is an action in equity brought to subject the proceeds of the cattle deposited in the appellant bank to the payment of the balance due to appellee. The appellee had judgment in the court below for the balance due on the Powers note and mortgage, which the appellant seeks to reverse in this court, contending that it had no notice of the appellee's mortgage, and no notice of any lien or of any trust in or upon the proceeds of the cattle deposited in its bank. From the record in this case it is undisputed that the appellant bank knew, when it took its mortgage from Elmore, that the cattle were mortgaged. Its officers say that Elmore told them of "a mortgage" or "one mortgage." It made no inquiry as to who held the mortgage incumbrance or the amount thereof; it made no effort whatever to ascertain the facts relative to the incumbrance; such information as it had would have put an ordinary prudent man upon inquiry, which, if

followed up, would have disclosed the mortgage indebtedness against the cattle. The law charged the bank with all the knowledge that it would have obtained had it made inquiry of Elmore as to the incumbrance on the cattle. Yet the bank elected to take the mortgage without further investigation or inquiry, which convinces us, as it undoubtedly did the trial court, that the appellant bank had notice of the purchase-price mortgages, or notice of facts sufficient to impute notice to it of the existence of those mortgages. When Elmore said, "Now, boys, these cattle have got to be settled for first," the bank knew he had not paid for the cattle, that he still owed for them, and that they were mortgaged for all or part of the purchase price; hence, no further inquiry by the bank. He was a customer of the bank; it knew his financial standing; knew whether or not he could purchase and pay for 50 head of cattle; knew whether the cattle were paid for or not; knew whether he could buy without giving security on the cattle. The bank knew, or could have known, the facts. If it did not know and failed to make inquiry, it should not now complain of want of knowledge. It accepted the mortgage more as a matter of form than a security. It had advanced, at previous times, money to Elmore before shipment for the same purpose. It relied, not upon its chattel mortgage, but upon Elmore. It had been assured that there would be sufficient money to pay the mortgage indebtedness from the cattle and the amount due the bank, and relied upon his statement then, as it had before. Had there been no slump in the cattle market, the cattle would have brought sufficient money to pay, not only Elmore's indebtedness to appellant bank, but also the purchase-price mortgages, and there would have been no lawsuit.

The bank having knowledge of these purchase-price mortgages, and having received the proceeds of the mortgaged cattle under an agreement with Elmore to first pay the mortgage debt against the cattle, made the bank a trustee of the proceeds for that purpose. While the legal title to the proceeds of the mortgaged cattle was in Elmore, the equitable title thereto, or so much thereof as was necessary to pay its mortgage, was in the appellee, and the appellant bank's application of a part thereof in liquidation of Elmore's indebtedness by his direction before or at the time of application, leaving an insufficient amount to pay appellee's mortgage, would constitute no defense to an action in equity brought to subject this trust fund to the payment of that mortgage. The proceeds being sufficient to pay both purchase-price mortgages, the bank must restore so much of the trust fund as is necessary to pay the balance due the appellee. The relation of debtor and creditor existed only as to what money re-

mained after the purchase-price mortgages had been paid. The record in this case brings it within the rule announced in *Alter v. Bank of Stockham*, 53 Neb. 223, 78 N. W. 687.

[2] The judgment of the lower court is sustained by the evidence and is affirmed.

NITZ v. WIDMAN et ux. (No. 21581.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser $\S$ 44—Evidence sufficient to show that testator was owner at death of land devised.

Evidence examined, and held that the testator was, at the time of his death, the owner of the land devised.

2. Wills $\S$ 524(2), 635—Devise to daughter for life, remainder to her children, refers to children in being, but will open and let in after-born children.

A devise to testator's daughter for life, and after her death in equal shares to her children, should be construed as referring to her children living at the time of the testator's death, but subject to open and let in any after-born child or children coming into being before the time appointed for distribution, unless a different intention is plainly manifested by the will.

3. Partition $\S$ 12(5)—Owner of life estate may maintain partition against cotenant holding fee-simple title.

The owner of a life estate in a portion of a larger tract of land may maintain partition proceedings against a cotenant holding a fee-simple title.

4. Partition $\S$ 47—Infant remaindermen entitled to join as plaintiffs in partition.

Minors may, by their next friend, join as plaintiffs in a partition proceeding, when, under the provisions of a will, and the conditions of the property devised, it is probably necessary in order to protect their interests from total loss.

Appeal from District Court, Saunders County; Corcoran, Judge.

Action by Josephine Nitz, for herself, and as next friend for her minor children, against William Widman and wife. From judgment for plaintiff, and an order directing partition, defendants appeal. Affirmed.

B. E. Hendricks, of Wahoo, for appellants.
J. H. Barry, of Wahoo, for appellee.

Heard before LETTON, ALDRICH, DAY, and DEAN, JJ., and SHEPHERD and STEWART, District Judges.

STEWART, District Judge. In this opinion Josephine Nitz and her five children will

be referred to as plaintiffs, and William Widman as defendant.

From a decree of the district court for Saunders county, declaring plaintiffs the owners of a share in certain land in said county, occupied and claimed adversely by the defendant, and from an order for partition, the defendant appeals.

March 1, 1893, Joseph Widman and William Widman, father and son, purchased and took a deed to about 629 acres of land in Saunders county, for the expressed consideration of \$23,730, and gave a \$10,000 mortgage on the land and on 160 acres of land belonging to Joseph Widman. February 12, 1917, Joseph Widman died, leaving a will, which has been duly probated, devising, among other things, a life estate in a portion of said lands to Josephine Nitz, and then over to her children. On the date of testator's death Josephine Nitz was the mother of five living, unmarried, minor children. Josephine Nitz instituted this suit in partition on her own behalf, and as the next friend of said children. All shares of other devises have been conveyed to the defendant.

By his cross-petition the defendant claims that about the year 1903 he had an agreement and a written contract for the purchase of his father's half interest in said lands, whereby it was provided that defendant was to have a deed after payment of incumbrances then existing, and the sum of \$500 annually for ten years. Defendant alleges that said written contract was lost or destroyed, that he has fully performed its conditions, and asks to have his title quieted to the whole tract.

On this branch of the case, to entitle defendant to prevail, he must show by clear and satisfactory evidence that an agreement between him and his father was made, and that its conditions were fully performed by him. *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685; *Peterson v. Bauer*, 83 Neb. 405, 119 N. W. 764; *O'Connor v. Waters*, 88 Neb. 224, 129 N. W. 261; *Moline v. Carlson*, 92 Neb. 419, 138 N. W. 721.

[1] Several witnesses testified in substance to having heard the testator say that defendant was to pay the incumbrances on the land and \$500 annually for ten years, when he would get a deed; that defendant had fulfilled his contract and could have his deed if he would come and ask for it. Harry Widman, a brother of defendant, testified to being present when his mother stated in testator's presence that attorney Gilkeson had drawn the contract, and that defendant should have his deed; that the testator got mad and stuck the contract in the stove. For five years before the land was bought, the defendant, with one or the other of his brothers, farmed between 400 and 500 acres of land, starting with a team and wagon,

the gift of his father. At the date of purchase, defendant testified he had in the bank between \$6,000 and \$7,000. He admits on cross-examination, that 1904 and 1905 were poor crop years, and that prices on farm products in 1906 were low. He has had the use of the whole tract since the spring of 1893. He produces receipts showing taxes paid by him for 18 years, and 4 checks for \$500 each and one for \$250 for defendant to the testator, dated in 1907, 1908, 1910, 1913, and 1914, which were received in evidence. It appears that such payments had been continued for about 18 years. It is not shown who actually paid the notes or procured the release of the \$10,000 mortgage on maturity of final installment, March 1, 1896. Defendant has made lasting improvements, found by the trial court to be worth \$18,000. Testator made a will about 1901, and three others since that time, in which he devised the undivided half of the land in question.

The record affords no light on defendant's failure to get a deed from his father. They lived at no great distance apart, and there is no suggestion of any estrangement between them, and no satisfactory explanation is given of the conduct of the testator in disposing by will of the lands claimed by the defendant. The provisions of the will gave the defendant about 120 acres of land, and half of the residue of the estate, which, as shown by the order or distribution, was about \$2,200.

The will in question contained the following:

"Third. I desire that my daughter, Josephine Nitz, and my son, Harry Widman, shall each have 40 acres out of the land which I own jointly with my son William, same to be of the average value of the entire tract, and I therefore give and devise to said daughter and son forty acres each of said land.

"Fourth. The balance of my property, whether the same be real, personal or mixed, I give, devise and bequeath to my sons John and William, in equal shares."

"Sixth. Should my son William die before I do, then the part devised to him herein shall be divided in equal shares among my other children. The share and interest devised to my daughter Josephine Nitz by this instrument shall descend to her during her lifetime only, and after her death in equal shares to her children.

"Seventh. I am not forgetting the children of my deceased daughter, Martha, but as they have had considerable from my estate heretofore, I do not wish to make any further provision for them herein. This is also the reason no greater amounts are given to my son, Harry, and my daughters, Josephine and Emma."

[4] Defendant contends that the minor plaintiffs are not entitled to unite with the life tenant in prosecuting the partition suit, because it is uncertain how many, if any, of them may survive the life tenant, who, also,

may have given birth, at the time of her death, to other children who survive her.

[2] The recital of the will, "and after her death in equal shares to her children," contemplates the possibility of the birth of other children. The estate in remainder vested in the living children of Josephine Nitz at the date of the testator's death, but subject to open and let in any after-born children of said Josephine Nitz in being before the time appointed by the will for distribution. *Webber v. Jones*, 94 Me. 429, 47 Atl. 903; *McLain v. Howald*, 120 Mich. 274, 79 N. W. 182, 77 Am. St. Rep. 597; *Forest Oil Co. v. Crawford*, 77 Fed. 106, 23 C. C. A. 55; 28 R. C. L. 265, sec. 242.

[3] The defendant further contends that the petition of the life tenant and the remaindermen by their next friend conferred no power upon the court to confirm the shares of the several parties, or to order partition. Under the will Josephine Nitz had a right to immediate possession of her portion of said land, and to maintain an action for its partition. She is a tenant in common with the defendant. The general rule now is that every cotenant may demand partition as a matter of right, however inconvenient or injurious it may be to make it, or whether the title of the parties be legal or equitable, if there is a present right of possession. R. C. L. § 27, p. 743; *Freeman, Cotenancy and Partition* (2d Ed.) § 455; *Carneal v. Lynch*, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819.

Although the minor plaintiffs in this case had no present right of possession, they were proper parties, for the purpose of preserving and protecting their estate from the danger of total loss by reason of defendant's right to contribution of plaintiff's proportion of the value of extensive improvements upon the premises. Section 7588, Rev. St. 1913, provides:

"The action of an infant must be brought by his guardian or next friend. When the action is brought by his next friend, the court has power to dismiss it, if it is not for the benefit of the infant; or to substitute the guardian of the infant, or any person, as the next friend."

Since the plaintiff Josephine Nitz had the right to maintain this proceeding, without the consent of said minors, the defendant cannot be heard to complain that they are in court. By permitting the case to proceed on their behalf by their next friend, the court practically said it was for the minors' benefit. Under the peculiar provisions of the will, and the attending conditions surrounding the property involved, we cannot say that the court was without power to order partition, as prayed, of the plaintiffs' combined estates. In this case we are not unmindful of the provisions of sections 1652, Rev. St. 1913.

The trial court doubtless anticipated that from a tract of upwards of 300 acres a partition could be made in kind, awarding plaintiffs their share in such proportion as to free it from charge for existing improvements, and also avert the costly expense of attending sale, together with the necessity of protecting the estate in remainder by a bond for a long period of years.

An examination of authorities cited in defendant's brief discloses that they are either in harmony with the law as recognized in this opinion or that they are not applicable to this case. In the main they are to the effect that one of several tenants in common cannot, as against his cotenants, make a transfer by metes and bounds of a portion of the common land.

By the will in this case, each devise was spread throughout the whole tract. It varied the quantity and character of estates created, but gave no particular or specific part of the land to any devisee.

The judgment and order of the district court was right, and is affirmed.

LOWER v. STATE. (No. 21780.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Indictment and information $\S$ 51(2) — Assistant attorney general has no authority to sign information.

Under the provisions of chapter 205, Laws 1919, an assistant attorney general has no authority to make and sign an information in his own name, and an information so signed is a nullity.

2. Attorney General $\S$ 2—"Assistant" is not an independent officer.

The assistant attorney general is the agent of the attorney general, and not an independent officer, and his official acts must be performed in the name of his principal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assistant.]

Error to District Court, Saunders County; Good, Judge.

Ray A. Lower was convicted of felony, and he brings error. Reversed and remanded, with directions.

Slama & Donato, of Wahoo, and Jamieson, O'Sullivan & Southard, of South Omaha, for plaintiff in error.

Clarence A. Davis, Atty. Gen., for the State. Heard before MORRISSEY, C. J., and DAY, DEAN, LETTON, and ROSE, JJ.

DAY, J. Ray A. Lower was convicted of a felony in the district court for Saunders

county, and sentenced to the penitentiary under the provisions of the indeterminate sentence law. As plaintiff in error he has brought the record of his conviction here for review.

A number of errors are assigned, and argued in his brief; but, in the view we have taken of the case, only one need be considered.

It is first argued that the information is insufficient to charge an offense, particularly so, because the same was not made and signed by a proper prosecuting officer authorized by law so to do. The information was made and signed by "Cecil F. Laverty, assistant attorney general for the state of Nebraska," and the question is squarely presented whether the assistant attorney general of the state has legal authority to make and sign an information in his own name.

[1] It is the policy of the law, as expressed in article 1, § 10, of our Constitution, that no person shall be held to answer for a criminal offense (except, in certain cases named), unless on a presentment or indictment by a grand jury. A proviso is made in the Constitution "that the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecution." Acting under this power the Legislature of 1885 made provision for prosecuting criminal offenses by information, and, among other provisions, enacted section 9063, Rev. St. 1913, which was amended by chapter 164, Laws 1915, and reads as follows:

"All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto and indorse thereon the names of the witnesses known to him at the time of filing the same."

The term "prosecuting attorney" and "county attorney" signify the same. Rev. St. 1913, § 8904. The Legislature, by chapter 205, Laws 1919, constituted a department of justice, and placed the attorney general as head thereof. By the terms of the act the general control and supervision of all actions and legal proceedings in which the state of Nebraska is a party or interested, and the control of all of the legal business of all of the departments and bureaus of the state, or of any office thereof which requires the services of an attorney in order to protect the interest of the state, is given to the attorney general. Section 3 of the act provides:

"The attorney general is hereby authorized to appear for the state and prosecute and defend in any court or before any office, board, or tribunal, any cause or matter, civil or criminal, in which the state may be a party or interested."

Section 4 provides:

"The attorney general and the department of justice shall have the same powers and pre-

rogatives in each of the several counties of the state as the county attorneys have in their respective counties."

Section 6 provides:

"The attorney general shall have power to appoint a deputy attorney general, and such regular and special assistants as he may deem necessary. The deputy attorney general shall give bond to the state of Nebraska in the sum of ten thousand dollars with good and sufficient sureties to be approved by the governor which bond together with a copy of his appointment shall be deposited in the office of the secretary of state. The deputy may do and perform in the absence of the attorney general all the acts and duties that may be authorized and required of the attorney general. The attorney general shall be responsible for the acts of his deputy."

An examination of the foregoing sections clearly indicates that it was the intention of the Legislature to clothe the attorney general with power to prosecute criminal actions in any county in the state, and, as a necessary incident, the power to make complaints, to make, sign, and file informations, and in fact to exercise any power in each of the several counties of the state as is given to the county attorneys in their respective counties. It is also clear that the deputy is authorized, in the absence of the attorney general, to do and perform any act which the attorney general is authorized to perform. It will be noted, however, that while the Legislature has made provision for the giving of bond by the deputy attorney general, and has prescribed that he may exercise all the acts and duties of the attorney general, in the absence of the latter, it has not attempted to define or prescribe the powers and duties of the assistants. The only reference to the "assistants" is that the attorney general is given power to appoint "such regular and special assistants as he may deem necessary." If by this act it was the intention of the Legislature to authorize the assistants to do and perform such acts as the attorney general is authorized to do, as independent officers, it seems strange that it did not say so, especially in view of the fact that the powers of the deputy are set out in the same section of the act in which the authority to appoint assistants is given.

In Mechem, Public Officers, § 584, the rule is stated as follows:

"The question in whose name a deputy officer should act is one of much importance and of considerable apparent uncertainty. * * * In several of the states the authority to act in an official capacity is given to the principal alone, or, if the appointment of deputies is recognized or authorized by law, they are regarded as the mere private agents or servants of the principal and not as independent public officers deriving independent authority from the law. Where such is the case, the authority exercised by the deputy is, manifestly, a deriva-

tive and subsidiary one—it is the authority conferred upon the principal, and not an authority inherent in the deputy. It follows then, logically and legally, that the authority should be exercised in the name of him in whom it exists and not in his name who of himself has no recognized authority at all. The execution should, therefore, be in the name of the principal alone or in the name of the principal by the deputy.

"In other states, as has been seen, the deputy is recognized as an independent public officer and is endowed by law with authority to do any act which his principal might do. In these cases where the authority exists in the deputy himself by operation of law and is not derived solely through the principal it is well executed in the name of him in whom it exists, the deputy himself.

"Under either state of facts, the authority of a special deputy, who, as has been seen, is regarded as the mere private agent or servant of the principal, would, unless otherwise provided by statute, be properly exercised in the name of the principal."

An officer, in whom the official discretion and powers of the office are vested, may, when authorized by law, perform the functions of his office through the services of assistants, acting under his direction and supervision, but he cannot delegate to them, where such assistants are not by law given the authority, the power to perform his official duties independently of any control or direction by him, and according to their own individual judgment and discretion. 18 C. J. 1346, § 88. An assistant is one who stands by and aids or helps another in the performance of the latter's duties. *State v. Longfellow*, 95 Mo. App. 660, 69 S. W. 596. And unless there is a clear expression in the statute to the contrary, it will be presumed that the Legislature intended that public duties, which require the exercise of discretion, should be performed by the public officers themselves, and not by their assistants. *Commonwealth v. Smith*, 141 Mass. 135, 6 N. E. 89.

As was said in *McGarrah v. State*, 10 Okl. Cr. 21, 133 Pac. 260:

"There are many reasons why a power of this kind should be confined to the prosecuting officer. He is expected to be impartial in abstaining from prosecuting, as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned. It is therefore of the highest importance to the public that this power should be carefully exercised, and that the responsibility should rest upon the officer to whom it is confided."

And, in *Engle v. Chipman*, 51 Mich. 524, 16 N. W. 886, the court said:

"The prosecuting attorney is a very responsible officer, selected by the people and vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney. * * * This discretion is official and personal, and our laws have only allowed its delegation on special grounds, where an assistant has been provided for by carefully

guarded legislation. It is directly contrary to public policy to allow any general delegation of a prosecutor's powers, and the courts cannot recognize any such arrangement as forming a basis for personal compensation."

It has been pointed out that section 4 of the act (Laws 1919, c. 205) provides that "the attorney general and the department of justice" shall have the same powers and prerogatives in the several counties as the county attorneys themselves have in those counties, and it is argued that this is an expressed delegation of official power to the assistants, who are to be appointed by the attorney general, since such assistants, through their appointment, become a part of the department of justice. We cannot so interpret that provision. The first provision of the act recites that—

"There is hereby constituted an executive department to be known as the department of justice and the attorney general shall be the head of this department."

The law does not attempt to specifically enumerate the official members who shall be taken to constitute that department, other than the above recital. As to what officers shall be interpreted to constitute the department of justice must be gathered from the general provisions of the act. As before stated, the attorney general and his deputy are by the statute expressly vested with official powers. Such powers are confined to them alone. They are the only persons, spoken of in the act, who can be deemed to be officers connected with the department of justice. In the eyes of the law these officials, so far as the exercise of the powers of the department is concerned, constitute the department of justice. Many other persons—assistants, clerks and stenographers—are employed in that department, but their mere connection with it vests in them no official power. We must look to the provisions of the law to determine in whom the powers of the department of justice are vested, and those official powers cannot be extended by presumption to others than those in whom such powers are expressly delegated.

[2] It is quite clear that the Legislature has not made the assistant attorney general an independent officer, and clothed him with power to act in his own name. At best, he is a mere agent of the attorney general, and, as such, must perform official acts in the name of his principal.

It follows from what has been said that there is no authority under the statute for the assistant attorney general to file an information in his own name, and that, therefore, the information as filed in this case is a nullity.

The judgment is reversed and the cause remanded, with directions to enter a nolle prosequi.

Reversed and remanded, with directions.

DAGGETT v. PANEBIANCO. (No. 21612.)
(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Landlord and tenant $\S$ 150(1,5)—Landlord not bound to repair or pay for repairs by tenant.

"In the absence of an express contract a landlord is not bound to repair leased premises, nor to pay for repairs made thereon by the tenant." *Murphey v. Illinois Trust & Savings Bank*, 57 Neb. 519, 77 N. W. 1102.

2. Landlord and tenant $\S$ 291(16)—Evidence held to sustain direction of verdict for plaintiff landlord against tenant.

Evidence examined, and held to sustain the action of the trial court in directing a verdict for the plaintiff.

Appeal from District Court, Douglas County; Estelle, Judge.

Action by D. Daggett against Tom Panebianco in forcible entry and detainer brought in the justice court, where judgment was entered for plaintiff, and the defendant appealed to the district court, resulting in directed verdict and judgment for plaintiff, and the defendant appeals. Affirmed.

Edward R. Burke, of Omaha, for appellant.

Gerald M. Drew, of Omaha, for appellee.

Heard before LETTON, DAY, and DEAN, JJ., and CLEMENTS and MORNING, District Judges.

DAY, J. This is an action of forcible entry and detainer brought by D. Daggett against Tom Panebianco, and was originally tried in justice court, where judgment was entered for plaintiff for possession of the premises in controversy. Defendant appealed the case to the district court for Douglas county, where the case was tried on the original complaint and answer filed in the justice court. After the testimony was all in, the trial court, on motion of plaintiff, instructed the jury to return a verdict in his favor, which was accordingly done, and judgment was entered thereon. The defendant appeals.

The following state of facts appears from the record: Tom Panebianco leased the premises from D. Daggett, by written lease, for the term of one year from the 20th day of August, 1918, to the 20th day of August, 1919, at an agreed rental price of \$16 a month, payable in advance. The lease provided "that all plumbing, water pipes, gas pipes and sewerage shall be at the risk of the said party of the second part (defendant herein), and that said party of the first part (plaintiff) shall not be in any way liable for any defect therein, or for any damages resulting from any defects or faults therein." The lease also contained the provision "that said party of the second part will, during the

said term, keep the said premises in good and tenantable repair externally and internally, reasonable tear and wear excepted."

It appears that all rent was paid up to June 20, 1919, when the plaintiff's agent sought to collect the rent then due for the month beginning on that date. The defendant refused to pay the rent unless he was allowed to deduct the sum of \$2.25 which he had paid to a plumber for repairing a leaky toilet on the premises. The plaintiff was out of the city at the time, and his agent refused to make any such allowance for the plumber's bill which defendant had paid. A like refusal of part of defendant to pay the rent occurred perhaps two or three times during the month that ensued, and on July 20, 1919, another month's rent was due, and the agent then sought to collect the two months rent, or \$32 then due from defendant. Defendant again refused to pay the \$32 unless he was allowed to deduct the \$2.25 for the plumber's bill. Thereafter, and on July 23, 1919, the plaintiff's agent served a three days' notice to quit on the defendant, and on July 28, 1919, this action of forcible entry and detainer was filed in justice court, as above stated.

The defendant relies upon two grounds for reversal: First, that it was error on the part of the trial court to sustain plaintiff's motion for a directed verdict; and, second, that the verdict directed by the trial court is contrary to law and the evidence.

As to defendant's first ground for reversal, we are of the opinion that it was entirely proper for the trial court to direct a verdict for the plaintiff, inasmuch as there were no disputed questions of fact. As to this principle, see *Keeley Institute v. Wade*, 61 Neb. 313, 85 N. W. 288.

[1] As to the second ground for reversal, the lease provided that the tenant (defendant) should be liable for all plumbing repairs. Nevertheless, he had some repairs made, and then refused to pay his rent unless the bill for the plumbing repairs was deducted from the rent then due. When this occurred he was in default, and it was entirely proper for plaintiff's agent to then serve the notice to quit. The defendant admitted that he had no authority whatever from plaintiff to have these repairs made, but did so on his own initiative. It is not shown by the evidence whether the condition of the toilet was occasioned by reasonable tear and wear, or through some fault of the tenant. If it was caused by reasonable tear and wear, then under the provisions of the lease it would have been the duty of the landlord to pay for the repairs. The defendant, by insisting that the repair bill be deducted from the rent, necessarily took the position that the condition of the toilet was the result of reasonable tear and wear, and in making his de-

fense it was necessary for him to establish that fact. In our view of the testimony, he has failed to do this.

In *Murphey v. Illinois Trust & Savings Bank*, 57 Neb. 519, 77 N. W. 1102, it was held:

"In the absence of an express contract a landlord is not bound to repair the leased premises, nor to pay for the repairs made thereon by the tenant."

And, in *Turner v. Townsend*, 42 Neb. 376, the court said:

"The obligation of a landlord in any case to repair and rebuild leased premises rests solely on express contract, and without an express contract to that effect a landlord is neither bound to repair leased premises himself, nor to pay for repairs made by the tenant."

By specific terms in the written lease, the defendant was liable for these plumbing repairs.

[2] From a careful consideration of all the evidence, and applying the law applicable to such cases, we are convinced that defendant's grounds relied upon for reversal are not well founded, and that the trial court was justified in directing a verdict in favor of plaintiff, and that the verdict returned was proper under the evidence introduced.

Finding no errors prejudicial to the defendant which would require a reversal, the judgment is

Affirmed.

OLSEN v. DANISH BROTHERHOOD IN AMERICA et al. (No. 22221.)

(Supreme Court of Minnesota. July 22, 1921.)

(Syllabus by the Court.)

1. Corporations §665(3) — Changes of rates and benefits by fraternal beneficiary association pertain to its internal affairs.

Changing rates of assessments and benefits in a fraternal beneficiary association pertains to the management of its internal affairs.

2. Corporations §665(3) — Courts will not interfere with management of internal affairs of foreign fraternal beneficiary association.

Courts refuse to entertain actions which interfere with or attempt to regulate the management of the internal affairs of a foreign corporation. Hence the complaint herein, which shows that the action is brought by plaintiff in his own behalf and in behalf of the other members of the defendant corporation, a fraternal beneficiary association incorporated under the laws of Nebraska, to enjoin said defendant and its officers from enforcing changes made in the assessment rates and benefits of the association, was demurrable.

Appeal from District Court, St. Louis County; H. A. Dancer, Judge.

Action by Carl Wilhelm Olsen against the Danish Brotherhood in America and others. From an order overruling a demurrer to the complaint, defendants appeal. Reversed.

Warren E. Greene and Mason M. Forbes, both of Duluth, for appellants.

James A. Wharton, of Duluth, for respondent.

HOLT, J. Appeal from an order overruling a demurrer to an amended complaint; the questions involved being certified as doubtful.

It will not be necessary to set out the lengthy pleading, in view of the ground upon which we dispose of the appeal. The substance of the allegations only need be mentioned, and are these: That the defendant corporation is a fraternal beneficiary association, organized and existing under the laws of Nebraska, the other defendants being the officers of a subordinate lodge of the association at Duluth, that plaintiff is a member in good standing and holds a membership benefit certificate issued by the association; that the association has been authorized to do business in this state; that at a convention of the association it undertook to change its by-laws, radically altering the membership assessments and the benefits; and that these changes were not made in accordance with the constitution or by-laws of the association, and were not made so as to comply with a certain Nebraska statute pleaded. Plaintiff alleges that he brings the action "in his own behalf and in behalf of other members of said order"; that defendants are about to promulgate and enforce said changes and amendment, and thereby irrevocably destroy the vested rights and equities of plaintiff and other members of said order; "that said amendment and change in their contract of insurance will impose increased rates, liens, charges, and in some cases loss of death benefit; will impair the value of certificates and deplete the present surplus funds; will create lapses with extended insurance privilege never intended in original certificate, and that said act is wrongful, unauthorized, illegal, and unreasonable, and constitutes a breach of contract with plaintiff and other members, and each of them," in nine specified respects pertaining to each member of the order. The prayer is that the said amendment and changes in the rates and plan of assessments be declared null and void, and that said defendants and each of them and their successors and agents be forever restrained "from carrying them into effect."

The demurrer was on two grounds: (1) That the court has no jurisdiction of the subject of the action, in that it appears that the acts complained of affect plaintiff solely as a member of the defendant corporation, and that the action relates altogether to the

management of the internal affairs of a Nebraska corporation; and (2) the facts stated do not constitute a cause of action.

[1] It is to be noted that the action is not confined to plaintiff's own contract and its preservation. It is brought in behalf of other members of the corporation also, and to prohibit defendants from enforcing the adopted changes of rates and benefits. Such action in behalf of others is authorized under the proviso of section 7674, G. S. 1913. But it is quite apparent that fixing rates and benefits of a corporation of this kind pertains to the management of its internal affairs. Benefits promised must come from rates paid or assessments levied against the members. The very existence of the corporation depends upon a proper adjustment of rates and benefits. How this is to be done is peculiarly a problem of internal management, to be solved by the governing body of the corporation or by delegates of its members in convention assembled. The necessary changes to maintain a proper ratio between receipts and disbursements must be worked out within the organization under the supervision of its officers and in the manner prescribed by its laws and the laws of the state of its domicile. It is apparent that, if an action of the nature here pleaded may be maintained in every state where the corporation has members, uniformity of either assessments or benefits could not be hoped for. The courts of one state might hold changes made by the corporation valid, while courts of other states declare them void. No association of the sort here involved, having members in different states, could well survive a condition where the courts of a state other than its domicile step in and determine for the future what the assessments and benefits of its members in such state shall be. The disaster likely to result to foreign fraternal beneficiary associations if actions of the instant type lie may well cause courts to pause before assuming jurisdiction. Especially so in view of the decision in *Royal Arcanum v. Green*, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771, where it was held that an adjudication as to rates and benefits by the courts of the domicile of the corporation binds its members wherever residing. Some courts also give as a reason for declining to assume jurisdiction over affairs relating to the internal management of a foreign corporation that neither its officers, or governing body, nor its records are within the reach of the decrees, orders, or processes of any courts except the courts of its domicile.

This court has repeatedly recognized the rule that equity will not take jurisdiction of actions wherein it is sought to interfere with the internal management of a foreign corporation's business. *Gulford v. Western Union Telegraph Co.*, 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407; *Selover v. Isle Harbor Land Co.*, 91 Minn. 451, 98 N. W.

344; *State ex rel. v. De Groat*, 109 Minn. 168, 123 N. W. 417, 134 Am. St. Rep. 764; *Gere v. Dorr*, 114 Minn. 240, 130 N. W. 1022; *Van Dyke v. Railway Mail Ass'n*, 118 Minn. 390, 137 N. W. 15, Ann. Cas. 1913E, 455; *Tasler v. Peerless Tire Co.*, 144 Minn. 150, 174 N. W. 731.

Langan v. Supreme Court Council Am. Leg. of Honor, 174 N. Y. 266, 66 N. E. 932, is greatly relied on by respondent. It was there held, three justices dissenting, that an action for damages does not lie against a foreign fraternal benefit association for unlawfully increasing assessments, but the remedy is in equity to compel the association to live up to its contract with its member. However, it was not intimated that an action in behalf of other members would lie. Our attention has not been called to any other case of a similar ruling, and we have found none outside the state of New York. It is directly opposed to the decision in *Ebert v. Mutual Reserve Fund Life Ass'n* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457, where this equitable remedy was unsuccessfully urged upon the court. The experience of the New York courts seems to cast doubt on the practical workings of the rule there adopted; for after *Green v. Supreme Council of Royal Arcanum*, 206 N. Y. 591, 100 N. E. 411, was, in 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771, reversed by the Supreme Court of the United States (wherein the Appellate Court of New York had applied the rule of the *Langan Case*, notwithstanding that the courts of the domicile of the corporation had held the change in the assessments valid), the case of *Evans v. Supreme Council of Royal Arcanum*, 223 N. Y. 497, 120 N. E. 93, 1 A. L. R. 163, was determined. There the plaintiff, Evans, relying on the *Green* decision in 206 N. Y. 591, 100 N. E. 411, tendered the assessments according to the rate before the change, and when the amount was refused brought the action to enjoin the society from suspending him. He obtained a temporary injunction upon the giving of a bond to pay whatever rate the court would finally adjudge to be the lawful rate. The Appellate Court, under the decision of the federal court in the *Green Case* felt itself compelled to hold the change in the rate binding as determined by the courts of the domicile of the defendant, and that therefore Evans, because of the nonpayment of the assessments as changed, was deprived of membership, notwithstanding the courts of New York had attempted to maintain his status by means of the injunction.

[2] In our opinion the amended complaint shows on its face that the action is one in which a court of this state is asked to interfere with the internal management of a foreign corporation. Jurisdiction should not be assumed for that purpose, and the demurrer should be sustained.

The order is reversed.

SELOVER et al. v. HEDWALL. (No. 22175.)

(Supreme Court of Minnesota. June 24, 1921.)

(Syllabus by the Court.)

1. Appeal and error $\S$ 1047(5), 1069(2) — Pleading $\S$ 333—Court held not exceeding discretion in permitting plaintiffs to prove claim, although late in serving bill of particulars; nor in not permitting defendant to examine plaintiffs' accounts with other clients, and in not giving plaintiffs' account books to jury.

The court did not exceed its discretion in permitting plaintiffs to prove their claim for services, although they had been four days late in serving their bill of particulars, nor in refusing to permit defendant to examine plaintiffs' accounts with other clients, and its failure to give such books to the jury was not prejudicial.

2. Attorney and client $\S$ 153—Failure to communicate information concerning client's interests held not to forfeit compensation.

The facts alleged in defendant's second defense and counterclaim, to the effect that the directors of the investment company had authorized its attorneys to dismiss the action against him if, by so doing, they could procure the dismissal of six actions brought by other parties in which the company was directly or indirectly a defendant, and that plaintiffs knew that such authority had been given but failed to inform defendant thereof, were not sufficient to constitute a defense or counterclaim, and the court properly excluded the evidence offered thereunder.

Holt, J., dissenting.

Appeal from District Court, Hennepin County; Chas. S. Jelley, Judge.

Action by A. W. Selover and others, co-partners, as Selover, Schultz & Selover, against Charles J. Hedwall, to recover for services as attorneys. Verdict for plaintiffs, and defendant settled a bill of exceptions, and from an order denying a new trial, he appeals. Affirmed.

A. Ueland, of Minneapolis, for appellant.

J. A. Mansfield, of Minneapolis, for respondents.

TAYLOR, C. Plaintiffs are attorneys at law. They brought this action to recover the reasonable value of professional services performed for defendant and their disbursements in his behalf, and recovered a verdict for the sum of \$2,665.01. Defendant settled a bill of exceptions and made a motion for a new trial. This motion was denied, and he appealed.

Defendant contends that the court erred: (1) In receiving any evidence of plaintiffs' claims for services, they having failed to serve a bill of particulars within the time prescribed by the court; (2) in ruling that defendant could examine only those portions

of plaintiffs' account books read in evidence; (3) in not giving these account books to the jury to take to the jury room; and (4) in excluding the evidence offered in support of his second defense and counterclaim.

[1] 1. Defendant served a demand for a bill of particulars. In response thereto plaintiffs furnished a statement in which they set forth at considerable length the services which they had rendered in an action brought against defendant by the receiver of the Western Syndicate Investment Company, and also the services which they had rendered at defendant's instance in preparing for an action to be brought in the United States District Court, attacking the validity of certain capital stock issued by the Surety Fund Life Company, an insurance company in which defendant was a stockholder. They also included in the statement an itemized bill of disbursements amounting to the sum of \$65.01, and concluded the statement by saying that they charged the sum of \$3,500 as a reasonable fee for the services mentioned therein. Defendant did not question the sufficiency of the statement in respect to disbursements, but demanded a further and more specific bill of particulars in respect to the services claimed to have been performed in matters other than the action brought by the receiver, and showing the amount claimed for services in that action and the amount claimed for services in each of such other matters. Plaintiffs made no response to this demand, and thereafter defendant procured an order from the court requiring them to serve, within five days, a more particular bill of particulars, showing the title of any action or proceeding, other than the action brought by the receiver, in which they claimed to have performed services, and the amount which they claimed for services in the action brought by the receiver and in each of such other actions or proceedings. Nine days thereafter plaintiffs served a further statement, giving the title of the other action in which they claimed to have performed services, and stating that the value of their services was the sum of \$3,500 in the action brought by the receiver and the sum of \$500 in the other action. Defendant returned this statement on the ground that it was not served within the time required by the order and was not a copy of an account for services. Nothing further was done until the action came on for trial some eight months later, when defendant objected to any evidence of the account for services on the ground that plaintiffs had failed to comply with the order requiring a more specific bill of particulars. This objection was overruled and the evidence admitted, and defendant insists that the ruling was erroneous.

The action is not brought on an account, but to recover the reasonable value of services performed, and, strictly speaking, does not come within the provisions of section 7777, G. S. 1913. But, although the services of an attorney are not expected to be itemized like an ordinary account; yet, if they extend over a considerable period of time, it is recognized that he should comply with a demand for a bill of particulars to the extent of advising the defendant of the character of the services, of the matters in which they were rendered and of the amount claimed therefor to enable the defendant to prepare his defense. *Davis v. Johnson*, 96 Minn. 130, 104 N. W. 766. The statements furnished by plaintiffs complied with these requirements. More than eight months elapsed after the service of the second statement before the action was brought to trial and the slight delay in furnishing it was without prejudice to defendant. Under the circumstances the court would hardly have been justified in debarring plaintiffs from presenting their evidence, and the ruling was clearly within its discretion.

2, 3. Plaintiffs' accounts were kept in a loose-leaf book. Defendant's name was written at the top of one of these leaves. On this leaf he was credited with one payment of \$300 and another of \$100, and was charged with disbursements aggregating \$13.59. None of these items were disputed, and no other had been entered in the account. No entry had been made of the largest disbursement—an item of \$50 paid to another attorney for expenses—which seems to be undisputed; and no entry had been made of plaintiffs' charge for services. Later plaintiffs opened another similar book, and carried forward the totals from this leaf to a similar leaf in the second book. Some error was made in carrying forward these totals, but that seems to be of no importance. A month or more after plaintiffs brought this suit alleging the value of their services at the sum of \$3,500, they entered a charge for that amount in the second book. Plaintiffs did not attempt to prove their claim by their books, but produced them in response to a demand made by defendant. The plaintiff who testified concerning the books stated that the leaves read in evidence were the only ones containing anything relating to defendant, and objected to defendant's request to be permitted to examine the accounts with other clients, and on the assurance of plaintiffs' counsel that the other parts of the books contained nothing relating to defendant, which fact does not appear to have been disputed, the court ruled that defendant must confine his examination to the portions of the book in evidence. We fail to see wherein defendant was prejudiced by this ruling or by the failure of the court to send the books to the juryroom.

[2] 4. In his second defense, defendant set forth in substance that the receiver of the Western Syndicate Investment Company was appointed for the purpose only of prosecuting and defending actions for that company; that plaintiffs were defendant's attorneys in an action brought against him by the receiver; that they were also attorneys for one Dunn in an action prosecuted against Dunn by the receiver; that they were also attorneys for the several plaintiffs in six different actions in which the investment company was either a party defendant or interested on the side of the defendants; that while all these actions were pending the board of directors of the investment company, with the consent of the receiver, adopted a motion authorizing the attorneys of the company to stipulate to dismiss the action against defendant and to abandon further proceedings in the action against Dunn, if the plaintiffs in the six actions in which the company was either a defendant or interested on the side of the defendants, in consideration thereof, would stipulate to dismiss such actions; that plaintiffs were informed of the adoption of this motion soon after it was adopted, but failed to inform defendant thereof; that he did not learn of the adoption of such motion until after the action against him had been tried and had resulted in a large verdict against him; that by reason of plaintiffs' failure to inform him thereof he had been deprived of an opportunity to procure a dismissal of the action against him on the merits without expense; and that he was compelled to pay the sum of \$15,000 to compromise and settle the verdict rendered against him.

It is the undoubted duty of an attorney to communicate to his client whatever information he obtains that may affect the interests of his client in respect to the matters intrusted to him. *Rogers v. Gaston*, 43 Minn. 189, 45 N. W. 427; *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065; 2 *Ruling Case Law*, 963. And an attorney who is guilty of actual fraud or bad faith in the conduct of his client's business is not entitled to compensation for his services. *Davis v. Swedish National Bank*, 73 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. Rep. 400.

Conceding that the plaintiffs ought to have communicated to defendant the information which they had obtained, the answer contains nothing from which we can infer that they were guilty of either fraud or bad faith toward him, or that he sustained any loss by reason of their failure to communicate such information. It is not alleged or claimed that any proposition for a settlement was ever made to them, or that they ever had an opportunity to effect a settlement.

It nowhere appears that the plaintiffs, or any of them, in the six actions in which the investment company was either directly or

indirectly a defendant, were in any way interested or concerned in the outcome of the suit of the receiver against defendant, or would ever have consented to a dismissal of their own actions or to the making of the stipulation which the investment company authorized its attorneys to make. It does not even appear that the attorneys of the investment company would ever have entered into such a stipulation. Defendant predicates his claim on the fact that plaintiffs had knowledge of the authority given to its attorneys by the investment company, and did not communicate that knowledge to him. The facts alleged, if proven, were not sufficient to debar plaintiffs from recovering for their services, or to form the basis of a cause of action against them, and the court correctly excluded the evidence proffered under the second defense.

Order affirmed.

HOLT, J. I dissent. In my opinion the evidence offered and excluded, even though insufficient to constitute a counterclaim, should have been received as bearing on the value of the services rendered. What plaintiffs did or omitted to do was material upon that issue.

STATE v. HAMMERMILL PAPER CO.
(No. 22344.)

(Supreme Court of Minnesota. July 8, 1921.)

(Syllabus by the Court.)

Taxation §101.—Wood pulp in interstate shipment held not to acquire a situs at the port of shipment for taxation purposes.

Pulp wood was loaded and shipped by rail from the northern forests of Minnesota during the winter season to ports within the state on the shore of Lake Superior, where it was stored in the rail carrier's yards until navigation over the lakes opened in the spring, then shipped to its final destination, which was Erie, Pa., as shown by the shipping bill. *Held*, that the first movement was a part of an interstate journey, that the delay at the ports did not destroy the interstate feature, and that the property did not acquire a situs at the ports for the purpose of taxation.

Appeal from District Court, Lake County; Bert Fessler, Judge.

Taxation proceedings by the State against the Hammermill Paper Company. Judgment for defendant, and plaintiff appeals. Affirmed.

B. F. Fowler, Co. Atty., of Two Harbors, Clifford L. Hilton, Atty. Gen., and E. S. Oakley, Asst. Atty. Gen., for appellants.

Washburn, Bailey & Mitchell, of Duluth, for respondent.

QUINN, J. Defendant is engaged in the manufacture of paper at Erie, Pa., from pulp wood purchased in different states and shipped by common carrier to its place of business. In October, 1916, it entered into a contract with the Curry & Whyte Company of Duluth, for the purchase of not less than 57,000 nor more than 63,000 cords of pulp wood, one-third thereof to be delivered at the ports of Two Harbors and Knife river on the north shore of Lake Superior, in Minnesota, between the opening of navigation on the lake and November 1, each year for three years. Measurement and acceptance to be made on board cars at vessels loading point between January and April 30. The wood, except about 285 cords, which was hauled in on sleds, was cut and loaded on cars in the forests of Northern Minnesota and shipped by rail to the ports mentioned, at interstate freight rates, the billing showing its final destination to be at Erie, Pa.

Upon arriving at Two Harbors or Knife River, at which points it was to be loaded onto boats, the wood was inspected, and that which passed inspection was stored in the yards of the railroad over which it had been shipped, and a yardage storage charge made therefor. The wood so accepted remained in the yards until the opening of navigation in the spring, when it was loaded onto boats and transported to its final destination.

On May 1, 1918, there was in store in the yards at the ports named considerable more than 30,000 cords of such pulp wood belonging to respondent, upon which the local authorities assessed and levied a state tax of over \$7,000. The validity of that tax is the bone of contention in this lawsuit. The sole question is, Was the property in question an article of interstate commerce on May 1, 1918? It is conceded that property in transit from state to state is exempt from state taxation. It has been so held in this state. *State v. Maxwell Motor Sales Corporation*, 142 Minn. 226, 171 N. W. 566.

The trial court found and held that, due to natural causes, it was not possible to transport said pulp wood from Two Harbors or Knife river by boat to Erie, Pa. until navigation opened in the spring of 1918, and as soon as the navigable season opened on the Great Lakes all of the wood assessed was transported by boat to Erie; that the boats were loaded from the docks of the respective railway companies, and during the whole of the time after the wood was loaded upon the cars until the arrival of the same at Erie, except such wood as moved by sleds was in the care and custody of the rail carriers or the lake carriers; that it was contemplated at the time the wood was loaded on cars for transportation that the same should ultimately be delivered at Erie, and that it was in fact so delivered, but, owing

to the fact that it is not possible to operate boats on the Great Lakes by reason of natural causes during the winter season, a considerable part of said wood was in the yards of the respective railway companies at the ports in Minnesota on May 1, 1918, and that the same was in process of transportation by common carrier from the place where it was loaded in Minnesota until it arrived at Erie, and had no taxable situs in this state; that as conclusions of law the personal property tax assessed and levied against the defendant on account of such pulp wood is void, and should be set aside, except the amount thereof levied against the defendant by reason of the wood hauled to said ports on sleds, and ordered judgment accordingly. From an order denying appellant's motion for a new trial this appeal was taken.

It is contended on behalf of appellant that the lake ports were used merely as assembling points, and that the purchase and acceptance of the wood on board cars at these points were only for convenience in inspecting and measuring, and that storage was a preliminary to the interstate journey; that the assembling of the wood shipped by rail was not different from that brought in on sleds; that the acts necessary to render the commodity shipped an article of interstate commerce remained yet to be performed, namely, the procuring of boats and the loading of wood for shipment to its destination; and, further, that the indefinite delay at the ports destroyed the interstate feature of the shipment, if any such had attached prior to its arrival at such ports.

The greater portion of the wood in question was cut and loaded on cars back in the woods by the sellers, and then transported by rail to the ports. Interstate rates were applied. These rates were justified by the decision in *Pulp & Paper Mfg. Traffic Association v. C. M. & St. P. Ry. Co. et al.*, 34 Interst. Com. Com'n R. 500, 510, where it is stated:

"It appears that during the winter months shipments of pulp wood from points on petitioner's line destined to points on the Great Lakes are hauled to the docks at Knife river, there unloaded, and held until the opening of navigation in the spring. On such shipments petitioner has assessed the intrastate rates, which are higher than those prescribed by us, although it was known to petitioner when these

shipments left the point of origin that they were destined to interstate points beyond Knife river. Petitioner seems to be in doubt as to whether or not the interstate rates should have been assessed; but justifies its action by asserting that this traffic was billed only to Knife river. Petitioner appears to fear the presentation of reparation claims because of its having assessed the intrastate rate. We entertain no doubt that such shipments are interstate and subject to the interstate rates."

As to the pulp wood involved in this action, the portion loaded on cars was so billed as to show its ultimate destination to be Erie, Pa. The trial court so found. The wood was stored with the rail carrier for shipment to Erie as soon as navigation over the Lakes would permit. Under its contract \$7 per cord was to be paid by the respondent to the seller on or before the 15th of each month for all wood measured and accepted during the previous month, the balance of \$1.60 per cord to be paid after the arrival of each cargo at Erie. All these matters were proper to be taken into consideration by the trial court in determining whether the wood was held in storage for the purpose of being forwarded to Erie as soon as the season would permit. That court passed upon this question, and settled it adversely to appellant. *State v. Franklin Sugar-Refining Co.*, 79 Minn. 127, 81 N. W. 752.

It is common knowledge that the removal of pulp wood from the northern swamps and forests is practically confined to the winter season when the ground is frozen, which necessitates the hauling, unloading, and holding at the docks until the opening of navigation in the spring. It is suggested that such shipments might be made by rail, thereby avoiding all delay, but the shipment of pulp wood such a distance by rail would be wholly impracticable. The contract of purchase and sale clearly recognized this fact, and contemplated shipment over the lakes. If the contract amounted to an actual sale, and the wood was en route to fill the contract, it is of no importance whether the shipment by rail was made out in the name of the shipper or the buyer. The localities seeking to enforce the tax never had any proprietary interest in the wood. The wood was in the course of transportation to another state when the cars left the forest.

Affirmed.

DE VITA et al. v. PAYNE, Director General of Railroads. (No. 22341.)

(Supreme Court of Minnesota. July 8, 1921.)

*(Syllabus by the Court.)***1. Appeal and error ¶970(2)—Proper verification of business record entries within discretion of trial judge.**

Whether record entries relative to the issues made in the regular course of business are properly verified as a basis for receiving them in evidence, is a question for the exercise of practical sense and sound discretion by the trial judge, and his decision will not be disturbed on appeal if there is any evidence reasonably supporting it.

2. Carriers ¶117—Inspection by consignor before loading held not to relieve carrier from duty of furnishing suitable cars.

It is the duty of railway company as a common carrier to furnish suitable cars for the transportation of the particular class of goods intended to be shipped, and it is not relieved from such duty by reason of the fact that the consignor inspected the car before loading.

3. Carriers ¶185(3)—Proof of delivery to carrier in good condition and to consignee in damaged condition sufficient to sustain recovery against initial carrier.

Proof of the delivery of a shipment by consignor to the carrier in good condition and of its delivery to the consignee at the end of the route in damaged condition is sufficient to sustain a recovery for damages against the initial carrier.

4. Carriers ¶108—A carrier is an insurer of the safe transportation of goods.

A common carrier is an insurer of the safe transportation of goods committed to it for that purpose, and responsible for all damages to the same while in transit, unless such damage is occasioned by certain excepted causes.

5. Carriers ¶121—It avails nothing to show shipper negligent if damage would not have occurred except for carrier's fault.

To relieve itself from such liability the carrier must show that the damage arose solely from one or more of the excepted causes, and it avails it nothing to show that the shipper was negligent if the damage would not have resulted except for the concurring fault of the carrier.

Appeal from District Court, Hennepin County; J. W. Molyneaux, Judge.

Action by Salvatore De Vita and others against the Chicago, Rock Island & Pacific Railway Company, for which John Barton Payne, Director General of Railroads, was subsequently substituted. Judgment for plaintiffs, and defendant appeals. Affirmed.

Stringer & Seymour, of St. Paul, for appellant.

Geo. O. Stiles, of Minneapolis (F. M. Miner, of Minneapolis, of counsel), for respondents.

QUINN, J. This action was brought against the Chicago, Rock Island & Pacific Railway Company to recover for damages to a carload of flour while in transit from Minneapolis to Niagara Falls. Subsequently John Barton Payne, Director General of Railroads, was substituted as defendant, and all the carriers referred to were operated by him. The Minneapolis Eastern Railway Company is a belt line in Minneapolis upon which the Pillsbury mills are located. Practically speaking, it is a terminal switching system in the milling district of Minneapolis. The Pillsbury Flour Mills Company was engaged in shipping both flour and feed, and kept standing orders with the railroads for cars for both commodities. The plaintiff resides and is engaged in business at Niagara Falls, in the state of New York. The Chicago, Rock Island & Pacific Railway Company has a line of road from Minneapolis to Chicago, where it connects with the Erie line, which extends easterly through Niagara Falls. It was over these roads that the car of flour in question was transported from Minneapolis to Niagara Falls, and there delivered to the plaintiff. As we gather from the record, the person referred to as the "car inspector of the Minnesota Transfer Railroad" was employed by and acted as the agent of all the carrier lines entering the Twin Cities.

The plaintiffs had purchased a carload of flour from the Pillsbury Company, to be shipped to them at Niagara Falls, on November 1, 1918, an empty NYC box car was standing on the Minneapolis Eastern tracks near the mills when a car inspector of the Minnesota Transfer Company inspected the same as to its suitability for the shipment of flour. He found and reported that the car had a leaky roof, and made the following notation on the side of the car with white chalk: "Leaky roof; no good for flour, O. K. for feed." This was the method of designating the condition of cars. On the following day the car was placed on the Pillsbury Company track for loading. An employe of that company made an inspection of the car, and reported it in good condition. On November 4, the Pillsbury Company loaded the car with flour, made out a bill of lading in the standard form, and delivered it to the joint agent of the railroads in Minneapolis for execution. The bill of lading was issued, and, together with the car of flour, delivered to the Chicago, Rock Island & Pacific Railway Company for transportation to the plaintiffs at Niagara Falls. The contents of the car were damaged in transit by rain leaking through the roof. The cause was tried to the court without a jury, findings made, and judgment ordered in favor of plaintiffs. Appellant moved for amended findings and for a new trial. This appeal was taken from the judgment subse-

quently entered upon the findings and order as amended.

Two reasons are urged why the judgment should be reversed: First, that it was error to receive in evidence the record containing the report of the inspector of the Pillsbury Company with reference to the condition of the car, because no proper foundation had been laid therefor; and second, the general proposition that the findings, decision, and judgment of the court below were not supported by the evidence and should have been made in defendant's favor.

[1] Upon the trial defendant offered testimony tending to show that an inspection of the car in which the flour was shipped was made by the car inspector of the Minnesota Transfer Railroad, and certain markings made thereon by him indicating that the roof was not in suitable condition for the shipment of flour, as bearing upon the shipper's knowledge of the condition of the car at the time of loading. This testimony was received over plaintiffs' objection. To controvert the same respondent produced from the records of the Pillsbury Company its car book, in which was kept a record of all cars loaded and shipped. This record was made in the usual course of business, and preserved by the company as evidence of the facts it purported to show. The book contained the written report of the Pillsbury Company's inspector to the effect that on the day before the car was loaded it was in proper condition for the shipment of flour. This inspector was not produced as a witness, as he was not then in the employ of the company, and his whereabouts was unknown. Under the rule announced in *Swedish-American Nat. Bank v. Railway Co.*, 96 Minn. 436, 105 N. W. 69, the record was admissible. See, also, *Dunnell's Minn. Dig.* § 3346.

[2] It is the duty of a railway company as a common carrier to furnish suitable cars for the transportation of the particular class of goods intended to be shipped and it is not relieved from such duty by reason of the fact that the shipper inspected and accepted the car before loading. It appears that the inspector of the Transfer Company, acting for appellant, inspected the car two days before it was loaded. He found the roof leaky, marked the car not suitable for flour, and so reported to his superiors. As soon as the car was loaded with flour appellant accepted it and undertook to transport the same to its destination. When appellant received the bill of lading issued by the joint agent it had full notice that the car which the inspector had condemned two days before was loaded with flour and offered for shipment. In accepting the same under such circumstances it cannot be held that the carrier is not liable for damage to the shipment on account of the defective condition of the car. *Shea v. Railway Co.*, 68 Minn. 102, 68 N. W. 608; *Leonard v. Whitcomb*, 95 Wis. 646, 70 N. W. 817.

[3] The trial court found that the car was unsuitable for the shipment of flour; that it was furnished by defendant for the transportation of either flour or feed; that defendant caused the same to be inspected and caused to be written with white chalk upon the side of said car the words "Leaky roof; no good for flour, O. K. for feed;" that when the same was loaded said words appeared thereon; that this was the method and practice adopted by defendant in designating the condition of cars as to their suitability for shipping either flour or feed, of which the Pillsbury Company was aware; that it was the practice of the Pillsbury Company to cause to be inspected cars furnished it for shipment of flour or feed for the purpose of ascertaining their fitness for such use; that the car in question was inspected by its inspector on November 2; that said inspector determined and reported that the roof was in good condition, and that the car was previously loaded with grain; that the Pillsbury Company was unaware of the fact that said car had been so marked, and had no knowledge that its roof was in a leaky condition. Proof of the delivery of the shipment to the carrier in good condition and of its delivery at the end of the route in damaged condition is sufficient to sustain a recovery for damages against the initial carrier.

The Carmack amendment to the Hepburn Act, as enacted June 29, 1906 (U. S. Comp. St. § 8604a), provides, in effect, that any common carrier, railroad, or transportation company, receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability thereby imposed; provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

[4, 5] The general rule is that a common carrier of goods is an insurer of the safe transportation of the goods committed to it for that purpose, and it is responsible for all damages to the same while in transit, unless such damage is occasioned by certain excepted causes. These causes are the act of God, act of public enemy, the inherent quality or "proper vice" of the articles themselves, or some act or omission of the shipper or owner. The case under consideration does not come within the exceptions. To relieve itself from liability the carrier must show that the damage arose solely from one or more of the excepted causes, and it avails it

nothing to show that the shipper was negligent if the loss or damage would not have resulted except for the concurring fault of the carrier. *Northwestern Marble & Tile Co. v. Williams*, 128 Minn. 514, 151 N. W. 419, L. R. A. 1915D, 1079; *William A. Duncan v. Great Northern Ry. Co.*, 17 N. D. 610, 118 N. W. 826, 19 L. R. A. (N. S.) 952, and note. See, also, note, L. R. A. 1915C, 1223. The damage was the direct result of the defective car. The loading was proper, and but for the leaky roof there would have been no damage from rain.

Appellant's car inspector testified that on November 1st the car was on the unloading track; that it had been formerly loaded with wheat; that he inspected it carefully, found a leaky roof, unfit for flour, and so marked and reported it; that his attention was called to the leaky roof by water stains on the inside of the car. The Pillsbury Company's inspector also inspected the car, but, as appears from his report contained in the record testimony offered, did not detect the leaky condition of the roof, and the trial court found that the Pillsbury Company had no notice or knowledge either of the leaky roof or of the marking of the car by appellant's inspector.

The finding, in our opinion, is justified by the testimony. It was a question of fact to be determined from the evidence.

Affirmed.

**In re DULUTH & N. M. RY. CO.
STATE v. DULUTH & N. M. RY. CO.**

(No. 22423.)

(Supreme Court of Minnesota. July 22, 1921.)

(*Syllabus by the Court.*)

1. Railroads — 214 — Operation loss not required.

Unless a railway company has contracted to keep its road in operation, it has the constitutional right to abandon it if it can no longer be operated except at a loss.

2. Railroads — 223 — Commission without power to order abandonment of road operated at loss.

Although a railway company may have the constitutional right to abandon its road for the reason that it can be operated only at a loss, the Legislature has withheld from the Railroad and Warehouse Commission power to authorize an abandonment on that ground.

Appeal from District Court, Lake County; Richard T. Daly, Judge.

Proceedings by the Duluth & Northern Minnesota Railway Company to abandon and close for traffic its railroad. An order authorizing abandonment was on the Attorney General's appeal on behalf of the state vacated, and the company appeals. Affirmed.

Washburn, Bailey & Mitchell, of Duluth, for appellant.

Clifford L. Hilton, Atty. Gen., C. M. Christopherson, Asst. Atty. Gen., and Henry G. Carleton, Sp. Asst. Atty. Gen., for the State. Joseph Myer, of Minneapolis, and B. F. Fowler, of Two Harbors, amicus curiae.

TAYLOR, C. The Duluth & Northern Minnesota Railway Company made an application to the Railroad and Warehouse Commission for permission to abandon its railroad. The Commission held extended hearings and on December 20, 1920, made an order authorizing the company to abandon the railroad and close it to traffic on and after April 1, 1921. The Attorney General appealed from this order to the district court and, at the hearing before the court, made a motion to set aside and vacate the order on the ground that the facts found by the Commission show that the Commission had no power to make it. The court granted this motion by an order which, although somewhat peculiarly worded, unquestionably revoked the permission to abandon the road granted by the Commission. The company appealed.

The statute provides:

"No company operating any line of railroad in the state of Minnesota shall abandon the same or any portion thereof, nor shall it abandon any siding, side track, spur or other railway track of any kind which has once been opened and used for business, nor shall it close for traffic thereon except as provided in section 4424 as the same is hereinafter amended. Any company violating any provision of this section shall forfeit to the state not less than two hundred dollars nor more than one thousand dollars for each day such violation continues." Section 4423, G. S. 1913.

"Any such company desiring to abandon or close for traffic any portion of its line, siding, side track, spur or other railway track, shall first make application to the Commission in writing. Before passing upon such application the Commission shall fix a time and place for hearing and require such notice thereof to be given as it deems reasonable. Upon the hearing, the Commission shall ascertain the facts and make findings thereon, and if such facts satisfy the Commission that the proposed abandonment or closing for traffic will not result in substantial injury to the public, they may allow the same, otherwise, it shall be denied, or, if the facts warrant it, the application may be granted in a modified form." Section 4424, G. S. 1913.

From the findings of fact made by the Commission it appears that the railway company was organized under the laws of the state of Minnesota in 1898; that the railroad extends from Knife river on the shore of Lake Superior northerly and northeasterly through Lake county into Cook county roughly paralleling the shore of the lake; that it was constructed in connection with the logging operations of the Alger-Smith Company and has always been financed, managed and controlled by that company, and

stockholders of that company; that the earnings of the railroad have come mainly from the traffic furnished by the logging operations of that company; that that company has disposed of all its timber in the territory tributary to this road and no more traffic can be expected from that source; and that the road can be operated in the future only at a very substantial loss.

The Commission made further findings to the effect that there was no public necessity for that portion of the road extending beyond the station of Cramer; that the road could be discontinued without serious inconvenience to residents along that portion of the line extending from Knife river to a point 15 miles beyond the station of Algiers, a distance of about 32 miles, as they have access to other railroads; but that the discontinuance of the road would compel some 500 residents living along that portion of the line extending from the point 15 miles beyond the station of Algiers to the station of Cramer, a distance of about 25 miles, either to ship out their products and bring in their supplies by water during the season of navigation, or haul them over wagon roads for distances varying from 15 to 40 miles.

After making these findings of fact and quoting from the statute and from the decision in *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323, in which it was held that a carrier cannot be compelled to carry on its business at a loss and may cease operating a railroad when it can be operated only at a loss, the Commission stated:

"In view of the fact that the Duluth & Northern Minnesota Railway Company cannot operate its line of road except at a loss, the Commission finds that the Duluth & Northern Minnesota Railway Company have the right to abandon the operation and use of the same as a common carrier. * * * Therefore it is ordered that the Duluth & Northern Minnesota Railway Company are hereby permitted to abandon and close for traffic its line of railroad * * * on and after April 1st, A. D. 1921."

The court revoked this order on the ground that the statute had not given the Commission power to authorize the abandonment of a railroad on a finding that it could be operated only at a loss without a further finding that such abandonment would not result in substantial injury to the public.

That this railroad can be operated in the future only at a substantial loss is not only found as a fact by the Commission but stands undisputed so far as the record before us discloses.

[1] That a railroad company cannot be compelled to continue to operate its railroad when such operation can be carried on only at a loss is settled by the decisions of the United States Supreme Court. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323; *Bullock v. State of Florida ex rel.*, 254 U. S. 513,

41 Sup. Ct. 193, 65 L. Ed. —, filed January 17, 1921. These cases hold that to compel it to do so would be taking its property without compensation in violation of the rights secured to it by the federal and state Constitutions. Of course a railway company which has assumed contractual obligations requiring it to operate its road may be compelled to do so, for railway companies, as well as individuals, are required to perform their contracts, but there is no claim that any obligation of that sort exists in the present case. If in fact the road can be operated only at a loss, the company has the legal right, under the federal decisions, to close it to traffic and dismantle it.

Whether, where a railway company claims the right to abandon and dismantle its road on the ground that it can be operated only at a loss, the state may require the company to accept the junk value of the road, if there be a purchaser who will take it at such value and undertake to continue it in operation, has been considered to some extent by the courts as is shown by the decisions cited in the note found in 8 A. L. R. at page 238, but that question is not involved in this case.

[2] The statute under which this proceeding was brought was enacted long before the federal Supreme Court announced that a railway company had the constitutional right to abandon its road unless it could be operated at a profit, and the Legislature in enacting the statute apparently did not have in mind such a situation as is here presented, and made no provision for it. While it might seem desirable that the question whether a railway company has the right to abandon its road because it cannot be operated except at a loss should be determined in some orderly and authoritative manner before the road is closed to traffic, and while the Railroad and Warehouse Commission is probably the only agency of the state which possesses the facilities and machinery for ascertaining and determining the questions of fact involved, yet that Commission possesses only the authority given to it by the Legislature and cannot exceed the bounds to its power fixed by the Legislature.

It is urged that the Legislature has not empowered the Commission to authorize the abandonment of an entire line of railroad under any circumstances, but it is not necessary to determine that question in this case. The statute after providing for a hearing further provides:

"Upon the hearing, the Commission shall ascertain the facts and make findings thereon, and if such facts satisfy the Commission that the proposed abandonment or closing for traffic will not result in substantial injury to the public they may allow the same, otherwise, it shall be denied."

By this provision the Legislature has expressly limited the power of the Commission to authorize an abandonment to those cases in which they find as a fact that such aban-

donment "will not result in substantial injury to the public." They did not find such fact in the present case; on the contrary they found, in effect, that the proposed abandonment would result prejudicially to a large number of permanent residents served by the road who have no other convenient access to the markets of the country. Consequently, by reason of the express limitation imposed by the Legislature, the Commission was without power to make the order here in question. Of course in so far as the prohibitory provisions of the statute infringe the constitutional rights of the company such provisions cannot be enforced. But the only question here presented is whether the Commission assumed to exercise a power which it did not possess, and as we find that it did, the order of the trial court is affirmed.

PRATSCHNER v. ELECTRIC SHORT LINE RY. CO. (No. 22381.)

(Supreme Court of Minnesota. July 8, 1921.)

(Syllabus by the Court.)

1. Appeal and error $\S$ 1050(1)—Admission of evidence as to proper operation of automobile over crossing held not reversible error.

Testimony received over objections, bearing directly upon the proper method of operating an automobile over a crossing, held not reversible error, it not being prejudicial to the rights of the appellant.

2. Trial $\S$ 295(1)—Where general charge correct, error cannot be predicated on isolated parts.

Assignments of error as to isolated parts of the charge not well taken, the general charge being such as to fully and fairly submit all the issues to the jury.

Appeal from District Court, McLeod County; C. M. Tift, Judge.

Action by A. L. Pratschner, as administrator of the estate of Elizabeth Pratschner, deceased, against the Electric Short Line Railway Company, to recover for wrongful death. Verdict for plaintiff, and from a refusal of a new trial, defendant appeals. Affirmed.

Geo. T. Simpson and John F. Dahl, both of Minneapolis, and G. W. Brown, of Glencoe, for appellant.

Samuel A. Anderson, of St. Paul, Murray & Baker, of Bird Island, and L. D. Barnard, of Renville, for respondent.

QUINN, J. This is an appeal from an order of the district court of McLeod county refusing a new trial. The action was brought to recover for the wrongful death of

Elizabeth Pratschner, plaintiff's intestate, for the exclusive benefit of the next of kin of the deceased.

It is alleged in the amended complaint that defendant's line of railway near the village of Winsted intersected at right angles a north and south public highway; that on the 19th day of September, 1918, and for a considerable time immediately prior thereto, defendant kept and maintained its right of way at said highway crossing in a careless and negligent manner in this, that there was an abrupt drop of several inches from the planking of said crossing to the dirt grade on each side of the said main track, and on each side of said side track; that while deceased was riding as a passenger in an automobile traveling in a southerly direction on said highway, and crossing said railroad track, and while in the exercise of due care, and without any negligence on her part, the defendant well knowing the defective condition of said highway crossing, carelessly, negligently, and without regard to the safety of travelers thereon, and without giving a sufficient signal, or keeping a proper lookout ahead, and without having a flagman stationed at said crossing to warn persons of the approach of cars, ran and propelled a certain electric passenger car at a high and dangerous rate of speed in an easterly direction over said highway, striking with great force the automobile in which decedent was riding, thereby throwing her from said automobile, and causing her instant death. The answer denies negligence on the part of defendant, and alleges that the decedent's death was the result of her own negligence. In appellant's brief are set forth 13 assignments of error, the first 6 of which go to the ruling of the court upon the admissibility of evidence. The other assignments relate to alleged errors in charging the jury.

The testimony discloses that there is a main line track and a side track about 10 feet apart at this crossing. There were planks between the rails of both tracks, and a plank 6 inches wide and 3 inches thick on the outside of the four rails, all flush with the rails, but the plank north of the north side track rail and the one north of the north main track rail stood above the roadbed about 2 inches. The space between the two tracks sagged down a few inches. Deceased was coming from the north in a Ford coupé driven by her son. He also was killed in the collision. The electric car was approaching from the west. The weather was cold, and there was a strong wind from the northwest. There is testimony tending to show that a Ford automobile passing over this crossing at the rate of 10 to 12 miles per hour would receive severe bumps, and that it would be compelled to slow down to about

6 miles per hour having in mind the safety of the car and passengers. At a point about 60 feet west of the highway were a large number of piles of ties, ranging in height up to 9 or 10 tiers, tending to obstruct the view of a car approaching from that direction. There was also testimony tending to show that the whistle on this car was not easily heard, and that it was blown only at whistling posts. The automobile was struck broadside, and was carried on the pilot of the electric car, dragging upon and somewhat splintering the ties for a distance of over 500 feet. The motorman testified that he was running the car about 18 to 20 miles per hour; that he applied the air brakes when he heard the crash; that he could not stop, because there was oil on the rails; that the car had a speed of 50 miles per hour; that the brakes were in good order, and that running 20 miles per hour on dry rails he could stop the car in 125 feet. The coupé was entirely inclosed, with glass doors and a glass shield. The sun was shining brightly in the west. There were three passengers on the electric car, all of whom testified that they observed the automobile through the windows when it was some 800 feet north of the crossing.

[1, 2] The testimony received over appellant's objections bore directly upon the proper method of operating a Ford car over the crossing in its condition prior to the accident. The testimony was given by a witness accustomed to driving a Ford car over the crossing, and, while it was not elicited in the most formal manner, yet we see no prejudice to the rights of the defendant flowing therefrom. There was no prejudicial error in the rulings. Seven assignments are urged to the charge. They are to isolated parts thereof. A reading of the entire charge, as given, discloses that the issues were fully and fairly submitted to the jury, and that there was no error on the part of the trial court in refusing a new trial. The court informed the jury as to the requirements of the statute with reference to such crossings, and fairly submitted to it whether the crossing was in proper condition.

Affirmed.

MANNHEIMER BROS. v. KANSAS CASUALTY & SURETY CO. (No. 22395.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

1. Insurance $\S$ 514½, New, vol. 11A Key-No. Series—Insurer's refusal to defend action against insured held not to create greater liability than amount stated in policy.

Defendant issued its policy of indemnity insurance thereby agreeing to indemnify and pro-

tect plaintiff, within the limits therein stated, from loss on account of injuries caused to third persons from the operation of its auto truck; and, further, to defend all actions brought against plaintiff to recover for such injuries:

It is held, that the refusal of the insurance company to conduct the defense of an action so brought does not expose it to greater liability to the insured for injuries to the persons complaining than the amount stated in the policy.

2. Insurance $\S$ 514½, New, vol. 11A Key-No. Series—Measure of liability for insurer's breach of contract to defend suits against insured stated.

The measure of liability for a breach of the contract in that respect is: (1) The amount stated as for injuries to third persons; and (2) all necessary costs and expenses incurred by the insured in defending the action.

3. Insurance $\S$ 514½, New, vol. 11A Key-No. Series—Insurer held not entitled to reduction of liability for cost and expense.

The insurance company is not entitled to a reduction of its liability for such cost and expense in proportion as its maximum liability bears to the amount so claimed by the injured party.

4. Insurance $\S$ 514½, New, vol. 11A Key-No. Series—Insurer's contract to defend suits against insured held indivisible.

The contract to defend is indivisible and extends to the whole case, regardless of the amount involved or whether it exceeds or does not exceed the liability of the insurance company.

5. Insurance $\S$ 665(4) — Payment of attorney's bill held sufficient evidence of value of services to justify allowance thereof in action by insured against insurer.

Counsel for defendant who was employed to defend the action following the refusal of defendant to do so, at the conclusion of the litigation presented a bill for his services which plaintiff acquiesced in and paid. There being no suggestion of fraud or collusion, or basis to justify an inference of an exorbitant charge, the presentation and payment of the bill is held sufficient evidence of reasonable value to justify the allowance thereof as an item incurred in the defense of the action. The rule applied in *Mitchell v. Davies*, 51 Minn. 168, 53 N. W. 363, should not be extended to include a showing of that kind.

6. Insurance $\S$ 665(4) — Evidence sustaining finding that insurer repudiated obligation to defend suits against insured.

The findings of the trial court that defendant repudiated its liability and refused to defend the action are sustained by the evidence.

Appeal from District Court, Ramsey County; F. M. Dickson, Judge.

Action by Mannheimer Brothers against the Kansas Casualty & Surety Company. From the judgment, both parties appeal. Affirmed on both appeals.

C. D. & R. D. O'Brien, of St. Paul, for appellant.

Dille, Hoke, Krause & Faegre and R. F. Merriam, all of Minneapolis, for respondent.

BROWN, C. J. The facts in this case are not in dispute in any substantial respect. Defendant in due course issued to plaintiff its insurance policy, thereby agreeing for the consideration paid to indemnify plaintiff for any loss or injury occasioned to third persons from the operation of plaintiff's auto delivery truck in the city of St. Paul. There was subsequently a collision between the truck and an automobile in which one Hillstrom and one Hanscom were riding, resulting in serious injury to both. They thereafter brought separate suits against plaintiff, charging in their complaints as the basis of the actions that the collision was caused by the negligence of the operator of the truck, the servant and employé of plaintiff. Though the insurance policy obligated defendant to defend those actions on behalf of plaintiff, defendant therein, the company refused to do so, on the ground that by reason of certain facts not necessary here to repeat, it was not liable on the policy. Plaintiff then employed counsel who conducted the defense throughout the litigation. The trial of the actions resulted in a judgment for Hillstrom in the sum of \$12,633.62, and for Hanscom in the sum of \$2,630.73. There was an appeal in the Hillstrom Case and an affirmance in this court. 178 N. W. 881. Plaintiff then brought an action against defendant to recover on the policy the amount paid on the Hanscom judgment, and the costs incurred in defending that action, and recovered a default judgment which was affirmed on appeal. *Mannheimer Bros. v. Kansas Casualty & Surety Co.*, 180 N. W. 229, wherein defendant's claim of nonliability was held without merit. Plaintiff paid the Hillstrom judgment, and then brought this action to recover on the policy, demanding therein the full amount of the Hillstrom judgment, and the cost and expense of defending the action through the courts, including an attorney's fee of \$1,500. Defendant in effect admitted liability; it could not well do otherwise, for the question was ruled adversely to it in the Hanscom action. But defendant claimed that it was not liable for the full amount of the judgment, since the policy limited its liability to \$5,000, and demanded that plaintiff's recovery be confined to that amount. Defendant also demanded that the costs incurred by plaintiff on the appeal in the Hillstrom Case be apportioned between the parties in accordance with their separate interests therein.

The action was tried without a jury, at the conclusion of which the court gave judgment for plaintiff for the sum of \$5,000 (the amount fixed by the policy), and all the costs incurred by plaintiff in defending the former

action, including an attorney's fee of \$1,500. The items of costs were \$42.85 incurred in the district court, and \$410.11 incurred on the appeal to this court. Judgment was entered accordingly, and both parties appealed.

[1] 1. Defendant's appeal challenges the allowance of the full amount of the Supreme Court costs, and the sum of \$1,500 as attorney's fees. The objection to the Supreme Court costs is that defendant's liability on the policy does not exceed \$5,000, and that since the judgment in the Hillstrom Case, from which the appeal was taken, was \$12,633, defendant should be charged with the costs of the appeal only to the extent and in proportion that its liability bears to the whole amount, namely, five-twelfths. In our view of the contract this contention was properly rejected by the trial court. The insurance contract obligated defendant to defend all actions brought against plaintiff, on claims for damages resulting from the operation of the insured truck, and we find no qualification limiting its obligation in that respect to the extent of its own interests in the litigation. The duty created by the contract was to conduct the whole defense, and if necessary to vindicate the rights of the insured to prosecute an appeal to the Supreme Court. The undertaking is indivisible, and the failure to respond thereto also indivisible, exposing defendant to all necessary costs which plaintiff incurred in doing that which defendant had undertaken but refused to do.

[5, 6] 2. The objections to the attorney's fee allowance are: (1) That defendant offered to perform its duty in the premises and defend the action, but its offer was rejected, thus exonerating it from further responsibility in the matter; and (2) that the record contains no evidence of the value of the services of the attorney plaintiff employed, therefore, under the rule applied in *Mitchell v. Davies*, 51 Minn. 168, 53 N. W. 363, cannot be recovered. Neither objection is sustained. As to the first it need only be said that the trial court found as a fact that defendant repudiated its liability on the policy and refused to defend the action. The evidence is ample to sustain the finding; at least, it is not so clearly against the evidence to justify interference by this court. As to the second objection, it appears that after defendant had declined to conduct the defense to the action plaintiff employed an attorney of prominence and high standing who took charge of the litigation and conducted it with ability to a final conclusion. He subsequently presented his bill for \$1,500, which plaintiff paid without question. There was no direct evidence that the services were in fact of that value. But we think, and so hold, that the fact that the charge was made and promptly acquiesced in and paid by the client is some evidence that the amount was reasonable, and in the absence of fraud or

collusion, sufficient upon which to base a finding of reasonableness. The case of Mitchell v. Davies, 51 Minn. 168, 53 N. W. 363, should not be extended to facts like those here presented.

[2-4] 3. The question presented by plaintiff's appeal is whether the extent of the liability of defendant is that named and fixed by the contract, or whether, since defendant breached the contract, repudiating liability and refusing to defend the action as required by the policy, the limitations of the contract disappear rendering defendant liable for the full amount of plaintiff's loss. We answer the question adversely to plaintiff's contention that the liability is general and to the full amount of the Hillstrom judgment. The terms of the policy pertinent to the subject are as follows:

"The company's liability under paragraph one of the insuring agreements, on account of bodily injuries to or death of one person is limited to five thousand dollars, and subject to the same limit for each person, the company's total liability on account of bodily injuries to or death of more than one person as the result of one accident is limited to ten thousand dollars."

The policy was for \$10,000, with a limitation of \$5,000, for injury or damage to any one person, and a total liability not greater than \$10,000, to more than one person injured in the same accident. Both Hillstrom and Hanscom were injured in the one accident, and the terms of the policy quoted apply to the case. This limitation is unambiguous and free from doubt and cannot be added to without making a new contract for the parties. The question presented is controlled by the general rule that the measure of damages for the breach of a contract for the payment of money is the amount agreed to be paid with interest. The fact in this case that defendant's obligations under the contract extended beyond the payment of the amounts stated and included the promise to conduct the defense of the action cannot be held to enlarge the limitation as to the amount fixed as reimbursement for injuries to persons. The failure to defend exposed defendant only to the additional liability for the cost and expense which plaintiff was put to by reason of defendant's breach of the contract in that respect. That breach clearly did not create any greater liability on the facts here disclosed. The authorities cited by plaintiff are not in point. None thereof involved the precise question here presented, and our research has brought to light no adjudications sustaining plaintiff's contention. What the situation would be, for illustration, in a case where the insurer failed to take an appeal in an action which it was under obligation to defend, upon a showing that a reversal and complete exoneration of the insured would have followed, we do not consider. Such is not the case at bar. An ap-

peal was taken by plaintiff, resulting adversely, and the only extra damages suffered in consequence of defendant's neglect was the cost thereof, which plaintiff here recovers.

It follows therefore that the liability of defendant under the terms of the contract above quoted is limited to \$5,000, for each person injured, and the trial court was right in so holding. This disposes of plaintiff's further point that since in the Hanscom Case the full \$5,000 was not used in paying his claim, plaintiff may claim the balance up to the full amount of the insurance of \$10,000. To grant that contention would also amount to a judicial remodeling of the contract.

This disposes of the case and all points involved, and, finding no error, the judgment appealed from is affirmed on both appeals.

McCRAV et al. v. BUTTELL et al.
(No. 22407.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

1. Pleading $\S$ 428(4) — Complaint held to state cause of action where objection first raised by objecting to evidence thereunder.

The complaint stated a cause of action for specific performance.

2. Specific performance $\S$ 10(1)—Vendor may be required to perform to extent of his own interest where lack of authority to bind co-tenant not known to vendee.

Where the vendor, for himself and as agent for the other part owners, contracts to convey the entire property, but in fact lacked authority to execute the contract on behalf of the other part owners, the vendee may require him to perform the contract to the extent of conveying his own interest in the property on receiving a proportionate part of the purchase price, unless it be shown that the lack of authority in the vendor was known to the vendee when he executed the contract.

3. Tenancy in common $\S$ 55(6) — Evidence sustaining finding that purchasers had no knowledge of vendor's lack of authority to bind co-owners.

The evidence sustains the finding that defendant executed the contract on behalf of all the owners, and the finding that plaintiffs had no knowledge of his lack of authority to do so.

4. Principal and agent $\S$ 1(6)(1)—Defendant held not entitled to take advantage of special instructions to agent not communicated to plaintiff.

Defendant cannot take advantage of special instructions given to his agent which were not communicated to plaintiffs.

Appeal from District Court, Stevens County; S. A. Flaherty, Judge.

Suit by P. A. McCray and another against Sam J. Buttell and others for specific performance. Judgment for plaintiffs, and from a denial of a motion for amended findings or for a new trial, defendants appeal. Affirmed.

Nell M. Cronin, of Minneapolis, for appellants.

James B. Ormond, of Morris, for respondents.

TAYLOR, C. William Buttell and Samuel J. Buttell were brothers and were the owners as tenants in common of a farm of 320 acres in Stevens county. William Buttell died intestate in November, 1918, and his interest in the farm passed to and vested in his widow and three minor children. They removed to the state of Nebraska. Samuel continued to operate the farm and was appointed administrator of William's estate. He desired to sell the farm and had a conversation with his brother's widow in which she told him to list it for sale. They seem to have had no understanding or agreement concerning either price or terms. On May 3, 1919, Samuel listed the farm for sale with Joseph J. Gaffney, a real estate agent residing at Morris, the county seat. Gaffney negotiated a sale to plaintiffs, and prepared a contract, dated June 7, 1919, in which "Samuel J. Buttell, a single man, * * * ——— Buttell, widow of William Buttell, and Samuel J. Buttell as agent for the heirs of William Buttell, deceased," were named as parties of the first part and the plaintiffs were named as parties of the second part, and by which the parties of the first part sold and agreed to convey the farm "unto said parties of the second part, or their assigns, by deed of warranty, upon the prompt and full performance of said parties of the second part of their part of this agreement." The contract fixed the purchase price at the sum of \$37,120, being at the rate of \$116 per acre. The farm was incumbered by a mortgage for \$16,000. The purchasers were to assume this mortgage, and were to pay \$2,000 at the execution of the contract and \$4,000 on or before March 1, 1920. When the payment of \$4,000 was made, the parties of the first part were to execute and deliver a warranty deed of the property, and the purchasers were to execute a mortgage back in the sum of \$15,120 for the balance of the purchase price, the mortgage to be due on or before March 19, 1924, and to bear interest at the rate of 6 per centum per annum from March 1, 1920. The contract was prepared in triplicate. The plaintiffs executed the three copies on June 7, 1919, and at the same time delivered to Gaffney their checks for the sum of \$2,000, the amount of the initial payment. Thereafter, and on the same day, the defendant executed the three copies personally, and also as agent for the heirs of William Buttell. Thereupon Gaffney delivered to him two copies of the contract and the checks for the initial pay-

ment and subsequently delivered the other copy of the contract to the plaintiffs. Defendant sent the two copies of the contract, which he received, to William's widow for her signature. He cashed the checks for the initial payment and deposited \$1,000 thereof to the credit of his own bank account and \$1,000 thereof to the credit of the bank account of William's estate. He gave Gaffney two checks of \$320 each—one drawn on his own bank account and the other drawn by him as administrator on the bank account of William's estate—to apply on Gaffney's commission for making the sale. William's widow returned the two copies of the contract forwarded to her without her signature and refused to agree to the sale. Defendant took the matter up with Gaffney on the theory that she might consent to the sale if the payment of March 1, 1920, was substantially increased and Gaffney induced plaintiffs to agree to increase the amount of that payment to the sum of \$10,000, but she also rejected this proposition. Thereafter defendant informed plaintiffs that he was unable to carry out the contract and tendered back the initial payment of \$2,000, which they refused to accept. On March 1, 1920, plaintiffs tendered to defendant the sum of \$4,000, the amount of the payment due on that date, and demanded a deed. Defendant refused to receive the money or execute a deed, and plaintiffs brought this action for specific performance of the contract.

The court found in substance, among other things, that defendant executed the contract "individually and as agent for the heirs of William Buttell"; that he had refused to carry out the contract in any manner; "that plaintiffs have duly performed all the conditions of said contract on their part to be performed up to the making of the March 1, 1920, payment which they have duly tendered, and are ready, willing and able to carry out and perform their part of said agreement"; that defendant had no authority to execute the contract on behalf of the heirs of William Buttell, deceased, of which fact plaintiffs had no notice or knowledge; and that, at the trial, plaintiffs had expressed a desire to take the interest of defendant in the property with an abatement of the purchase price, if they could not obtain the entire property.

The court directed judgment to the effect that upon the payment by plaintiffs of one-half the amount of the cash payments specified in the contract and the execution by them of a mortgage in accordance with the terms of the contract for one-half the amount of the deferred payment, defendant should be required to perform the contract to the extent of conveying his undivided one-half interest in the property by warranty deed subject to the incumbrances against the property and with a provision in the deed by which plaintiffs assumed one-half of such in-

cumbrances. The order also contained proper provisions in respect to interest, in respect to the application of the payment already made, and in respect to other matters not necessary to mention. Defendant made a motion for amended findings or for a new trial and appealed from the order denying it.

[1] 1. At the trial defendant objected to the admission of any evidence under the complaint on the ground that it failed to state a cause of action, and urges that the court erred in overruling this objection.

"Upon such an objection every reasonable intendment will be indulged in favor of the sufficiency of the complaint * * * The objection will be overruled if the complaint can be sustained by the most liberal construction." Dunnell, Minn. Dig. § 7687.

Giving the complaint the liberal construction required by the rule under such circumstances, we think it stated a cause of action for specific performance, and we fail to see wherein any incompleteness in its statements resulted to the prejudice of defendant.

The complaint alleged that plaintiffs had duly performed all the conditions of the contract on their part. It further alleged that they had tendered payment of the \$4,000 on March 1, 1920, and that they were still ready and willing to pay the purchase price on receiving a full warranty deed. Defendant argues that the general allegation of performance by plaintiffs is limited by the specific allegation that they had tendered payment of the \$4,000 installment, and that it cannot be assumed that they had executed, or offered to execute, the mortgage for the deferred installment, or had assumed, or offered to assume, the existing mortgage. Conceding, without deciding, that this contention is correct, the allegations were, nevertheless, sufficient under long established rules. *Lewis v. Prendergast*, 39 Minn. 301, 39 N. W. 802; *Minneapolis. St. P. & S. S. M. Ry. Co. v. Chisholm*, 55 Minn. 374, 57 N. W. 63; *Blunt v. Egeland*, 104 Minn. 351, 116 N. W. 653; *Murray v. Nickerson*, 90 Minn. 197, 95 N. W. 898. The tender of the installment of \$4,000 was all that plaintiffs were required to do before the execution of the deed, and the complaint shows sufficiently that they were ready to perform on their part.

[2, 3] 2. Defendant contends that, "where the vendee knew, at the time of entering into the contract of the vendor's incapacity to give him the entire estate, he cannot have specific performance as to the vendor's interest with abatement of the price," and cites numerous authorities in support of this proposition.

It is doubtless the general rule that, where the vendee enters into the contract knowing that there is a portion of the property, or an interest therein, which the vendor can neither convey nor cause to be conveyed, he cannot compel a conveyance of so much of the prop-

erty as the vendor is able to convey with an abatement of the purchase price for the deficiency, and that, if he elects to enforce specific performance under such circumstances, he must pay the full purchase price and rely upon the covenants in his deed for reimbursement for any loss resulting from defects in his title. But where the vendor contracts on his own behalf in respect to his interest in the property and on behalf of the other part owners in respect to their interests therein, and is thereafter unable to convey the entire property, or cause it to be conveyed, for the reason that he lacked the power to bind such other part owners, the vendee may require him to convey his own interest in the property on receiving a proportionate part of the purchase price, unless it be shown that the vendee made the contract with knowledge that the vendor was not authorized to act for such other part owners. *Melin v. Woolley*, 103 Minn. 498, 115 N. W. 654, 946, 22 L. R. A. (N. S.) 595. The authorities are considered and the rules which govern in such situations are pointed out in that case. In the present case defendant contracted on his own behalf and as agent for the heirs of William. He in fact acted without authority in making the contract as agent for the heirs of William, but the court found that plaintiffs had no notice or knowledge that he lacked such authority. We think the evidence is ample to sustain this finding and that the case falls within the rule applied in the *Melin* Case. Defendant insists that in order to bring the case within this rule it must appear that he represented that he possessed the authority which he assumed to exercise; that it is conceded that he never met plaintiffs nor had any correspondence with them until after the contract had been repudiated by William's widow; and that consequently he could have made no representations to them. We think that his execution of the contract as agent for the heirs of William was a sufficient representation that he had authority to act for them. No claim is made that plaintiffs had any knowledge as to William's heirs or as to defendant's right to represent them except such as was given by the contract itself. The contract, without giving her first name, designated the widow of William as one of the parties of the first part, and defendant urges that this fact and the fact that the contract was not signed by her was notice to plaintiffs that it was incomplete and brings the case within the rule applied in *Stub v. Grimes*, 38 Minn. 317, 37 N. W. 444. She was one of the heirs of William under the statute. When the contract was delivered to plaintiffs it had been executed by defendant as agent for all these heirs and purported to be complete; and we think that naming the widow as a party to the contract, in the recitals therein, was not sufficient to require the court to find that plaintiffs were charge-

able with notice that defendant lacked authority to act for her.

[4] 3. Defendant also questions the authority of Gaffney to deliver the contract to plaintiffs. Defendant took two copies of the contract executed by plaintiffs and took the checks for the initial payment and cashed them. He could hardly expect to receive this money and an obligation binding plaintiffs without giving them an obligation binding him. Moreover Gaffney was his agent, and, if there was any understanding between them that the contract was not to be delivered to plaintiffs until it had been signed by the widow of William, and the weight of evidence is to the contrary, there is no claim that plaintiffs had any knowledge of such understanding.

We are convinced that the trial court disposed of the case correctly and the order appealed from is affirmed.

O'NEIL v. DAVIDSON. (No. 22226.)

(Supreme Court of Minnesota. July 15, 1921.)

(Syllabus by the Court.)

1. Brokers $\S$ 8(3)—Finding that brokers negotiating lease of office building was lessor's agent sustained.

The evidence is sufficient to sustain a finding that a broker who negotiated a lease of certain property in controversy was the agent of the lessor.

2. Landlord and tenant $\S$ 231(7) — Evidence sustaining finding that lessor's broker induced execution of lease by untrue statement of income of expenses.

There is evidence that the broker submitted to the lessee an untrue statement of the income of the property and the expenses of operation, as a statement covering the preceding year. If the broker was the agent of the lessor, it is not material when or by whom the statement was prepared.

3. Landlord and tenant $\S$ 231(7) — Evidence sustaining finding that lessee relied in executing the lease upon untrue statement as to expenses of operation.

There is evidence that the lessee relied on the statement as to expenses of operation.

4. Landlord and tenant $\S$ 231(7)—That lessee discovered untrue character of representations as to income before taking possession held not to charge him with knowledge as to expenses of operation.

The evidence was not conclusive that the lessee waived the alleged fraud. The fact that before taking possession he discovered the untrue character of the portion of the statement relating to income does not conclusively charge him with knowledge of the facts as to the portion relating to expenses of operation.

5. Landlord and tenant $\S$ 233(4)—Instruction as to lessee's damages in action for rent of office building held supported by evidence.

There is evidence to sustain the finding of damages on the theory on which the case was submitted.

Appeal from District Court, Ramsey County; J. C. Michael, Judge.

Action by Michael J. O'Neil against Watson P. Davidson to recover rent, with counterclaim by defendant. Verdict for plaintiff for less than amount claimed. A denial of defendant's motion for a new trial was affirmed on appeal (180 N. W. 102). Plaintiff moved for judgment notwithstanding the verdict, motion denied, and judgment was entered, and plaintiff appeals. Affirmed.

Baldwin Schroeder and Linus O'Malley, both of St. Paul, for appellant.

Lightner & Young, of St. Paul, for respondent.

HALLAM, J. On March 22, 1917, plaintiff leased to defendant the Globe Building, an office building in St. Paul, for the term of 99 years. The first year's rent was paid in advance, and thereafter defendant paid rent monthly until April 1, 1919. This action was brought to recover \$5,000, the rent from April to August, 1919, inclusive. Defendant counterclaimed, alleging damages for misrepresentations inducing the lease. The jury returned a verdict for plaintiff in the sum of \$886.94. They thus allowed defendant \$4,213.06 on his counterclaim. Defendant moved for a new trial, contending that he was entitled to greater damages. The motion was denied and defendant appealed. The order was affirmed. O'Neil v. Davidson, 180 N. W. 102. Plaintiff moved for judgment notwithstanding the verdict. The motion was denied and judgment was entered. Plaintiff has now appealed.

[1, 2] 1. The representations relied upon are alleged to have been made by William Egeland, a broker concerned in the negotiation of the lease. The claim is that Egeland submitted a written statement showing that the gross annual rent of the building was \$33,168, and the total annual expense of maintenance and operation was \$15,557.80, and that these figures were untrue.

Plaintiff contends that the proof is not sufficient to show that Egeland was his agent. We think it is. It appears that Egeland had some talk with defendant pertaining to a lease of the Globe Building before he secured any agency agreement from plaintiff, but this is not uncommon and is not necessarily inconsistent with his ultimate agency for plaintiff. Egeland testified that he was plaintiff's agent; that he had an oral agreement with plaintiff to act as his agent for a stipulated commission long be-

fore the lease was closed and that on the same day on which the lease was closed, an agreement between them was made in writing, which agreement recited that Egeland had negotiated the lease for plaintiff, and in which plaintiff agreed to pay Egeland a commission. Plaintiff denied the agency and gave such an explanation of the making of the written contract that it was probably not conclusive upon him but the evidence is sufficient to sustain a finding that Egeland was plaintiff's agent.

As above stated, the claim of misrepresentation is that during the course of the negotiation, Egeland submitted to defendant a statement containing an untrue showing of the income of the building and the expense of its operation. This statement showed "gross rentals \$33,168," and "expenses" aggregating \$15,557.80, itemized under sub-headings as follows: Taxes, \$4,128; insurance, \$250; coal, \$3,850; water, \$325; light, \$540; labor, \$5,340; toilet service, \$124.80; repairs and incidentals, \$1,000—showing also a balance to the good of \$17,610.20.

It is not shown that plaintiff prepared this statement, but this is not material. If, as the jury found, Egeland was plaintiff's agent, the result of his submitting it is the same as though it had been prepared by plaintiff himself.

The statement was an old one which Egeland had in his office, but the evidence sustains a finding that it was submitted to defendant as a statement as of the preceding year. There were large items of expense such as for power and manager's charges which were not mentioned in the statement, but we think it is a permissible inference from defendant's evidence that it was submitted as a complete statement. The evidence shows that the actual expenses were substantially more than the total of the statement submitted, or in other words, that the statement was untrue.

[3] 3. Plaintiff contends that defendant did not rely on this statement. His testimony is that he did.

The evidence is that defendant discovered the facts as to the rental return prior to the time that he took possession of the building. Any representation as to rentals was therefore waived and was properly eliminated by the trial court.

We think there is sufficient evidence that defendant relied on the representations as to the expenses as shown in the statement. In one part of defendant's testimony, he said he relied on the showing of the statement as to the net return, but this does not seem to us at all conclusive that he placed no reliance on the showing of expense of maintenance. This was one of the items that went to make up the net return. Even if he was influenced only by the net return, he might

be misled by a statement false only as to the items on one side of the ledger.

There is evidence that defendant knew that there was some expense for power and manager's charges, but we think it does not conclusively appear that he knew these expenses were not included in the statement.

It appears that defendant was a man of large experience in realty matters, but we still think a jury might find that he had been deceived.

[4] 4. Nor do we think the proof conclusive that defendant waived the fraud for which he recovered damages. The damages recovered were, by the court's instructions, limited to those arising prior to the discovery of the falsity of the representation. From the amount of damages allowed, we must infer that the jury found that the falsity of the representations was not discovered for something like the period of a year. The claim of waiver is based on the contention that defendant was charged with knowledge of the falsity of these representations at the time he took possession under the lease. The evidence as to this is not conclusive against defendant. He had knowledge at that time of the falsity of the statement as to rentals, but there is evidence that he had not such knowledge as to the expenses. Nothing in the decision on the former appeal was intended to conclude defendant on this point.

[5] 5. The court instructed the jury that the measure of damages was the difference between the represented expense and the actual expense of operation, from the time of the commencement of the lease until defendant was chargeable with knowledge of the true state of facts. No exception was taken to this charge and no error is predicated upon it. There is evidence from which the jury might, on this basis, compute damages in the amount allowed.

Judgment affirmed.

TENNANT v. RAFFERTY et al. (No. 4841.)
(Supreme Court of South Dakota. June 23, 1921.)

Landlord and tenant — §92(1) — Specific performance — §57 — Contract for sale of land held to constitute binding contract.

An option clause in a lease: "Party of the first part hereby agrees to give the party of the second part a chance to buy said land, * * * any time between this date and March 1, 1920, for the sum of \$20 per acre, or \$6,400, payable as follows: Cash payment, \$1,400; and \$5,000 on five years' time, on or before, at 5 P. C. P. A. interest"—held to contain enough to constitute a binding contract to sell the land, where lessee tendered the full amount of the purchase price, and court erred in sustaining a

demurrer to complaint praying for specific performance.

Appeal from Circuit Court, Potter County; J. H. Bottum, Judge.

Action by L. E. Tennant against James Rafferty, as administrator of the estate of Michael F. Rafferty, deceased, and others. From an order sustaining a demurrer, plaintiff appeals. Reversed.

James R. McGee, of Salem, for appellant. O'Keefe & Auldridge, of Gettysburg, for respondents.

POLLEY, P. J. Action for specific performance of a contract to convey real property. Defendants demurred to the plaintiff's complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and plaintiff appeals.

The contract involved is a lease of a half section of land in Potter county for a period of three years, with an option to the lessee to purchase the land during the life of the lease. The clause in the contract granting the alleged option is stated as follows:

"Party of the first part hereby agrees to give the party of the second part a chance to buy said land, * * * any time between this date and March 1, 1920, for the sum of \$20 per acre, or \$6,400, payable as follows: Cash payment, \$1,400; and \$5,000 on five years' time, on or before, at 5 P. C. P. A. interest. Party of the second part agrees not to make any charges for improvements on said land described within."

Pursuant to the terms of the agreement, plaintiff entered into possession of the land, and, relying upon his right to purchase the same, made improvements thereon to the value of \$5,000. During the spring of 1919 the owner and lessor of the land died, and James Rafferty, one of the defendants, was appointed administrator of decedent's estate. The other defendants are heirs at law of decedent. Within the time limited by the option clause in the contract plaintiff undertook to exercise his right to purchase the land. He offered the defendants the entire contract price of the land, and demanded that they execute a conveyance of the title to him. Defendants refused to accept the tender or to execute a deed. Plaintiff then tendered defendants \$1,400 in cash and notes for the balance in five years, with interest at 5 per cent. payable annually, and secured by a mortgage on the land. This tender and demand defendants also refused, and plaintiff brought this action to compel performance.

Defendants' reason for refusing to carry out the terms of the agreement is that such agreement is incomplete, indefinite, and uncertain. In support of this position defendants claim that the contract does not provide for the giving of any note or security for

the deferred payment on the purchase price, and does not specify whether the interest on the deferred payment is payable annually, or not until final payment is made. Neither of these grounds is well taken. While it is customary to take notes secured by mortgages for deferred payments on sales of real estate, there is no law that requires it, and in this case there was no occasion for it. The contract does not provide for a conveyance of the title until the purchase money is all paid. So long as the grantor retains the title, there is no occasion for a mortgage.

In order to exercise his option to purchase, the grantee is required to pay \$1,400 in cash. The balance of \$5,000 he may pay at his option at any time "on or before" five years after the first payment, and the right to purchase implies the right to a conveyance of the title when the purchase money is all paid.

It is also contended by defendants that it cannot be determined whether the clause, "5 P. C. P. A. interest," where used in the contract, means interest at 5 per cent. per annum, without specifying when payable, or interest at 5 per cent. payable annually. But it is not necessary to consider this question. Plaintiff had the privilege of paying all cash, and his tender of the full amount of the purchase price eliminated the question of interest.

While the contract set out in the complaint is not very artistically drawn, we believe it contains enough to constitute a binding contract to sell the land involved, and the demurrer should have been overruled.

The order appealed from is reversed.

TABOUR REALTY CO. v. NELSON, Clerk of Circuit Court, et al. (No. 4832.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

Judgment 6883—Does not estop assignee of claim found fraudulent where assignee was not a party.

A judgment finding that the assignment of a claim to the funds in the hands of the receiver appointed in foreclosure proceedings was a fraud upon the court, and that the claimant and the assignee were estopped from claiming any right to the funds is not conclusive against the assignee where the judgment was rendered in action in which the assignee was not made a party.

Appeal from Circuit Court, Brown County; Frank Anderson, Judge.

Action by the Tabour Realty Company against N. E. Nelson, as Clerk of the Circuit Court of Brown County, and another. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Amos N. Goodman, of Aberdeen, for appellant.

Van Slyke & Agor, of Aberdeen, for respondents.

SMITH, J. Appeal from an order sustaining a demurrer to plaintiff's complaint. The complaint alleges substantially the following facts: In April, 1916, the First National Bank of Aberdeen began an action to foreclose a mortgage given by one Cranmer and his wife, in which action one Gannon was appointed receiver of the rentals of the mortgaged property pending suit. After foreclosure and deed in January, 1918, the receiver made final report disclosing net proceeds of such rentals in his hands to the amount of \$1,608.98. On September 4, 1918, the trial court entered an order approving and allowing said report and directing the receiver to pay over said money to the Cranmers. Thereafter, and on September 28, 1918, Suttle, the defendant in this action, commenced an action against the Cranmers. In that action Gannon was served as garnishee, and made return denying that he had in his possession money or property belonging to the Cranmers. Said return also set forth the receivership proceedings above referred to, stating that he had in his possession as such receiver \$1,608.98; that an order had been entered by the court in the foreclosure action directing him to pay said money to the Cranmers; that prior thereto there had been exhibited to him a written assignment purporting to be executed by the Cranmers assigning the funds in his hands as receiver to the Tabour Realty Company, which assignment he ignored; that, at the time the order was entered directing the receiver to turn the funds over to the Cranmers, one Goodman, an attorney at law, acted for and represented the Cranmers, and was also attorney for the Tabour Realty Company, assisting in procuring said order of September 4, 1918, all of said parties having knowledge of said purported assignment of said funds to the Tabour Realty Company; that demand had been made for payment of said fund to the Tabour Realty Company; that said receiver did not know to whom said money belonged, whether to the Cranmers, to the Tabour Realty Company, or whether accountable as garnishee in the action by Suttle against the Cranmers, and that he would pay the money as directed by the court.

The complaint further alleges that about February 4, 1918, the Cranmers assigned in writing and conveyed to the Tabour Realty Company, plaintiff herein, the money thus in the hands of Gannon as receiver; that the Tabour Realty Company, in February, 1918, presented said written assignment to said receiver, and demanded said money, which demand was, and at all times has been refused; that the defendants Suttle and Nelson at all

times knew that said fund had been assigned to Tabour Realty Company as disclosed by the answer of Gannon in the garnishment proceeding; that in the action begun by Suttle on September 28, 1918, in which Gannon was served as garnishee, the summons and complaint, together with the garnishment summons, were served on the Cranmers in Minneapolis on November 18, 1918; thereafter, on May 12, 1919, the Cranmers being in default, the trial court entered judgment against them in favor of Suttle for \$1,394.16, and further ordered and adjudged that the funds in the hands of Gannon as garnishee be applied in satisfaction of said judgment, that said Gannon deliver said fund to defendant Nelson, then clerk of said court, and that said clerk apply the same in satisfaction of a special execution issued on said judgment, which was done—Suttle receiving from the clerk the amount of his said judgment and costs, out of said moneys. In addition to findings of fact and conclusions of law upon which said judgment was entered, the trial court also made and entered the following finding of fact:

"VI. The court further finds from the evidence that S. H. Cranmer and Tabour Realty Company are estopped from claiming any part of the funds in the hands of said garnishee defendant, Fred Gannon, for the reason that a fraud was perpetrated upon the court, in that the defendants claim to have assigned such fund to the Tabour Realty Company, and at the same time the defendant S. H. Cranmer was representing the Tabour Realty Company as attorney, and that thereafter a judgment was entered in the above court in favor of S. H. Cranmer and Emma A. Cranmer with the knowledge and consent of the Tabour Realty Company; and that by reason thereof, both Emma A. Cranmer and S. H. Cranmer and Tabour Realty Company are estopped from having or claiming to have any right in and to the funds in the hands of said garnishee defendant Fred Gannon, and that, by virtue of the proceedings herein, the plaintiff J. H. Suttle is entitled to all of such proceeds."

Upon this finding of fact the trial court entered judgment decreeing an estoppel against the Cranmers and the Tabour Realty Company from claiming any interest in the funds in the hands of Gannon, and further adjudged that, upon payment by Fred Gannon of said funds to the clerk of court, the said Gannon be relieved from all liability as garnishee and from all liability on account of funds remaining in his hands as receiver in the case of First National Bank against the Cranmers. Upon all the foregoing facts set forth in the complaint, respondent contends that the Tabour Realty Company, plaintiff in this action, cannot recover the funds in the hands of defendant Suttle, for that the foregoing finding of fact and judgment constitute a binding estoppel against such claim. It is appellant's contention that no such estoppel can exist for the reason that

the Tabour Realty Company was never made a party defendant in said action or to said garnishment proceedings against Gannon. The Tabour Realty Company was not a party to the garnishment proceedings, nor was it a party to the action of Suttle against the Cranmers in which said finding of fact and judgment of estoppel were entered, and is in no manner otherwise estopped or bound thereby. No judgment or decree against any person is valid or binding unless founded upon and entered pursuant to due process of law. The demurrer in this case, so far as it was founded upon improper joinder of parties or causes of action, is disposed of by the decision of this court in Robinson v. Nelson et al., 183 N. W. 874, not yet [officially] reported. We are of the view that the complaint states a cause of action and that the trial court erred in sustaining the demurrer thereto.

The order of the trial court is reversed.

BAXTER v. PARK.

DOWD v. SAME.

(Nos. 4894, 4895.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

1. Negligence $\S$ 29—Duty to child essential element.

A landowner cannot be held liable for injuries to a child upon his premises, any more than for injuries to an adult, unless the circumstances were such that the landowner owed some duty to the child.

2. Negligence $\S$ 39—Landowner's duty to children defined.

An owner of land, who places dangerous articles or structures upon his own premises, so situated that children of tender years, unconscious of danger, may be led by childish curiosity and impulse to enter upon such premises, owes to such children the duty to take such precautions as may be reasonable under the particular circumstances to avoid the danger to them which he knows, or may be reasonably expected to know.

3. Negligence $\S$ 39—Complaint for death of children attracted by unprotected excavation held to state cause of action.

Complaints, alleging that defendant had made an excavation on his premises, the walls of which were sand and gravel likely to fall at any time, that defendant knew that children were attracted by the excavation, but that no guards were put up around the excavation, state a cause of action for the death of children killed by a caving in of the excavation wall while they were playing thereunder.

Appeal from Circuit Court, Codington County; W. N. Skinner, Judge.

Separate actions by Emma Baxter, as administratrix of the estate of Orville Claude Baxter, deceased, and by Mary Dowd, as administratrix of John Joseph Dowd, deceased, against Herbert Park, to recover damages for death of plaintiff's intestates. From an order sustaining demurrer to the complaint in each action, the plaintiffs appeal. Reversed.

McFarland & Kremer, of Watertown, for appellants.

Mather & Stover, Hanten & Hanten, and A. R. Henrikson, all of Watertown, for respondent.

SMITH, J. Appeal from an order of the circuit court of Codington county sustaining defendant's demurrer to plaintiff's complaint. The complaint alleges that the defendant was the owner of certain lots in the business district of the city of Watertown; that prior to the summer of 1919 he had caused certain excavations about 8 feet deep to be made on said grounds, which excavations disclosed a sand and gravel bottom and side walls of sand and gravel; that defendant thereupon constructed walls of cement on the easterly, southerly, and northerly sides thereof; that in the summer of 1919 he caused a continuation of said excavation to be made, extending a considerable distance westerly from the original excavation; that the walls of said additional excavation, also 8 feet deep, were of a sandy and gravel nature, likely to fall at any time, as defendant well knew, and were left in that condition, and that no guards of any sort or nature were put up around or about said excavation to keep children of tender age therefrom, or to warn them of danger, or to protect said side walls from caving in; that said excavation was immediately adjacent to a traveled public street in the business part of the city, and was adjacent to and surrounded on the other three sides by traveled paved alleys; and that a traveled path or track led from the alley on the north and from that on the south down into the excavation; that said excavation had been used for many months by children for playing in; that such children were attracted thereto by the walls and the character of such excavation, the same being sand and gravel, all of which was known to defendant; that it was his duty to safeguard the same, and that he was negligent in failing so to do; that on October 24, 1919, Orville Claude Baxter, seven years of age, together with other children, were attracted into said excavation, without knowledge of danger from caving of said walls, with the result that he and another young boy were killed by the caving in of the wall.

The real question sought to be presented by the demurrer is the applicability of the rule embodied in a class of decisions known

as the Turntable Cases, to the particular facts alleged in the complaint. That rule seems to have been originally adopted and applied in this country in *Sioux City and Pacific Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, citing as authority *R. Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 115. The gist of that decision is stated in the following language:

"In fact this doctrine is not treated as an exception to the law relating to trespassers, but rather as a part of the law applicable to the rights of 'invitees,' to whom the owner owes the duty of exercising care for their safety."

Discussing the circumstances under which a child of tender years might or might not be considered an "invitee," the court said:

"If the defendant did know, or had good reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play, * * * they would be deemed 'invitees,' in which case the owner owes the duty of exercising care for their safety."

On the other hand, discussing conditions under which the defendant might or might not be deemed guilty of actionable negligence in respect to an invitee, the court says:

"The machine in question is part of the defendant's road which was lawfully constructed where it was. If the company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know or had no reason to suppose that, if they resorted there, they would be likely to get injured thereby, then you cannot find a verdict against them."

One not an invitee could not recover damages under this rule, because the right of recovery is made to rest primarily upon the question whether the facts and circumstances existing were such that they might be considered by a jury as amounting to an invitation to children of tender years to go upon the premises and ignorantly to put themselves in a place or position in which injury might occur. And the court holds that, in determining whether the particular facts and circumstances were such as to constitute an implied invitation to children, the ignorance, immaturity, and natural curiosity and impulses of childhood may be taken into account by a jury. On the other hand, defining the duty which the owner of premises owes to such possible invitees, the court holds that it would be proper for the jury to determine whether the defendant had or had not good reason to suppose that children might resort to the premises, or whether the defendant did or did not know, or had or had not good reason to suppose, that, if children did resort there they would be likely to be injured. In short, when the defendant had no good reason to suppose that children might resort or be attracted

to the premises, or if defendant did not know and had no reason to suppose that, if children did resort there, they would be injured, the charge of negligence would be rebutted; and, even though the child was an invitee and was injured, the defendant would not be guilty of actionable negligence.

Respondent contends that:

"In considering the question as to whether a duty exists, there is no distinction between the case where an infant is injured and one where the injury is to an adult; though where the duty is imposed the law may exact more vigilance in its discharge as to the former"

—and asks:

"Why should innocent children have greater rights than innocent adults, in respect to damage resulting from the nature of the premises upon which they enter without permission?"

"Remedy against the landowner for harm happening from the condition of the premises is denied to adults who are entirely free from intent to violate rights and whose presence upon the land is due to pardonable mistake or to irresistible external force. The test is not whether their motives were innocent or even laudable, or whether their conduct was careful, but whether they entered without the owner's permission. If so, they cannot claim that the owner was under duty to make things safe for their access, or to give warning of nonapparent danger. * * * The decision turns, not upon the presence of fault in the plaintiff, but upon the absence of fault in the defendant. * * * He fails because the landowner owed him no duty to have the premises in a safe condition for his entry. * * * Why should the moral innocence of a childish intruder raise a duty on the part of the landowner which is not created by the moral innocence of an adult intruder?"

Carried to its logical conclusion, this reasoning denies a recovery to any trespasser, whether infant or adult, except for an injury caused by the willful or wanton act of the landowner, and it must be conceded that there are decisions, respectable in number, which so hold. They rest wholly upon the legal theory that the owner of property has an unqualified right to make any lawful, beneficial use thereof, and owes no duty to any trespasser. The exercise of this right has been held by some courts to be modified or restrained by the principle recognized in the common law, and expressed in the maxim: "Sic utere tuo ut alienum laedas—One must so use his own rights as not to infringe upon the rights of another." Section 45, Code 1919. Logically this maxim cannot justify or excuse a trespasser, for the reason that no one possesses the legal right to become a trespasser. *Langer v. Goode*, 21 N. D. 462, 131 N. W. 258, Ann. Cas. 1913D, 429; *Greyvensteyn v. Hattingh et al.*, 21 Ann. Cas. 643. Many of the cases, however, without any very clear definition of the duty of the landowner, a violation of which would constitute negligence, treat the subject from

the standpoint of the infant's contributory negligence, and, adopting the reasoning in the Stout Case, say:

"It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult that, to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." *Edwards v. Railway Co.*, 21 S. D. 504, 110 N. W. 832.

[1] We think it may be laid down as a principle fundamental in all this class of actions that a landowner cannot be held liable unless he owes to the injured child a duty which he has neglected. As was said by Justice Lurton in *Felton v. Aubrey*, 74 Fed. 353, 20 C. C. A. 436:

"If there was no breach of duty, then there was no wrong, irrespective of the boy's capacity to know that what he was doing was dangerous."

[2] Probably a majority of the decisions emphasize the thought that a child trespasser is presumably not guilty of conscious negligence, while an adult presumably is, and that the child, being only a technical trespasser, and unconscious of and not chargeable with negligence, may recover, while the adult trespasser may not. But we are asked, What duty does the landowner owe to one, that he does not owe equally to the other, to make his premises safe for trespassers? The answer must be that the landowner does owe a duty to children, whom he knows may be exposed to such injury, which he does not owe to an adult, and which duty arises only when the landowner knows and is conscious of the dangerous character of the artificial thing which he himself has placed or created upon his premises, and has knowledge, because of its proximity to them, that children in its immediate locality are or may be exposed to injury therefrom. In such case the attractive character of the object or structure does not, in itself, create the duty, though when the duty exists the attractive character of the object may affect the degree of care required of the owner to guard against possible injury. As is said in *Sher-*

man & Redfield on the Law of Negligence (6th Ed.) vol. 1, § 98:

"The overwhelming weight of authority both in number of decisions and in soundness of reasoning by which is established the right of little children to recover damages for injuries suffered while trespassing should alone be sufficient to settle this question."

This class of cases recognizes a new and broader duty of the landowner than that announced in the Stout Case. But practically all the cases hold, in effect, that if the landowner had no reason to suppose that children would resort to the premises, or had no reason to suppose that they would be injured if they did, he owed no duty to guard against barely possible injury. *Talty v. Atlantic*, 92 Iowa, 135, 60 N. W. 516; *Gillespie v. McGowan*, 100 Pa. 147, 45 Am. Rep. 365; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514.

Counsel in their briefs and upon oral argument have presented their views with great earnestness and ability, and have exhibited unusual industry in compiling and attempting to classify the decisions of the courts of the different states. These decisions, however, present such variations of facts, of reasoning, and of results, that we shall not attempt to analyze or review them, further than to say that a great majority of them, either directly or by clear implication, sustain the view that the landowner, who places dangerous articles or structures upon his own premises, so situated that children of tender years, unconscious of danger, and led merely by childish curiosity and impulse, and who, living in proximity to such premises, may have easy access thereto, owes to such children the duty to take precautions such as may be reasonable under the particular circumstances to avoid danger to them which he knows, or may be reasonably expected to know, may exist because of the character of the article or structure and its location and immediate surroundings.

[3] We are of the view that the facts alleged in the complaint are such as to constitute a cause of action which should be submitted to a jury. The above-entitled appeals involve identical facts and pleadings, and are submitted upon the same briefs and arguments. Both are disposed of by this decision.

The order of the trial court is therefore reversed.

YOUTCEY v. BADGER SCHOOL DIST. NO. 43, in DAVISON COUNTY et al.
(No. 4919.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

1. Schools and school districts §40—Title to schoolhouse site owned by civil township held transferred to new district.

On the organization of a school district formerly a part of another district, where a schoolhouse on ground owned by the old civil township, but located in the new district, was awarded to the latter, the equitable title to and sole beneficial use of the schoolhouse site was transferred to the new district, and became the lawful site until changed in the manner provided by statute.

2. Schools and school districts §69—New selection of schoolhouse site not required on formation of new district where existing site awarded to latter.

The formation of a new school district does not require a new selection of a schoolhouse site where an existing site was awarded to the new district.

3. Schools and school districts §69—Selection of new schoolhouse site not legally authorized at a bond election.

Under Rev. Code 1919, § 7456, authorizing electors by majority vote at an annual meeting to instruct the board to erect a new schoolhouse, section 7457, providing for a special meeting on 10 days' notice, giving the object thereof, and sections 7495 and 7496, as amended by Laws 1919, c. 180, making it the duty of the board to build and remove schoolhouses when "lawfully directed by the electors," and to acquire land therefor for a site "legally chosen," the erection of a new schoolhouse or selection of a site may be authorized at an annual or special meeting, but, bond elections being held under different provisions, requiring 20 days' notice of an election therefor, and a ballot in the form prescribed by section 7593, these statutes do not contemplate selection of a site at a bond election, and it follows that a new site was not selected at an election on less than 20 days' notice to issue bonds to build a schoolhouse and purchase a certain new site; and, besides, in any event, whether the question voted on is viewed as a two-fold proposition to issue bonds and to relocate the site, or a single proposition to issue bonds for building on a new site, the double proposition was not divisible, and failed, because one proposition failed, and the single proposition failed for lack of a two-thirds vote, the old schoolhouse being at the center of the district, and section 7494 requiring such a vote to change it.

Appeal from Circuit Court, Davison County; Frank B. Smith, Judge.

Action by J. F. Youtcey against Badger School District No. 43, in Davison County, South Dakota, etc., and others. From an order denying an injunction pending an appeal plaintiff appeals. Reversed.

Miller & Mitchell, of Mitchell, for appellant.

Spangler & Wire, of Mitchell, for respondents.

SMITH, J. Appeal from an order of the trial court denying an injunction pending an appeal to this court.

Plaintiff, a resident elector and taxpayer, who is appellant here, brought an action in the circuit court of Davison county, to enjoin the defendant school district and its officers from entering into a contract for the erection of a schoolhouse. Affidavits used on the hearing disclose that the defendant school district was organized April 19, 1918; that it was formerly a part of Badger township school district No. 2; that prior to the organization of defendant school district, Badger township No. 2 had five schoolhouses; that, in the apportionment of property between the old and new districts, the schoolhouse located in the new district was awarded to, and was used by, the new district, until the fall of 1920, when it was destroyed by fire, since which time school has been conducted in the town hall in the village of Loomis; that the tract of ground on which this schoolhouse stood was owned by the civil township under a deed containing certain conditions which are not material to the conclusion reached.

On or about May 11, 1920, a petition signed by more than one-third of the voters of the new district was presented to the defendant school board, asking:

That the question of issuing \$30,000 in bonds for the purpose of building and furnishing a schoolhouse and purchasing grounds known as the "Wendleboe" site adjoining block 5 in the village of Loomis, upon which to locate the same, be submitted to a vote of the electors: that on the 24th day of May, 1920, the school board, in special meeting, passed a resolution submitting said question to a vote of the electors on June 13th, which resolution recited:

"Whereas, a legal petition signed by more than one-third of the legal voters of said school district No. 43, Badger township, Davison county, S. D., asking for school bonds to be issued by the said district in the sum of thirty-thousand dollars (\$30,000) for the purpose of building and furnishing a schoolhouse and purchasing grounds for same, to be located on the 'Wendleboe site' * * * adjoining block 5, in Loomis, S. D., etc., and that the question of issuing school bonds in the sum of thirty thousand dollars (\$30,000) be submitted to the qualified voters of said district at the election to be held in said school district for that purpose."

That on May 28th notices of such election were posted at three public places in the said district, which notices stated that a vote would be had on the—

"question of issuing bonds for said district to the amount of thirty thousand dollars (\$30,000) for the purpose of building and furnishing grounds for same to be located on the 'Wendleboe site' * * * adjoining block 5 in Loomis, S. D. * * *"

That the question submitted to the voters at said election was on ballots reading as follows:

For Issuing Bonds

Against Issuing Bonds

That there were 46 votes in favor of issuing bonds and 33 votes against; that, at a meeting held on February 25, 1921, the board adopted plans and specifications for a new schoolhouse; that the electors of the district have never selected a site on which to build the new schoolhouse, unless such site was selected by the vote on the bond issue, nor have the voters instructed the board to build any schoolhouse except such instructions as may be presumed from the vote on the bond issue; that appeals were taken from the action embodied in the two resolutions above recited, which appeals are still pending and undetermined in the circuit court of Davison county; that the school board disposed of \$5,000 of the school bonds; and that they propose to expend this money in building a new schoolhouse on the site of the old schoolhouse.

The validity of these proceedings was attacked in the injunction action involved in this appeal. The ultimate questions are whether the school board, under circumstances disclosed by the record, have authority to erect a schoolhouse on the site of the former building destroyed by fire, or at all.

[1] Appellant urges as principal grounds for injunction:

First, that the defendant officers propose to erect a schoolhouse on a site to which the district has no title—in that the title was originally conveyed to, and is still in, the old civil district. This contention cannot be sustained. The equitable title to and sole beneficial use of the schoolhouse site was transferred, by the division of the property and the operation of law, to the new district, and is the lawful schoolhouse site until changed in the manner provided by the statute.

[2] Appellant next contends that the formation of a new district requires a new selection of a schoolhouse site, regardless of an existing site awarded to a new district. We do not concur in this view. Nothing in the statute, or in reason, requires this to be done.

[3] But appellant further contends, if the old site be held to be the property of the new

district, that the electors of the new district, at the bond election, did select the Wendleboe site, and authorize the erection of a new schoolhouse thereon, and that the officers of the district have authority to erect a new schoolhouse on that site, and none other. This contention presents the question whether the proceedings had in connection with the bond election constitute a valid and lawful selection of a new site for a schoolhouse, and also authorize the construction of a new schoolhouse. Section 7456 provides that at the annual common school district election the electors—

"shall have authority to instruct the board in matters pertaining to the management of the schools for the coming year. * * * At this meeting the electors may instruct the board pertaining to * * * the erection of a new schoolhouse, or the sale of an old one and the lands belonging thereto, * * * and it shall be the duty of the district board to carry into execution all such instructions as shall have received a majority vote of the electors of the district [present at the meeting], * * *"

In this connection we note that section 7457 provides that five legal voters may petition the clerk to call a special meeting of the voters at any time; and that—

"It shall be the duty of the clerk to call such meeting by posting notices, at least 10 days prior to the time of the meeting, in three of the most public places in the district. Such notices shall give the date, hour, and object of the meeting."

Clearly, this latter section is supplementary to section 7456, and was intended to authorize meetings of the voters to take action upon matters overlooked or neglected at the annual meeting, or arising since the annual meeting, and which would include the erection of a new schoolhouse. We are of the view that specific instructions are necessary to authorize the erection of a new schoolhouse in any case.

By section 7495 it is made the duty of the school board—

"to purchase or lease schoolhouse sites; build, hire, purchase, sell and remove schoolhouses when lawfully directed by the electors of the district, and to carry into effect all orders of the same."

By section 7496 as amended by chapter 180, Laws 1919, it is made the duty of the school board to acquire land not exceeding two acres, etc., as a schoolhouse site "legally chosen as a schoolhouse site by a lawful district meeting."

Under section 7456 and the sections last above referred to, we think it is clear that the erection of a new schoolhouse or the selection of a schoolhouse site, when necessary, may be authorized by the voters at the annual school meeting, or at a special meeting called pursuant to section 7457. Bond elections are held under different statutory provi-

sions. The statute fixes the date of the annual meeting. Special meetings of the voters require 10 days' notice. Bond elections require 20 days' notice (which was not given in this case, notices of election having been posted on May 28th and the election held on June 13th), and the use of a ballot in the form prescribed by the statute (section 7593). We find nothing in any of these statutes which seems to contemplate the selection of a schoolhouse site at a bond election. It follows that appellant's contention as to the selection of the Wendleboe site cannot be sustained.

The record also discloses that the site of the old schoolhouse was at the center of the district, as defined by the statute, and that the Wendleboe site was more than 160 rods distant from the geographical center.

A two-thirds vote would be required to change such site. Section 7494, Rev. Code 1919. Therefore, in any event, whether the question voted upon at the bond election be viewed as a two-fold proposition—viz, (a) for the issuance of bonds, (b) for a relocation of the site—or whether it be viewed as a single proposition—viz, for the issuance of bonds for building upon the Wendleboe site—the result would be the same. Under the former view the double proposition would not be divisible, and would therefore fail because one of the propositions failed. Under the latter view it would fail because of the lack of a two-thirds vote to authorize the change of the site. It necessarily follows from all the facts above stated that no authority to issue bonds was given by the voters at the election, and therefore that the trial court erred in refusing the pendente order, and that the trial court must be reversed.

RICHARDSON v. HALVORSON. (No. 4893.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

Animals § 100(1)—Notice to owner knowing trespass not required as condition of suit.

Rev. Code 1919, §§ 2922-2928, and section 2921, as amended by Laws 1919, c. 350, requiring notice to the owner of trespassing stock from a person who has suffered damage from them, etc., as a condition to commencing action, does not apply to a case where defendant owner of the stock took them upon plaintiff's land and grazed and pastured them there, knowing of the trespass and the extent of the damage.

Appeal from Circuit Court, Lyman County; Wm. Williamson, Judge.

Action by J. W. Richardson against Enoch Halvorson. Plaintiff had judgment before a justice, and defendant appealed to circuit court, and from judgment dismissing the action, plaintiff appeals. Judgment reversed.

F. E. Mullen, of Prescho, and Bartine & Bartine, of Oacoma, for appellant.

M. Q. Sharpe, of Oacoma, for respondent.

POLLEY, P. J. This action originated in a justice court. Plaintiff alleged ownership of a quarter section of land and that during the grazing season of 1920 defendant entered upon said land with his stock and grazed and pastured the same to plaintiff's damage. Plaintiff had judgment, and defendant appealed to the circuit court. In the circuit court it was stipulated that "the only question for the determination of the court being whether or not the plaintiff could recover at all without first having given notice to the defendant of the probable amount of damage which said stock had committed while trespassing upon his land, and the question of whether or not the action was commenced within the time permitted by statute." Under this stipulation defendant moved to dismiss the action on the ground that the complaint failed to state a cause of action "in that it shows a failure of notice given or that the trespass was committed within 60 days of the commencement of the action." This motion was granted, and judgment was entered dismissing the action at plaintiff's cost. From such judgment plaintiff appeals to this court.

The question to be determined is whether the case is governed by the provisions of sections 2922-2928, Rev. Code, and section 2921, as amended by chapter 350, Laws of 1919. Under the provisions of this statute it is necessary for a person who has suffered damage from trespassing live stock to notify the owner of such stock of the injury and the probable amount of the damage before commencing an action, and to bring his action for the recovery of such damage within six months after the infliction of the injury.

It is appellant's contention that the above provisions of the statute do not apply to this case; that these provisions are intended to apply only to cases where live stock while roaming at large had gone upon plaintiff's premises without the intervention or knowledge of the owner of such stock; that in this case the defendant brought his stock upon and grazed and pastured them on plaintiff's land, and for that reason defendant was not entitled to notice before the commencement of the action.

In *Burnett v. Myers*, 42 S. D. 233, 173 N. W. 730, we stated the reason for enacting the law invoked by respondent as follows:

"The provision found in section 3, c. 244, Laws of 1907 [section 2923, Revised Code], requiring that notice be given the owner of trespassing animals, before commencing action, is based upon reason. In the absence of this requirement, a party might be sued and compelled to pay costs who would be willing to pay the damage caused by his trespassing animals, if notified of such trespass and the amount of the damage claimed. He should be given an opportunity to pay, if he will, before being put to the expense of a lawsuit."

This being the reason, as we believe, for enacting the law, it does not apply in this case.

Respondent, having taken his stock upon appellant's land and grazed and pastured them there, knew of the trespass and the extent of the damage, and there was no occasion for giving him notice of what he already knew. The fact that the defendant was himself designedly a wrongdoer and had full knowledge of the injury takes the case out of the statute requiring the giving of notice.

Under the terms of the stipulation entered into by plaintiff and defendant, judgment should have been entered for plaintiff in the sum of \$50 and costs.

The judgment appealed from is reversed.

McCOY, J., concurs in the result on the ground that plaintiff was entitled to maintain this action as a general common-law remedy for wrongful tort.

SHAW'S DEPENDENTS v. FRED C. HARMS PIANO CO. et al. (No. 4749.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

1. Master and servant §418(6)—Review in compensation case limited to question whether decision is supported by credible evidence.

On an appeal to the circuit court from a decision of the Industrial Commissioner in a workmen's compensation proceeding, and on a further appeal to the Supreme Court, the question is whether there was substantial credible evidence supporting the findings of the commissioner, and where there is such evidence his decision should be affirmed, though the evidence before the circuit court appears to preponderate against such decision.

2. Jury §17(1)—No constitutional right violated by denying jury trial on appeal in workmen's compensation proceeding.

As, under Rev. Code 1919, § 9445, the remedy under the Workmen's Compensation Act is not exclusive, no constitutional right is violated by the denial of a jury trial on an appeal to the circuit court.

3. Master and servant §417(7)—Compensation Law authorizes rule limiting review.

Under Rev. Code 1919, § 9474, providing relative to workmen's compensation proceedings that no party shall be entitled to a second hearing on any question of fact as a matter of right, section 9489, authorizing appeals to the circuit court to be taken and prosecuted as provided in section 9180, and section 9180, authorizing appeals from the Industrial Commissioner under rules and regulations consistent with law adopted and prescribed by the Supreme Court, the Supreme Court had power to promulgate the rule that on appeal in a compensation proceeding the only question should be whether there was substantial credible evidence supporting the decision of the commissioner.

Whiting, J., dissenting.

Appeal from Circuit Court, Day County; Frank Anderson, Judge.

Proceedings under the Workmen's Compensation Act by the dependents of Claude L. Shaw, deceased, for compensation for his death, opposed by the Fred C. Harms Piano Company, employer, and the United States Fidelity & Guaranty Company, insurer. Compensation was denied by the Board of Arbitration and Industrial Commissioner, but awarded by the circuit court, and from the judgment and an order denying a new trial defendants appeal. Reversed.

Van Slyke & Agor, of Aberdeen, for appellants.

C. E. Sutcliffe, of McIntosh, and Waddel & Dougherty, of Webster, for respondents.

GATES, J. The decedent, Claude L. Shaw, was found dead adjacent to a highway near Webster, S. D., August 3, 1918. He was in the employ of the defendant piano company. Claim was made by his dependents for recovery under the Workmen's Compensation Law (Laws 1917, c. 376). Failing to agree upon an award, the Industrial Commissioner was notified, and a board of arbitration was formed as provided by law. After hearing and considering the evidence, the board found that decedent lost his life on August 2, 1918, by the overturning of an automobile driven by himself, while he was under the influence of intoxicating liquor, upon a public highway near Webster, S. D., at about midnight, without the fault of any other person, and that he drove off the graded public highway, whereby the automobile was overturned, and his death occurred immediately thereafter. The board therefore found that there was no liability on the part of defendants for the death of said Claude L. Shaw. Upon review of such decision the above recited finding of the board of arbitration was approved by the Industrial Commissioner, and a further finding was made by him to the effect that decedent was not engaged in transacting the business of the defendant piano company at the time of the accident. The Industrial Commissioner therefore determined that there was no liability on the part of defendants. Appeal was taken to the circuit court within and for Day county. Upon the conclusion of the trial the court made findings of fact and conclusions of law favorable to plaintiffs, and entered judgment against defendants for \$3,000. From the judgment and an order denying new trial defendants appeal.

[1] If the matter before us were to be determined by an answer to the question whether or not the evidence preponderated in favor of the decision of the trial court, we might be inclined to answer that question in the affirmative. But that is not the question before us. The question before the trial

court was, and the question before us is, whether there was substantial credible evidence supporting the findings of the Industrial Commissioner. After a careful study of the record we are forced to answer that question in the affirmative. The judgment and order appealed from must therefore be reversed, and the decision of the Industrial Commissioner affirmed. *Day v. Sioux Falls Fruit Co.*, 43 S. D. 65, 177 N. W. 816; *Vodopich v. Trojan Min. Co.*, 43 S. D. 540, 180 N. W. 965; *Paul v. Com.*, 288 Ill. 532, 123 N. E. 541; *Crosaro v. Com.*, 38 Cal. App. 758, 177 Pac. 489; *Bloomington-Bedford Stone Co. v. Phillips*, 65 Ind. App. 189, 118 N. E. 850; *Milwaukee C. & G. Co. v. Industrial Com.*, 160 Wis. 247, 151 N. W. 245; *Jackson v. Iowa Tel. Co. (Iowa)* 179 N. W. 849; *Porter v. Industrial Com. (Wis.)* 181 N. W. 317.

It is urged that the statute gives an appellant in the circuit court the right to a trial de novo.

[2] The effect of the promulgation of the rule announced in *Day v. Sioux Falls Fruit Co.*, supra, is to limit the review on appeal to the question whether there was substantial credible evidence supporting the findings of the Industrial Commissioner, thus eliminating a trial by jury in the circuit court. In view of the fact that the remedy under the Workmen's Compensation Act is not exclusive (Rev. Code 1919, § 9445), no constitutional right is violated by a denial of jury trial on appeal (*Moody v. Found.*, 208 Ill. 78, 69 N. E. 831; *Shaw v. Shaw*, 28 S. D. 221, 133 N. W. 292, Ann. Cas. 1914B, 554).

[3] The last sentence of section 9474, Rev. Code 1919, says:

"No party shall as a matter of right be entitled to a second hearing upon any question of fact."

Section 9180, Rev. Code 1919, authorizes appeals to the circuit court—

"under rules and regulations, consistent with the laws of this state, adopted and prescribed by the Supreme Court."

Section 9489, Rev. Code 1919, authorizes appeals to the circuit court and provides:

"Such appeal to be taken and prosecuted as provided in section 9180."

In view of these Code sections we are of the opinion that this court acted within its prerogative, and within the spirit of the Workmen's Compensation Law, in promulgating the rule announced in *Day v. Sioux Falls Fruit Co.*, supra.

The judgment and order appealed from are reversed.

WHITING, J. (dissenting). I cannot agree with the holding that the question before the trial court was "whether there was substantial credible evidence supporting the findings

of the Industrial Commissioner." The statute gives a right to a trial de novo. To restrict the power of the circuit court, as my colleagues would, absolutely deprives the parties of a trial de novo.

This court erred in *Day v. Sioux Falls Fruit Co.*, 43 S. D. 65, 177 N. W. 816. An examination of the cases cited in the opinion in that case discloses that the decisions in those cases were based upon statutes entirely different from our statutes. See subdivision (f), § 19, Ch. "Employment"; Laws Ill. 1915, p. 410; 1913 Statutes Cal. § 84, p. 318; 1915 Statutes Wis. § 2394; Code Supp. Iowa 1913, §§ 2477m24, 2477m33. In every one of these states, the statutes specifically deprive the trial court of all power except to review questions of law.

While this court is vested with the power to fix rules of procedure on appeal from the Commissioners to the Circuit Court, it cannot, by rule, either limit or enlarge the jurisdiction of such court.

BAUM IRON CO. v. CARLOCK.

In re STEVENS' ESTATE.

(No. 4903.)

(Supreme Court of South Dakota. Aug. 18, 1921.)

1. Executors and administrators § 238 — County court's order approving claim final.

Action of county court in approving a claim against the estate of a decedent prior to the taking effect of Laws 1913, c. 207, was final, and precluded the court from thereafter rejecting the claim during a hearing of the administrator's report under such statute, the statute having no application to such claim, and the only means of vacating the order being a proceeding seeking its vacation upon proper notice to claimant.

2. Executors and administrators § 227(3) — Verification of claim by assistant treasurer of company not shown to be corporation held sufficient.

Verification of claim of the company not shown to be a corporation by the assistant treasurer of the company held sufficient, since it will be presumed, whether the company is a corporation or a partnership, that the assistant treasurer thereof is possessed of sufficient knowledge of the claims held by such company to render him competent to verify such claims.

Appeal from Circuit Court, Gregory County; Wm. Williamson, Judge.

In the matter of the estate of Victor H. Stevens, deceased. From a judgment affirming an order of the county court allowing a claim of the Baum Iron Company, W. B. Carlock, as administrator de bonis non of the estate, appeals. Affirmed.

W. J. Hooper, of Gregory, for appellant.
E. O. Patterson, of Dallas, and Harold Gunvordahl, of Burke, for respondent.

WHITING, J. Appeal from a judgment based upon findings of fact and conclusions of law, which judgment affirms an order of the county court allowing a claim held by respondent against the estate of one Victor H. Stevens, deceased.

From the findings it appears that the claim was filed with the then administrator of the estate on April 13, 1913; that it was allowed by the administrator and approved by the county court on April 17, 1913, and the claimant advised of such allowance and approval; that thereafter, and in July, 1914, the county court, pursuant to the provisions of chapter 207 of Laws of 1913, issued its order, which, after reciting that the administrator had filed his report showing all the claims presented against the estate and the administrator's action thereon, fixed a date when such report would be heard and acted upon by the county court; that this order was served on claimant; that it contained nothing to advise him that the court would, upon such hearing, review its own action theretofore had on any claim; that upon the return day of said order, the county court entered an order rejecting the claim; that such order based such rejection upon the ground that the claim was not properly verified; that thereafter claimant brought this present proceeding wherein he sought to have the county court vacate its order of rejection; that the county court did vacate such order; and that from such order vacating the former order of the county court appeal was taken to the circuit court. It was the action affirming the county court from which this appeal has been taken.

[1] There is absolutely no merit in appellant's contentions herein. When, on April 14, 1913, the county court made its order approving the claim, such action was final. Said court could not thereafter vacate such order except in a proceeding seeking its vacation and upon proper notice to the claimant. Chapter 207 of the Laws of 1913 (which provides for a hearing after the expiration of the time for filing claims, upon which hearing the county court shall act upon all claims filed) had no application to this particular claim, for the very patent reason that such claim had been acted upon by such county court before such law went into effect.

[2] There is no merit in the contention of appellant that the verification of the claim was insufficient. It is quite probable that the verification was made on a blank form, following the wording of the statute of the state wherein such verification was executed. While the words of such verification do not follow the language of our statute, they do

contain language fairly covering every requirement of our statute. The appellant contends that the verification was insufficient, because it purports to have been made by an assistant treasurer of a company, without any showing that such company was a corporation. It matters not whether the claimant is a corporation or a partnership; it appearing that the party making the affidavit was the assistant treasurer of such company whatever its nature, it appeared that he was one who, from the very nature of his official position, would be qualified to make the affidavit of verification. Appellant relied upon the decision of this court in *Detroit Automatic Scale Co. v. Torgeson*, 38 S. D. 564, 156 N. W. 86. In that case, one purporting merely to be the agent of claimant company made the verification; and this court held that the mere statement that a person making the affidavit was an agent of a company did not show competency to make such an affidavit, or any reason why the affidavit was not made by the claimant himself. There is no similarity in the two cases. One occupying the position of treasurer, or assistant treasurer, of a company of whatever nature, must be presumed to be possessed of sufficient knowledge of the claims held by such company to render him competent to verify such claims. Furthermore, if such claimant was not a corporation, but, instead, a partnership, and the party making the verification was not a member of such partnership, yet his being in a position where he must be presumed to know the facts sufficiently explains why the affidavit was not made by a member of the partnership.

The judgment appealed from is affirmed.

ENO v. KNOX. (No. 4927.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

Parties @—30—Contract to purchase land held a joint contract, so that one of the parties could not sue for his part of the price paid.

A contract by two persons to purchase land for \$2,000, the price to be paid by the delivery of an automobile to the vendor at \$1,000, the separate note of each purchaser for \$250, and the balance by a mortgage on the land, was a joint contract, and where the vendor failed to perform, but kept the automobile, one of the purchasers could not maintain a separate suit to recover the value of his interest in the automobile, in view of Rev. Code 1919, § 2313, providing that all persons having an interest in the subject of the action may be joined as plaintiffs, and section 2315, providing that those who are united in interest must be joined either as plaintiffs or defendants.

Appeal from Circuit Court, Minnehaha County; L. L. Fleeger, Judge.

Action by L. L. Eno against C. E. Knox. From an order overruling his demurrer to the complaint, defendant appeals. Order reversed.

Bates, Johnson & Simons, of Sioux Falls, for appellant.

Keith & Luddy, of Sioux Falls, for respondent.

POLLEY, P. J. This action is brought to recover damages for breach of contract to convey title to real estate. Defendant demurred to the complaint on the grounds:

"That there is a defect of parties plaintiff" and "that the complaint does not state facts sufficient to constitute a cause of action."

The demurrer was overruled and defendant appeals.

The demurrer should have been sustained on the first ground. By the terms of the contract out of which the controversy arose defendant agreed to sell and convey a quarter section of land to plaintiff and one McMahon. The consideration was \$2,000, to be paid as follows: At the time of making of the contract plaintiff and McMahon delivered to defendant a certain automobile, which was accepted by defendant at the agreed price of \$1,000, and as payment of \$1,000 on the purchase price of the land. The balance of the purchase price was to be paid as follows: On the 1st day of August, 1919, said McMahon and plaintiff were each to give defendant a note for \$250, at which time defendant was to give plaintiff and said McMahon a good and sufficient warranty deed to the said land free and clear of all incumbrances. At a still later date plaintiff and said McMahon were each to give defendant a mortgage on the land for a similar amount. The contract further provides that, in case plaintiff or the said McMahon failed to make any of the said payments when due, the defendant could at his option forfeit the contract and retain all sums that had been paid as liquidated damages. The contract further provides that, in case defendant should fail to deliver the deed as above provided on the 1st day of August, 1919, defendant should return the said automobile to plaintiff and said McMahon, together with \$75 in cash to cover depreciation on the value of the car. The deed to the property was not delivered to plaintiff and McMahon on the 1st day of August, 1919, nor at all, nor did defendant return the automobile, or pay the \$75 for the depreciation thereon. Plaintiff alone then commenced this action to recover \$600, alleged to be the value of his interest in the automobile, and \$100 that he claims to have been damaged because the deed to the land was not delivered as provided for in the contract.

The contract on behalf of plaintiff and McMahon was a joint contract and could only be

performed jointly. Under the terms of the contract, neither of them could have paid one-half of the purchase price and compelled defendant to deed him a half interest in the land. When defendant failed to perform the contract on his part, any damage that accrued to plaintiff and McMahon accrued to them jointly.

Section 2313, Code 1919, provides that—

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this chapter."

Section 2315 provides that—

"Those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. * * *"

Plaintiff and McMahon are united in interest, and should have been joined as plaintiffs, unless for some reason McMahon refused to join as plaintiff, in which case the reason for his nonjoinder should have been stated in the complaint. There is clearly a defect of parties plaintiff, and the demurrer should have been sustained.

The order appealed from is reversed.

LAMPERT LUMBER CO. v. PEXA.* (No. 4808.)

(Supreme Court of South Dakota. Aug. 15, 1921.)

1. Trial $\S$ 170—Directed verdict for plaintiff held erroneous where he failed to prove his cause of action.

In suit to recover money retained by defendant, and which he claimed was due him as a commission on sales of lumber made by him as plaintiff's manager, defendant's evidence was that the commission was to be on sales over a period of one year, beginning seven months from time of entering with contract. On motion this evidence was stricken out, as being contrary to the statute of frauds, and verdict directed for plaintiff. Held that the direction of verdict was error, as plaintiff was required to prove his cause of action under the pleadings.

2. Frauds, statute of $\S$ 139(1)—After full performance it is immaterial that a verbal contract for services could not be performed within a year.

After full performance of a contract for services extending over a period of more than a year; it is immaterial that the contract was within the statute, and exclusion of oral evidence of it is error.

Appeal from Circuit Court, Day County; Frank Anderson, Judge.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied October 19, 1921.

Action by the Lampert Lumber Company against Thomas Pexa. From a judgment for plaintiff and an order overruling defendant's motion for a new trial, defendant appeals. Reversed.

Waddel & Dougherty, of Webster, for appellant.

Lewis W. Bicknell, of Webster, for respondent.

POLLEY, P. J. Defendant in this action was employed by plaintiff to act as manager of a lumber yard owned by it in the city of Webster. The contract of employment was made in the month of May, 1918, and no part of it was reduced to writing. The employment was to commence the 1st of July, 1918, and to continue through the remainder of that year and through 1919. It is the contention of plaintiff that defendant was to receive a salary of \$125 per month, which was to be in full payment for his services for the full term of his employment. Defendant admits that his pay for the remainder of the year 1918 was to be only \$125 per month, but claims that the employment was to continue to the 1st day of January, 1920, and that the agreement was that for the year 1919, he was to receive a salary of \$125 per month and in addition thereto a commission of 3 per cent. on all business in excess of \$30,000 that was transacted at that yard during the year 1919. Defendant had authority, while such employment continued, to draw checks against plaintiff's account at a local bank and pay certain bills and expenses, including his own salary. The business transacted at that yard during the year 1919 greatly exceeded \$30,000, and defendant, claiming he was entitled, under the terms of his contract, to commissions amounting to \$300, drew that amount of money in payment of such commissions. Plaintiff, claiming defendant had no right to such commissions, brought this action for the recovery of the same.

[1] At the close of defendant's testimony, plaintiff moved the court to strike out all of the evidence relative to the commission agreement on the ground that the contract, as claimed by defendant, was a contract that by its terms could not be performed within one year after it was made, and, not having been reduced to writing, was void under the statute of frauds. This motion was granted. The granting of this motion left defendant without any evidence whatever in support of his defense, and upon motion the court directed a verdict for plaintiff. Judgment was entered accordingly, and from such judgment and an order overruling his motion for a new trial, defendant appeals.

The granting of the motion for a directed verdict was error. Plaintiff had the burden

of proving its cause of action, and whether it was entitled to a return of the \$300, under the issues as made by the pleadings, was purely a question of fact for the jury.

[2] But it was error to strike out defendant's testimony as to what the contract really was. It is undisputed that the contract had been fully performed by defendant; therefore it is immaterial whether it is within the statute of frauds or not. The statute of frauds was enacted to prevent fraud, but to permit a party to accept the benefits of a contract that the statute of frauds requires to be in writing, and then invoke the statute to avoid payment, would be using the statute to perpetrate a fraud. Where the contract is one of employment and the employé has fully performed the contract on his part and there is nothing left for the other party to do but to pay the agreed compensation, the statute does not apply. 25 R. C. L. 722, § 369. *Diamond v. Jacquith*, 14 Ariz. 119, 125 Pac. 712, L. R. A. 1916D, 890, and note on page 890. In *Ford v. Ford*, 24 S. D. 644, 124 N. W. 1108, this court said:

"Where one having the right to accept or reject a transaction voluntarily takes and retains the benefits thereunder, he becomes bound by the transaction, and cannot avoid such transaction and its obligations by taking a position inconsistent therewith. Thus it has been repeatedly held that a person by accepting the benefits of transaction may be estopped from questioning the existence or validity of a contract."

In that case the question was one of title to real property but the principle involved is just as applicable to a case like this. In *Marks v. Davis*, 72 Mo. App. 557, that court said:

"The rule is firmly established in this state that the full and complete performance of a contract by one of the contracting parties takes the contract out of the statute of frauds, and that the party so performing his contract may sue upon it in a court of law, and that he is not compelled to abandon the contract and sue in equity or upon a quantum meruit, as seems to be the law in some of the states."

This seems to us to be the fair, reasonable rule, and will be adopted as the rule to be applied to such cases in this state. *Re Chamberlain*, 146 App. Div. 583, 131 N. Y. Supp. 245; *Id.*, 204 N. Y. 665, 97 N. E. 1103; *Durfee v. O'Brien*, 16 R. I. 213, 14 Atl. 857. Under this rule the question to be decided is purely one of fact. Plaintiff gave one version of the contract. Defendant gave another. Which of them gave the correct version presented only a question of veracity or recollection, and must be submitted to a jury.

The judgment and order appealed from are reversed.

SHARPE v. SCHOENBERGER. (No. 4944.)*

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Bills and notes $\S$ 158—Provision in six-month note for interest at 8 per cent., payable semiannually, with interest at 12 per cent. after maturity or default, held not to make note nonnegotiable for uncertainty.

A provision in a note made payable in six months for interest at 8 per cent., payable semiannually, but at 12 per cent. after maturity or default, and that any interest overdue should bear interest at 12 per cent., does not make such note nonnegotiable on the ground that the amount due or to be paid could not be accurately determined, since there could be no uncertainty occasioned by failure to pay interest semiannually.

2. Bills and notes $\S$ 180—Provision for payment of attorney's fees on default held nullity not affecting negotiability.

Under Negotiable Instruments Law, prohibiting including in any judgment or instrument any sum for attorney's fees or other costs not taxable by law, a provision in a note for payment of attorney's fees and collection expenses on default is an absolute nullity and surplusage, not affecting negotiability.

Appeal from Circuit Court, Minnehaha County; L. L. Fleeger, Judge.

Action by A. H. Sharpe against H. A. Schoenberger. Judgment for plaintiff, and defendant appeals. Affirmed.

Albert J. Keith and Michael G. Luddy, both of Sioux Falls, for appellant.

Kirby, Kirby & Kirby, of Sioux Falls, for respondent.

McCOY, J. Action to recover upon a promissory note. From findings and judgment in favor of plaintiff, defendant appeals. Appellant raises the question of the sufficiency of the evidence to sustain the findings of fact, conclusions of law, and judgment. The note sued upon is in words and figures as follows: "\$400.00.

"Kimball, South Dakota, April 9, 1920.

"October 9, 1920, after date, for value received, we jointly and severally, as principals, promise to pay to the order of Miles E. Peck, four hundred dollars. Negotiable and payable at the Kimball Commercial & Savings Bank, Kimball, South Dakota, with interest at the rate of 8 per cent. per annum, payable semiannually, until fully paid, but with interest at the rate of 12 per cent. per annum after maturity, or after default in payment of interest; and any interest overdue shall bear interest at the rate of 12 per cent. per annum. Upon default in payment, we agree to pay attorney's fees and collection expenses, and in case of suit hereon, any justice of the peace may have jurisdiction hereof to the amount of cost of the case. The holder of this note may extend the time of payment thereof from time to time,

without notice, but not for a period or periods aggregating more than 5 years from this date, and makers, indorsers, sureties and guarantors, waive demand for payment, notice of nonpayment, protest and notice of protest, and agree to all extensions of time within the five-year period above provided for. [Revenue stamps affixed, 8 cents.] H. A. Schoenberger."

[1] There is no dispute as to the facts. The said note was given in consideration of money lost in a gambling game. It is not disputed that the respondent obtained this note for value before maturity, and was a holder in good faith. No part of this note has ever been paid. It is the contention of appellant that said note upon its face, as a matter of law, is nonnegotiable, and was taken by respondent subject to the defense of a gambling consideration. It is the contention that the following provision contained in said note:

"With interest at the rate of 8 per cent. per annum payable semiannually until fully paid, but with interest at the rate of 12 per cent. per annum after maturity, or after default in the payment of interest, and any interest overdue shall bear interest at the rate of 12 per cent. per annum"

—makes said note nonnegotiable for the reason that said provision in said note constitutes a conditional promise uncertain of fulfillment, and that it could not be determined with any degree of accuracy the amount due or to be paid upon said instrument. We are of the opinion that if this note had been made payable one or two or more years after date this provision thereof would have made the same a nonnegotiable note by reason of the uncertainty of said promise; but the note in question, being dated on the 9th day of April, 1920, and maturing and becoming due on the 9th day of October, 1920, just six months, or one-half of one year, there could be no uncertainty occasioned by the failure to pay interest semiannually as the provision in relation to the payment of interest at the rate of 12 per cent. per annum under the terms of this note could, under no possible circumstances, become effective prior to the maturity of the note. The effect of this provision is that interest is payable at the rate of 8 per cent. per annum before due and 12 per cent. after due.

[2] Appellant also contends that the following provision contained in said note renders the same nonnegotiable:

"Upon default in payment we agree to pay attorney's fees and collection expenses."

We are of the opinion that under the provisions of section 1706, Code 1919, Negotiable Instruments Law, which provides that nothing therein contained shall be construed to authorize any court to include in any judgment or instrument made in this state any

sum for attorney's fees or other costs not taxable by law, constitutes that portion of said note an absolute nullity and surplusage, the same as if it were not contained therein. *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439; *Johnson v. Schar*, 9 S. D. 536, 70 N. W. 838. Hence we are of the view that the note in question is negotiable.

Finding no error in the record, the judgment and order appealed from are affirmed.

WHITING, J., not sitting.

DAKOTA NAT. BANK v. JOHNSON et al.*
(No. 4844.)

(Supreme Court of South Dakota. Aug. 18, 1921.)

Judgment ¶139—Judgment granting a motion to vacate judgment and for leave to defend held not abuse of discretion.

Where mortgaged property was sold for much less than the amount of the judgment, leaving a large deficiency judgment against mortgagee, and the mortgagee, during the year after having obtained knowledge of the entry of judgment, moved to have the judgment vacated as to her and for leave to defend, the court did not abuse its discretion in granting such motion.

Appeal from Circuit Court, Yankton County; R. B. Tripp, Judge.

Action by the Dakota National Bank against Olaf Johnson and wife. From an order granting motion to have judgment for plaintiff vacated as to last-named defendant, and for leave to defend, the plaintiff appeals. Affirmed.

Charles Hall Dillon and Harry A. Robinson, both of Yankton, for appellant.

Harry Kunkle, of Yankton, and Payne, Olson & Barton, of Vermillion, for respondents.

WHITING, J. Action to have a deed declared to be a mortgage and to foreclose same. Judgment was against both defendants, who are husband and wife. The husband made two motions seeking to have the judgment vacated, and that he be allowed to defend. These motions were both denied, and he has not appealed. The wife also moved to have the judgment vacated as to her and for leave to defend. Her motion was granted, and, from the order granting same, plaintiff has appealed.

The deed in question was given in 1914. The complaint alleged that the deed was given to secure the then existing indebtedness of defendants to a certain bank, and also any indebtedness thereafter existing against either or both of said defendants in favor of such bank. The complaint alleged

that the deed secured a note of \$2,157 signed by both and dated in 1918, six notes signed by the husband alone, of various dates subsequent to that of the \$2,157 note, and aggregating in all some \$1,500, and the amount of certain advancements made by the bank, but not evidenced by notes.

Though an appearance was entered upon behalf of defendants, they failed to appear for trial. The court made findings among which was a finding that respondent executed all of the notes. Judgment was entered against both defendants for the full amount of all the notes and of the other two items of claimed indebtedness. Upon special execution sale, the property was bid in for much less than the amount of the judgment, thus leaving a large deficiency judgment against respondent, who is possessed of other property. The property covered by the deed was the homestead of defendants, and of a value far exceeding the amount bid at the foreclosure sale. Respondent, by affidavit, represented to the trial court that the agreement was that the deed was to secure only the indebtedness then existing in favor of the bank, which is the same indebtedness that was afterwards represented by the \$2,157 note; that there never was any agreement under which this property could be held as security for any of the six notes, nor for the other items of indebtedness. She offered judgment on the \$2,157 note, and sought to defend as against all the others.

There was much evidence submitted to the trial court which we consider immaterial, and we shall not refer thereto. Appellant contends that it appears that respondent knew of the judgment for more than a year prior to the date, when the court made its order vacating same. We do not find this contention supported by the record herein. The most that can be said is that, if the respondent saw and read a certain notice which the sheriff claims to have posted in a conspicuous place on the mortgaged premises, she would have had notice that judgment had been taken. There is no proof that she saw such notice.

The trial court was justified in finding that respondent's motion was made within the year allowed by statute; that the trial court had been led to enter up a personal judgment against respondent to an amount very greatly in excess of any warranted under the complaint herein. We are of the opinion that it does not appear but that the trial court's order vacating the judgment was granted within a year from the time that respondent had notice of the judgment. The trial court did not abuse the discretion in it vested when it vacated a judgment unsupported by the complaint.

The order appealed from is affirmed.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied October 19, 1921.

CORNWELL v. SURETY FUND LIFE CO.
et al. (No. 4884.)

(Supreme Court of South Dakota. Aug. 18, 1921.)

1. Pleading $\S$ 214(1)—Demurrer admits allegations of complaint.

Demurrer to complaint admits the allegations thereof.

2. Fraudulent conveyances $\S$ 39, 182(5)—Insolvent husband cannot purchase insurance or assign policy to wife in excess of wife's statutory exemption.

A husband may not, with intent to defraud his creditors, or voluntarily, give to his wife, to the prejudice of his creditors, either by assignment of a policy in his own favor or by naming her as beneficiary therein, a contract of insurance in an amount in excess of the wife's statutory exemption under Rev. Code 1919, $\S$ 2861, 9310, notwithstanding husband's obligation to support wife and children, and the insurable interest of the wife and children in his life, or wife's absence of knowledge of the insolvency or of the fraudulent intent of the husband; and the insurance so purchased in excess of such exemption, though standing in wife's name, will be deemed a trust fund recoverable by the administrator of husband's estate for the benefit of his creditors.

3. Judgment $\S$ 668(1)—Recovery by insured's administrator of amount of policy in excess of wife's exemption estops wife, made party to action, from claiming amount recovered from insurer.

Recovery by administrator of husband's estate of amount of policy insuring husband's life in excess of wife's statutory exemption on the ground that the purchase of such insurance at a time when husband was insolvent was fraudulent as to his creditors would estop the wife, made a party to such action, from thereafter claiming the amount so recovered from the insurance company.

Appeal from Circuit Court, Codington County; W. N. Skinner, Judge.

Action by A. H. Cornwell, as administrator of the estate of Henry S. Rowe, deceased, against the Surety Fund Life Company and others. From an order sustaining demurrer to the complaint, the plaintiff appeals. Order reversed and cause remanded, with directions.

Hanten & Hanten and A. R. Henrikson, all of Watertown, for appellant.

Hall & Purdy, of Brookings, for respondents.

SMITH, J. Appeal from the circuit court of Codington county. On the 9th of April, 1910, the Dakota Western Assurance Company, in consideration of an annual premium of \$401.80, issued its policy of life insurance to one Henry S. Rowe in the sum of \$10,000, in which his wife, Alice K. Rowe, was named

as beneficiary. Thereafter on March 24, 1916, the defendant Surety Fund Life Company reinsured this policy and assumed all the obligations thereof and agreed to carry out its provisions precisely as though it had been originally issued by the Surety Fund Life Company. Thereafter the Surety Fund Life Company reinsured said risk to the extent of one-half thereof with the Pittsburgh Life & Trust Company. The insured died on July 15, 1916, and thereafter the Surety Fund Life Company filed claim against the Pittsburgh Life & Trust Company, and has received payment thereof from the Pittsburgh Life & Trust Company.

The plaintiff, A. H. Cornwell, as administrator of the estate of Henry S. Rowe, deceased, brings this action against the Surety Fund Life Company and Alice K. Rowe, claiming to recover for the benefit of the estate \$5,000 of the insurance money due under said policy. The complaint alleges that no part of the sum due under said policy has been paid by the defendant Surety Fund Life Company except the sum of \$3,131.08, paid on the 11th day of June, 1917, to Alice K. Rowe, the beneficiary in said policy. The complaint further alleges that the estate of Henry S. Rowe, deceased, is without funds and is unable to pay claims filed, allowed, and proved against said estate, aggregating more than \$3,000, as well as costs and expenses of administration as yet undetermined. The complaint further alleges that Henry S. Rowe, at the time of taking out said insurance, was insolvent and unable to pay his debts when due, and that he secured and kept in force in the name of his wife, Alice K. Rowe, the said insurance policy with his own funds, with intent to hinder, delay, and defraud his creditors of their demands, and to avoid claims and debts due to creditors who might file claims against his estate and—

"that said insurance was effected for the estate of the said deceased as beneficiary for the amount due under said policy in excess of \$5,000 as exempt, and the said beneficiary Alice K. Rowe, as wife of the insured, on account of the insolvency of the estate and of the insured at the time the policy was originally issued, and while the premiums were being paid, and admitting the same, makes claim only to the proceeds of said insurance policy exempt under the laws of this state, namely, \$5,000, and makes no claim to the balance due on the said policy, and has consented that the balance of the proceeds due on said policy may be used for the payment of expenses of administration and claims allowed against the estate of Henry S. Rowe, deceased," and that defendant has refused payment.

Plaintiff demands judgment against the defendant Surety Fund Life Company for \$5,000, with interest, etc. A copy of the policy is attached to and made a part of the

complaint. Defendant demurs, setting up four grounds: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that there is a defect of parties plaintiff; third, that the plaintiff has not legal capacity to sue; fourth, that there is a defect of parties defendant.

[1] From an order sustaining this demurrer plaintiff appeals and assigns error. The briefs and argument of counsel are directed mainly to the contention that the complaint does not state facts sufficient to constitute a cause of action. The demurrer admits the allegation of the complaint, that the transaction was carried out by the deceased, then an insolvent debtor, with intent to defraud his creditors.

In oral argument and in briefs filed appellant urges that certain provisions of the policy reserving to the insured a cash surrender value, a loan value, an annuity option, and a right to change the beneficiary, are, in themselves, sufficient to render the transaction fraudulent as against creditors. This contention requires no consideration further than to note that the demurrer admits that the transaction to the extent of \$5,000 of the insurance was fraudulent as to creditors. If the alleged fraudulent intent were in issue as matter of fact, these provisions of the policy might become material, but the admission by the demurrer renders them immaterial at this time. The defendant company does not deny, but admits, a liability of \$10,000 under the policy. Plaintiff, appellant here, concedes the right of the wife as beneficiary to receive \$5,000 of the proceeds of the policy under the statutes, which exempt that amount of life insurance from the claims of creditors. Hence it is immaterial whether such exemption be claimed under section 2861 or section 9310, Revised Code 1919. We do not find it necessary to determine whether the statutory exemption of \$5,000 proceeds of an insurance policy would be applicable where the policy was taken out by an insolvent debtor with intent to defraud his creditors. That question is not presented by the record; the right of the family of decedent to \$5,000 of the insurance money being conceded by appellant. The only controversy is as to the \$5,000 remaining in the hands of the defendant company.

The gist of respondent's defense is that the plaintiff, as administrator of the estate, is not entitled to this money. It is also apparent that the demurrer presents no question as to the amount of recovery; that is, whether a recovery may be had for the premiums fraudulently paid out, or for the insurance money due under the policy, except in so far as that question may be inseparably connected with the theory upon which the right to recover may be based. Respondent's contention is that, although the policy itself contains provisions under which the husband

retained the right to change the beneficiary and to assign the policy, such rights were never exercised in favor of the decedent's estate, and that no privity of contract exists between the administrator and the defendant company, particularly in view of the fact that the assent of the defendant company to a change of the beneficiary or an assignment of the policy is essential under the terms of the policy. The defendant company however, admits its liability to the wife as beneficiary, and her rights to the fund having become vested by the death of the husband, the limitations contained in the policy do not affect or limit her right to assign or transfer her interest therein either in whole or in part. We do not decide at this time, however, whether the facts alleged in the complaint are sufficient to constitute a valid transfer to the administrator of her claim against the company. In the absence of insolvency and fraud on the part of the insured, the creditors of the husband could have no claim upon the proceeds of the policy, and the administrator would have no right of action against either the wife or the defendant company. The action does not purport to have been brought to set aside the contract of insurance and recover the consideration paid by the fraudulent debtor, namely, the insurance premiums. The complaint does not allege that either the wife or the defendant company was party to the alleged fraud, and as to them the contract of insurance itself was and is valid, and could not be set aside.

The relief demanded is a decree declaring the proceeds of the contract, in the hands of the defendant, to be a trust fund for the benefit of the creditors of the guilty party. The administrator is not a party to, or a formal assignee of, the policy. But the policy, appellant contends, was the instrumentality by means of which the fund came into defendant's possession, charged with a trust in favor of the creditors of the estate because of the alleged fraudulent intent of the insolvent debtor. We think it quite plain from the facts presented and the relief demanded in the complaint that the action was founded upon that theory.

[2] In *Lehman v. Gunn*, 124 Ala. 213, 27 South. 475, 51 L. R. A. 112, 82 Am. St. Rep. 159, a case chiefly relied upon by appellant, an insolvent debtor took out a policy of life insurance on his own life, in favor of his mother and father as beneficiaries, paying the premium out of his own funds. Within a month thereafter he died. The defendant, Gunn, as administrator of the estate, through a compromise, accepted one-half of the amount of the policy in settlement. An action was brought by creditors of the decedent to subject the proceeds of the settlement in the hands of the administrator to the payment of their claims. Discussing the principles of law involved, the court said:

"As against existing creditors a voluntary conveyance by the debtor is in law per se fraudulent and void, without regard to the intention of the debtor, is a proposition too familiar and well settled to require citation of authorities. The nature and form of the conveyance, or the ways and means employed in bestowing the gift or donation is immaterial. It is enough if the thing given be liable to the satisfaction of the demands of creditors, to render the conveyance void. In the solution of this case some difficulty will be obviated, by first determining what it is that the debtor has conveyed or donated. It must be conceded that the benefits to be derived under the present policy by the beneficiaries named therein proceed from the acts of the insured, who procured the policy. The policy was issued by the company for a valuable consideration. The consideration moved from the insured and not from the beneficiaries.

"It cannot be doubted that if the policy had been taken out and payable to the estate of the insured, and subsequently by him transferred as a gift to his father and mother, that such a transaction would have been void as against existing creditors. So too, though the policy be issued in favor of the father and mother, if the premiums be paid out of the funds of the debtor, will the transaction be void as against existing creditors. * * * The policy, or the insurance which it represented, was the subject-matter of the gift and not the premium. The premium is used in the purchase of the property donated, and it is in the gift of this property so purchased that the creditor complains that he has been injured. * * * In *Fearn v. Ward* [80 Ala. 560, 2 So. 114], this court said: 'The insurance constitutes the property purchased, and is the subject-matter of the investment. If the father be in debt, such voluntary investment is fraudulent in law as to his existing creditors, without regard to his intent, or to his circumstances and condition as to his ability to pay. In such case, the donee will be regarded as a trustee for the benefit of the creditors of the donor.' * * * It is the diminution of the fund to which the creditor had the right to look for the payment of his demand, that gives him the right to complain. * * * If the wrong and injury to the creditor be accomplished through the fraud of the debtor, actual or constructive, it is immaterial what form it assumed. Equity will deal with the facts, the substance, without regard to forms or shadows. * * * Taking the allegations of the bill as true, upon the death of Winton the insurance became a trust fund for the benefit of his creditors, and all parties dealing with such a fund with notice may be held to an accounting."

Respondent relies largely upon the case of *Central National Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370, and contends that it is decisive of the precise question presented on this appeal. We think respondent is in error. That case seems to have been decided upon its own peculiar facts. Want of evidence of fraud in the transaction appears to have been controlling. The court, commenting on that phase of the

case, said, in effect, that the amounts paid for premiums on the policy were so small as to constitute no appreciable diminution of the decedent's estate, and could not have caused material injury to the creditors. In fact, the court seems to have been of the view that the premiums were paid out of funds placed by the wife's mother in the hands of the husband for the benefit of the wife, which funds Hume did, and might rightfully, and without fraudulent intent, devote to the purchase of insurance on his own life for the benefit of his wife and children. That these facts had a material bearing on the conclusion reached is apparent from the language used by the court:

"In all purely voluntary conveyances it is the fraudulent intent of the donor which vitiates. If actually insolvent, he is held to knowledge of his condition; and if the necessary consequence of his act is to hinder, delay, or defraud his creditors, within the statute, the presumption of the fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible. But the circumstances of each particular case should be considered, as in *Partridge v. Gopp*, 1 Eden, 163, 168; *s. c.* *Ambler*, 596, 599, where the Lord Keeper, while holding that debts must be paid before gifts are made, and debtors must be just before they are generous, admitted that 'the fraudulent intent is to be collected from the magnitude and value of the gift.' Where fraud is to be imputed, or the imputation of fraud repelled, by an examination into the circumstances under which a gift is made to those toward whom the donor is under natural obligation, the test is said, in *Kiff v. Hanna*, 2 Bland, 33, to be the pecuniary ability of the donor at that time to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their then prospects of payment; and in considering the sufficiency of the debtor's property for the payment of debts, the probable, immediate, unavoidable, and reasonable demands for the support of the family of the donor should be taken into account and deducted, having in mind also the nature of his business and his necessary expenses. *Emerson v. Bemis*, 69 Ill. 541.

"This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be, lawfully obtained, at least to the extent of requiring that under such circumstances the fraudulent intent of both parties to the transaction should be made out. And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered."

[3] Briefly stated, Justice Fuller held that payment of the insurance premiums by the insolvent husband, if from his own funds, did not appreciably contribute to his insolvency, and if paid out of funds placed in his hands by his wife's mother for her daughter's benefit, no injury resulted to creditors and no fraud appeared; that the proceeds of the policy belonged to the wife and children as beneficiaries; that, neither the wife nor the insurance company having had knowledge of the husband's insolvency when the contract of insurance was entered into, the contract was valid and binding on all parties, and the premiums paid could not be reached and appropriated by creditors. If it be assumed, in the absence of statutory provisions, as Justice Fuller seems to hold, that an insolvent debtor may purchase a reasonable amount of life insurance to provide for immediate needs of his wife and family in case of his death without wrongful injury to his creditors, that doctrine, we think, should have no application where a statute exempts, for a like purpose, a specific amount, as in our state, \$5,000, from the proceeds of life insurance policy. But the husband may not, with intent to defraud his creditors, or voluntarily, give to his wife, to the prejudice of his creditors, either by assignment of a policy in his own favor or by naming her as beneficiary therein, a contract of insurance in an amount in excess of this statutory provision. And the purchase of insurance by an insolvent husband in an amount in excess of the statutory exemption, and payment therefor from his own funds with intent to hinder, delay, and defraud his creditors, is not the less a voluntary gift by reason of the fact that the husband is legally bound to support his wife and children, or that they have a legal right to such support, or that they have an insurable interest in his life, or by reason of the fact that the wife had no knowledge of the insolvency or of the fraudulent intent of the husband. We are of the view that, under such circumstances, any amount of insurance thus purchased and paid for by the husband in excess of the statutory exemption, even though standing in the name of the wife, should be deemed a trust fund recoverable by the administrator of the decedent's estate, and that the insurance company defendant is not concerned in the distribution of such fund in the course of administration; that being a question which concerns alone the heirs and creditors and the wife. Whether the insurance company might interpose such a defense in an action wherein the wife, as beneficiary under the policy, was not made a party defendant, we do not decide; but it seems clear to us that where the wife is made a party defendant, as in this case, a recovery by the administrator would certainly estop the wife from

thereafter making claim against the defendant company, assuming the facts to be as stated in the complaint.

The order sustaining the demurrer is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

JOHNSON et al. v. MATHEWS, Co. Atty., et al. (No. 22535.)

(Supreme Court of Minnesota. Aug. 10, 1921.)

(Syllabus by Editorial Staff.)

Certiorari ¶23—Question of wisdom of act of county board in designating road as state highway cannot be considered.

The questions whether the county board acted wisely in designating a road as a state highway, and whether the commissioner of highways acted wisely in consenting to such designation, are purely legislative, and cannot be reviewed by the courts on certiorari.

Appeal from District Court, Lyon County; I. M. Olsen, Judge.

Certiorari on the relation of John G. Johnson and others against Rolland Mathews, County Attorney of Lyon County, and others, to review the action of the county board in designating a highway as a state road. From a judgment dismissing the writ, relators appeal. Appeal dismissed.

Chas. L. De Reu, of Marshall, for appellants.

Rolland Mathews, Co. Atty., and James H. Hall, both of Marshall, for respondents.

PER CURIAM. The trial court issued a writ of certiorari to review the action of the county board of Lyon county in designating a certain highway in said county as a state road, and also to review the order of the State Commissioner of Highways consenting to such designation. On the return the court discharged and dismissed the writ. The relators appeal. Respondents move to dismiss the appeal. The case is to be determined on the record made by the officers whose action is sought to be reviewed. *State ex rel. Sholund v. Duluth*, 125 Minn. 425, 147 N. W. 820. On the record we see no question presented except the question whether the county board acted wisely in designating the road in question a state road, and whether the Commissioner of Highways acted wisely in consenting to such designation. These questions are not judicial, but purely legislative, and are not reviewable by the court on certiorari. See *Sinclair v. Commissioners of Winona County*, 23 Minn. 404, 23 Am. Rep. 694; *Christlieb v. County of Hennepin*, 41 Minn. 142, 42 N. W. 930; *State*

ex rel. Hardy v. Clough, 64 Minn. 378, 67 N. W. 202.

The appeal is therefore manifestly without merit, and on that ground should be dismissed. See Johnson v. St. Paul City Ry. Co., 68 Minn. 408, 71 N. W. 619; Kennedy v. Fidelity, etc., Co., 100 Minn. 144, 110 N. W. 624.

Appeal dismissed.

STUART v. TORREY. (No. 21732.)

(Supreme Court of Nebraska. July 15, 1921.)

(Syllabus by the Court.)

1. Account, action on $\S$ 8—Judgment $\S$ 251(1)—Finding of unintentional mistake as to accounts not sustained by pleadings presenting question of correctness of account and settlement thereof.

Where the plaintiff's cause of action is based upon a running account, and the answer pleads a full and complete settlement, and the reply is a general denial, the issues presented by such pleadings are the correctness of the account and the settlement thereof. And a finding and judgment on such pleadings that "there was an unintentional mistake made by plaintiff and defendant in the computation of their several accounts when making settlement" held not to be sustained by the pleadings, and a material variance from the issues presented by the pleadings.

2. Compromise and settlement $\S$ 22—One claiming that a settlement did not include all debts due must plead and prove it.

The presentation and auditing, from time to time, of accounts by parties having business dealings and transactions with each other, and the making of new notes for the balances and the surrender of old notes given and payment of the last note given constitute a settlement between the parties. And where suit is brought by the maker of the notes on an account between the same parties covering the same period of time, and settlement of the items sued upon is alleged by the giving of notes by the plaintiff, the plaintiff must allege that the items sued for were not included in the settlements made, and the burden of proof is on the maker of the notes to show that the settlement did not include debts owing to him from the adverse party.

3. Account, action on $\S$ 7—Evidence held not to sustain judgment for plaintiff.

Evidence examined, and held not to sustain the judgment.

(Additional Syllabus by Editorial Staff.)

4. Pleading $\S$ 382(1)—Fraud or mutual mistake cannot be shown under general denial in reply to an answer pleading settlement.

Fraud or mutual mistake cannot be shown under a general denial in a reply pleading an answer to a settlement.

Appeal from District Court, Dawson County; Grimes, Judge.

Action by Otho Stuart against Herbert Torrey in the county court. The cause was appealed to the district court, resulting in judgment for plaintiff. Motion for new trial was overruled, and defendant appeals. Reversed and remanded.

John A. Miller and J. M. Fitzgerald, both of Kearney, for appellant.

W. A. Stewart, of Lexington, for appellee.

Heard before MORRISSEY, C. J., FLANSBURG and ROSE, JJ., and DICKSON and TROUP, District Judges.

DICKSON, District Judge. This action was commenced and tried in the county court of Dawson county, appealed to the district court, and there tried by the court without a jury. The plaintiff below, appellee herein, charged in his petition that, from May 13, 1913, until about the 26th day of March, 1919, he continuously dealt with and had business relations with the appellant, defendant below, in the buying and selling of horses and cattle, corn, feed and seed and that during each year he performed work and labor for the defendant at his request, and the defendant performed work and labor for the plaintiff. Plaintiff further alleges that no settlement of the alleged running account between him and defendant was ever made, and, as an excuse for overpaying the defendant, he alleges that the defendant falsely and fraudulently represented to him that he owed him large sums of money in excess of what was actually due, which he paid. The petition contains an itemized statement of the account, including debits and credits, and prays for an accounting and judgment thereon. By agreement it appears from the judgment of the court that the case was tried in the district court upon the answer and reply filed in the county court. The answer of the defendant admits the dealings with the plaintiff during the times set forth in plaintiff's petition, and avers that each year he made final and full settlement with the plaintiff for every item that he owed the plaintiff, and that their settlements included items due the defendant from the plaintiff; that many items set forth in plaintiff's account are inaccurate and incorrect, but that all items of the account between plaintiff and defendant which were justly due to either one or the other were fully settled; that on the 29th day of March, 1919, he settled fully and entirely with plaintiff for everything that was owing by defendant to plaintiff, and everything that was owing by plaintiff to defendant, and that in such settlement the plaintiff owed the defendant \$440, which was paid by plaintiff. The reply of the plaintiff was a general denial. The case was tried on the

11th day of June and taken under advisement until the 23d day of June, and on that day judgment was entered by the court against the defendant for \$564.50, the court finding that "there was an unintentional mistake made by plaintiff and defendant in the computation of their several accounts when making settlement, and that plaintiff, by reason thereof, overpaid the defendant the sum of \$564.50." A motion for a new trial was filed, in which the judgment was attacked for the reason the same was not supported by sufficient evidence, was against the evidence, and that the same was contrary to law. This was overruled and an appeal was taken to this court.

From a careful reading of the record in this case it appears that the first transaction between the parties was the purchase of a team of horses by plaintiff from defendant for \$220 in May, 1913. The next transaction was in 1914, the renting of a farm by plaintiff from defendant. From that time on, and up until 1918, the parties had numerous transactions, in which the plaintiff purchased from the defendant grain of different kinds, also other articles of personal property, and performed and exchanged work and labor with defendant; the defendant performing for and exchanging work and labor with the plaintiff. The first alleged and claimed settlement between the parties was in 1914. During that year the plaintiff purchased from the defendant a team of horses, work was performed on both sides, and a note was taken for some \$300. This note included the note for \$120, given for the team purchased in 1913, and the interest thereon, the note for \$120 being surrendered to the plaintiff. The next settlement was on April 23, 1915, when the plaintiff gave to the defendant his note for \$276, and received his 1914 note. They next settled on March 23, 1916, and on that date the plaintiff gave to the defendant his note for \$365, that being the amount then due after allowing all credits, and the note of April 23 was surrendered to plaintiff. In January following, another settlement took place, the plaintiff giving the defendant his note for \$930. Later, August 4, 1917, this note was taken up and surrendered to the plaintiff, and he gave the defendant his note for \$900, the difference, \$30, being on account of a transaction in relation to the sale of one team and the purchase of another whereby the plaintiff had an agreed credit of \$30. On February 22, 1918, the plaintiff gave the defendant his note for \$397.80; that being the amount then due the defendant. Some time later there was a horse transaction between them whereby the plaintiff's indebtedness to the defendant was increased to the extent of \$50, and later the plaintiff gave to the defendant his note for \$447.80 and received the note for \$397.80, and by agreement dated the last named note

for \$447.80 as of the date of the note for \$397.80. When the note for \$397.80 was given, the plaintiff was moving away from the farm he had rented from defendant, and the note for \$447.80 was given after he had moved. The giving of this last note ended the dealings between them except the payment of this note; payment being made on March 29, 1919, and the note being surrendered to the plaintiff.

[1] There is no dispute between plaintiff and defendant as to the giving of these notes, and they both testify that when the notes were given settlements were made, and the trial court in effect so found. It also found plaintiff would at these times present his accounts, the defendant also presenting his demands, and that they were examined by the parties and the amount due ascertained and a new note taken for the balance and the old note surrendered. The plaintiff in his testimony tells of the final settlement between him and Torrey and the payment and settlement of the last note for \$447.80. It seems that plaintiff was at Torrey's place helping him, staying there until he moved, and at that time Torrey figured up his credits and put them on the back of the note, as well as charging the plaintiff with certain items that he owed; both parties believing and intending this to be a full and final settlement.

[4] A careful reading of the evidence in this case convinces the writer that, at the time of the giving of the several notes, the parties audited their accounts and agreed on the amount that the plaintiff owed, and that the payment of the last note for \$447.80 was in final settlement of their transactions. There is an absolute failure of proof in the record of fraud, error, or mistake in the alleged settlements between the parties. In a review of the evidence, we are mindful of the fact that the trial judge had a much better opportunity to determine the facts than we have; but it is our duty to examine the record and enter judgment as we find the facts to be. After a careful and studied examination of the record, we have reached the conclusion that the finding by the trial court that there was "an unintentional mistake made by the plaintiff and defendant in the computation of their several accounts when making settlement" is not sustained by the evidence. To read the record is to be convinced. The parties agreed that they met once a year, or thereabouts; that they had their accounts before them, and that debits and credits were demanded, given, and refused, resulting in the giving of a new note for the ascertained balance and the surrender of the old note. The law favors and encourages settlements, and in the absence of fraud, error, or mistake, they should not be set aside. The record conclusively shows a meeting of the parties, a presentation, ex-

amination and adjustment of their accounts, the making of new notes for the found balance and the surrender of the old ones. Such acts constitute settlements. The notes reflect but a part of the transactions, yet they were given to evidence the amount due. To set aside their deliberate acts six years thereafter ought to require more than a mere suspicion of error. If such settlements are to be set aside by a single stroke of the pen, no man will be safe until the statute of limitations has run in his behalf. The plaintiff's cause of action was based upon a running account covering a period of nearly five years; the defendant by his answer admits having dealings with plaintiff during this time, but charges that his account, as set forth in the petition, was not complete, and as a defense alleges a settlement of all the items sued for and others not included therein. The plaintiff, not only in his reply, but in his petition, denies the alleged settlements, so that we have presented by the pleadings a suit upon an account, a plea of settlement, and a denial thereof. The rule is well settled in this state that fraud or mutual mistake cannot be shown under a general denial in a reply to an answer pleading settlement. *Gandy v. Wiltse*, 79 Neb. 280, 112 N. W. 569. Appellee, in a way, admits that the judgment is not sustained by the pleadings, but insists that the parties should be restricted in this court to the theory upon which the cause was tried in the court below (this rule being announced by this court many times), and he says:

"But the issue tendered by the answer was an account stated, settled, and paid. This issue was not tried. As before stated, both parties went into their business transactions from beginning to end and tried the question of debits and credits arising thereon regardless of the issue tendered by the answer."

The record, in some respects, justifies this statement by counsel for the appellee in this: That some incompetent, irrelevant and immaterial evidence was received by the court without objection. If the record disclosed the fact, as claimed by appellee, that the entire business transactions from beginning to end between the parties had been tried out in the action regardless of the issues tendered by the pleadings, and without objection, then, without doubt, both parties would be bound by the record in this court. But an examination of the record shows to the contrary. The plaintiff first offered evidence of such items of his account as it was agreed between the parties were in dispute, and rested. The defendant, without objection, offered evidence in contradiction of the disputed items in the plaintiff's account. After so doing, the record shows that, during the examination of the defendant, Torrey, the

plaintiff admitted owing him \$100, paid by him to plaintiff's corn huskers, also for a quarter of beef, \$17.50; neither being shown as credits due the defendant. At this state of the record, the defendant stated he had his bills for corn and feed furnished to the plaintiff, and the defendant then offered to show that, in addition to his credits admitted, he furnished corn and hay to the plaintiff which were not included in the credits given in by him. Whereupon, the plaintiff objected to this offer for the reason it was incompetent and immaterial, and not an issue in the case, and not within the pleadings and questions raised between the parties. This objection was by the court properly sustained. It is therefore evident from the record that the business transactions from the beginning to the end were not tried, and that the court tried the case on the pleadings as made, and that the bars were not thrown down and the case tried without regard to the pleadings, as contended by the appellee. The court, when objections were made, restricted the parties to the issues as made by the pleadings. Having done so, it was error to render judgment on an issue not involved and without the pleadings. Such a judgment must be set aside.

[2] This court said in *Traver v. Shaeffe*, 33 Neb. 531, 548, 50 N. W. 683, 688:

"There is no more inflexible rule of law than that, to sustain a verdict or judgment, the pleadings and the proof, *allegata et probata*, must agree."

[3] The record conclusively shows that many of the items of debit and credit were included in the notes given by the plaintiff, and that the account sued upon covers the same period of time that the notes did. In no place in the record does the plaintiff pretend to point out and show what items of credit, if any, were not included in the balance evidenced by his notes. Under such circumstances, the presumption is that all the items of debit and credit existing between the parties at the time of the giving of the notes were included, and before the plaintiff can recover on any of the alleged items he must allege that the items sued for were not included in the settlements made, and the burden of proof is on the maker of the notes to show that the settlements did not include debts owing to him from the adverse party. *Keller v. Keller*, 18 Neb. 366, 25 N. W. 364. The plaintiff not only failed to make such allegations in either his petition or reply, but absolutely failed in his proof. A further consideration of the assigned errors is unnecessary.

It follows, for the reasons given, that the judgment is reversed and the cause remanded.

Reversed and remanded.

BOLICH v. ROBINSON. (No. 21700.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Bastards $\S$ 19, 71—Alibi a legitimate defense; "quasi criminal proceeding."

A proceeding under the bastardy act (Rev. St. 1913, §§ 357-364) is a quasi criminal proceeding, and an alibi is a legitimate defense and should not be disparaged by the trial court; the weight or sufficiency of the evidence for that purpose being a question for the consideration of the jury. It is error for the trial court to discredit such defense by instructing the jury that "an alibi is capable of being manufactured and is sometimes manufactured," and that "it is incumbent upon the jury to scan the evidence thereof with caution and care."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Quasi Criminal.]

2. Courts $\S$ 26—District court, after once acquiring jurisdiction, retains it for purpose of entry of judgment.

When the district court acquires jurisdiction of an action, it retains it for the purpose of the entry of any judgment that may be proper under the pleadings and the evidence.

3. Bastards $\S$ 78—Mother may recover lying-in expenses after adoption of child during pendency of suit.

In a bastardy proceeding, a mother may, after the adoption of the child during pendency of the action, recover in that action her lying-in expenses.

4. Bastards $\S$ 23—Adoption of child during pendency of action relieves mother from liability for its support.

The adoption of a bastard child during the pendency of a bastardy action relieves the mother from liability for its support and charges the adopting parents with that responsibility, and that part of her cause of action for its support and maintenance is abated; but that part of her cause of action which permits her to recover lying-in expense is not abated, the rule being that, before an action is abated, there must be a complete termination of the action, and that as to any undetermined matter in issue the action as to that is not abated.

Appeal from District Court, Cuming County; Allen, Judge.

Bastardy proceedings by Fern Bolich against Harry Robinson. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

George A. Eberly, of Stanton, and F. D. Hunker, of West Point, for appellant.

J. C. Elliott, of West Point, and A. R. Oleason, of Wisner, for appellee.

Heard before MORRISSEY, C. J., FLANSBURG and ROSE, JJ., and DICKSON and TROUP, District Judges.

DICKSON, District Judge. This is a bastardy proceeding commenced in the county court of Cuming county, Nebraska, by Fern Bolich, appellee, and against Harry Robinson, appellant; the parties being hereinafter designated as plaintiff and defendant.

The plaintiff charged in her complaint that she was pregnant with a bastard child and that the defendant was the father. A hearing in the county court resulted in the binding over of the defendant to the district court; there a trial was had and the defendant found guilty and was, by the court, adjudged to be the father of the plaintiff's child, and required to pay \$1,800 for its maintenance. Defendant appeals from this judgment to this court, and assigns many reasons why the judgment of the district court should be reversed.

The plaintiff testified to two acts of sexual intercourse in Wisner, Nebraska, with the defendant January 11 and 18, 1919, and that pregnancy resulted therefrom. The defendant denied these alleged acts of intercourse, and offered evidence tending to prove that on those dates he was not in Wisner, but at a distant place.

From the evidence it appears that, on the 27th day of June following, the complainant entered the Fairmount Maternity Hospital of Kansas City, Missouri, where she gave birth to a child October 3 following. She testified that a few days after its birth she consented to its adoption, and has never seen it since. The defendant offered in evidence, and the trial court excluded, an authenticated copy of the judgment of adoption of the child as entered by the circuit court for Jackson county, Missouri, at Kansas City on the 7th day of November.

No useful purpose will be served by a discussion of the many errors assigned. But few merit consideration. We are presented at the outset with the question of the jurisdiction of the district court for Cuming county to try this case, the contention of the defendant being that the action abated because of the birth of the child and its adoption in Missouri, thereby relieving the mother and the county of all liability for its care and maintenance, and that neither the plaintiff nor the county could thereafter maintain an action for the maintenance of the child, neither being liable.

[2] From the record in this case it appears without dispute that every jurisdictional fact necessary to give the county court jurisdiction existed, and jurisdiction was acquired, not only by the county court, but by the district court. The district court having rightfully obtained jurisdiction, did it lose it by the mother going outside of the jurisdiction of the court for the purpose of confinement and the subsequent adoption of the child? We think not. The district court, having once lawfully and properly acquired

jurisdiction, retained it for the purpose of the entry of any judgment that might be proper under the pleadings and the evidence.

[3, 4] By the adoption of the child, the mother was relieved of its support and maintenance, and the liability of the father for the support and maintenance of the child to the mother ceased. The adopting parents being residents of Missouri, the child took the residence of the adopting parents and they became liable for its support and maintenance. The rule of law is: An adoptive parent is ordinarily liable for the support of an adopted minor child to the same extent as a natural parent would be liable, and the natural parent is relieved of responsibility. 1 R. C. L. § 22. The relinquishment by the mother of the child and the adoption thereof relieved the mother of the maintenance thereof and placed the burden upon the adopting parents, and that part of plaintiff's cause of action against the defendant was abated. The action would not abate without a complete termination. If there was anything left to determine, the undetermined matter was not abated. This court has held that the death of the child, also the mother, will not abate the proceedings. *Hanisky v. Kennedy*, 37 Neb. 618, 56 N. W. 208; *Dodge County v. Kenmitz*, 28 Neb. 224, 44 N. W. 184. In the *Hanisky Case*, the child died during the pendency of the action, relieving the mother and possibly the county of its support; and this court held that complainant was entitled to recover the lying-in expense. The term "maintenance" used in section 6, c. 37, Comp. St. 1889, was construed in that case to include the necessary expenses incident to the birth of the child, such as the employment of a nurse, midwife and physician, and a decent burial of the child. The right of recovery in this case is controlled by the *Hanisky Case*, and as to the lying-in expense only, that part of the plaintiff's cause of action was not abated. It follows that the district court erred in not receiving in evidence the record of the adoption of the child, and erred in rendering judgment against the defendant for \$1,800; the evidence before the court being that the lying-in expense was about \$225.

[1] A consideration of the other assigned errors is unnecessary, but in view of the fact that there may be a retrial of this case and that the trial court might again give the instruction complained of on an alibi, we deem it proper to express our disapproval thereof. This instruction is in conflict with the previous holdings of this court. The instruction complained of is as follows:

"The defendant has introduced testimony tending to prove an alibi. An alibi is the claim of a defendant that he was not at the place of the commission of the alleged act at the time it is claimed to have taken place. Where this claim is made in good faith and supported by competent evidence it constitutes a defense; but as an alibi is capable of being

manufactured and is sometimes manufactured, it is incumbent upon the jury to scan the evidence thereof with caution and care. If you believe from the testimony that the alibi has been established, then it would be your duty to find the defendant not guilty. If, however, after considering all the evidence in the case and the logical deductions therefrom, you are convinced that the defendant is guilty of the matters and things charged in the complaint, it is your duty to find him guilty."

The question of the parentage of the child was a question of fact for the jury. Evidence was properly received by the trial court as to the defendant's whereabouts on the dates of the alleged acts of intercourse, and it was the duty of the court to submit to the jury the defendant's defense of an alibi by proper instruction, and this defense should not be discredited by the trial court; the weight or sufficiency of the evidence for that purpose being a question for the consideration of the jury. *Henry v. State*, 51 Neb. 149, 70 N. W. 924, 66 Am. St. Rep. 450; *Casey v. State*, 49 Neb. 403, 68 N. W. 643. By this instruction the jury are told that an alibi is capable of being manufactured and that it is sometimes manufactured, and that it is incumbent upon the jury to scan the evidence thereof with caution and care. A similar instruction to the one under consideration was given by the trial court in *Henry v. State*, supra. In that instruction the trial court said to the jury:

"The fact, however, which experience has shown, that an alibi, as a defense, is capable of being and has been occasionally successfully fabricated, that even when wholly false its detection may be a matter of very great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance," etc.

Chief Justice Post, in commenting on that instruction, said:

"But that it is within the province of the judge under our practice, by means of cautionary instructions, to discredit a particular defense or the evidence in support of a particular proposition we cannot admit, since witnesses are by no known rule of law or logic presumed to be less truthful simply because they testify concerning an alibi."

In further criticism of this instruction Judge Post said:

"We are, however, unable to conceive of any sound reasons for cautionary instructions with respect to an alibi which do not apply with equal force to any other defense."

In *Casey v. State*, supra, the trial court, instructing on the question of an alibi, said:

"The evidence produced to establish an alibi should be cautiously received, though, when proved, it is as strong as any other defense."

Chief Justice Post said, in commenting upon this instruction:

"The vice of the instruction here assailed is, when tested by the authorities cited, first, that it discredits a legitimate defense, by advising the jury that the evidence in behalf of the accused should be received with caution."

The criticisms of the instructions in *Henry v. State* and in *Casey v. State*, supra, apply with equal force to the instruction under consideration, and the giving was prejudicial error.

For the foregoing reasons, the judgment of conviction must be reversed and the case remanded for trial de novo.

Reversed.

**CENTRAL BRIDGE & CONSTRUCTION CO.
v. SAUNDERS COUNTY et al.**
(No. 21779.)

(Supreme Court of Nebraska. July 7, 1921.)

(Syllabus by the Court.)

1. Counties §152—Bridge construction in anticipation of levy valid.

Where the county commissioners included in their yearly estimate of expenses for the ensuing year the sum of \$80,000 for bridge fund, they were authorized to order, under a yearly contract previously let for that purpose, the construction of bridges in anticipation of the levy which might lawfully be made for such fund, the cost of which was within the estimate and not in excess of such levy. *Austin Mfg. Co. v. Brown County*, 65 Neb. 60, 90 N. W. 929, approved.

2. Counties §152—Bridge construction held not invalid for want of funds.

Such orders are not rendered invalid by the fact that the bridge fund for previous years was exhausted, and that unpaid warrants were outstanding to an amount in excess of the authorized levy for the year in which such orders were issued; nor by the fact that such warrants were paid out of and exhausted the fund produced by the levy just mentioned.

3. Counties §168(2)—When warrants not payable from funds of subsequent year.

Warrants issued in payment for work contracted for in a certain year may not be lawfully paid with funds provided for expenses of a subsequent year, unless included in the estimates for such subsequent year, or unless there be a surplus in the proper fund after all claims against it arising during such year have been paid.

4. Counties §152—Cost of culverts chargeable to county bridge fund.

The cost of building culverts under section 2956, Rev. St. 1913, is chargeable to the "county bridge fund" authorized by section 6456.

5. Counties §198—Interest must be contracted for or imposed by statute.

Counties are mere political subdivisions of the state, and are not chargeable with interest on claims against them, except where lawfully

contracted for, or imposed by statute. Counties and municipal corporations proper distinguished.

(Syllabus by Editorial Staff.)

6. Appeal and error §1026—Erroneous judgment requires reversal only when prejudice shown.

An erroneous judgment does not require a reversal unless prejudice is shown.

7. Counties §190(2)—The words "plus 85 per cent. of the levy for the current year," as related to bridge funds, construed.

The word "plus," as used in Rev. St. 1913, § 2971, providing that bridges shall not be built, the aggregate cost of which shall exceed a sum greater than the amount of money on hand in the bridge fund derived from the levy of the previous years, plus 85 per cent. of the levy of the current year, etc., indicates something added to that which has gone before, and in this connection grants a power to contract to an extent in addition to the actual money in the different funds referred to, measured by the current levy.

8. Counties §190(2)—"Current year" and "ensuing year" as used in statute relating to bridge funds construed.

"Current year" as used in Rev. St. 1913, § 2971, providing that bridges shall not be built, the aggregate cost of which shall exceed a sum greater than the amount of money on hand in the bridge fund derived from the levy of previous years, plus 85 per cent. of the levy of the current year, etc., and "ensuing year" as used in Rev. St. 1913, § 954, providing that the county board at its regular meeting shall prepare an estimate of the expenses of the county for the ensuing year, refer to fiscal or calendar year.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Current Year; Ensuing.]

9. Bridges §20(2)—A "culvert" is a "bridge" within the statute validating contracts for construction or repair of bridges.

Although a culvert is a conduit for passage of water, or a way, and is generally a structure carrying a roadway and bridges a chasm in the road, it is a "bridge" within Laws 1919, c. 26, amending Rev. St. 1913, § 2971, validating contracts for the construction and repair of bridges, since a bridge is defined as a structure erected over a depression or an obstacle, as over a river, chasm, roadway, railroad, etc., carrying a roadway for passengers, vehicles, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bridge; Culvert.]

Appeal from District Court, Saunders County; Good, Judge.

From an allowance by the County Commissioners of Saunders County to the Central Bridge and Construction Company of a claim for repair of bridges and culverts, John O. Schmidt, a taxpayer, appealed to

(184 N.W.)

the district court, where the action of the Commissioners was confirmed, and the taxpayer appeals. Modified and affirmed.

Good & Good, of Lincoln, for appellant.
Slama & Donato, B. E. Hendricks, and J. H. Barry, all of Wahoo, for appellees.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ., and ALLEN and REDICK, District Judges.

REDICK, District Judge. This is a taxpayer's appeal from the allowance by the county commissioners of Saunders county, August 22, 1919, of certain claims of the plaintiff for the construction and repair of bridges and culverts for the said county during the year 1918, in the sum of \$51,791.03, composed of the following items: \$23,331.82 for culvert work, \$25,499.06 for bridge construction and repair, and \$2,960.75 interest thereon; John O. Schmidt, taxpayer, appealed from said allowance to the district court, where the same was confirmed, and now brings the matter here for review.

The facts are not disputed and are briefly as follows: In response to demands by the county, the plaintiff made bids for the construction and repair of bridges and culverts during the year beginning December 21, 1917, which were accepted, and on December 28, 1917, separate contracts were entered into covering said work which was to be accomplished upon written orders by the commissioners; such orders were issued and the work performed in accordance with the contract, and the principal amount allowed therefor is correct, and the fair and reasonable value of the work and labor performed and materials furnished.

It further appears that the bridge levy for the year 1917 in Saunders county was \$48,498.22 and the emergency bridge levy \$11,624.56, and the bridge levy for the year 1918 was \$51,500.51 and the emergency bridge levy \$12,875.13, and for 1919 a total levy for both funds of \$64,171.25; the total valuation upon which the levy was made was \$12,290,289. In January, 1918, and again in January, 1919, annual estimates were duly made and published of the necessary expenses of the county during the years, respectively, for the bridge fund \$80,000 and for the emergency fund \$20,000.

The following extracts are taken from a stipulation in the record:

"That on the 22d day of August, 1919, and prior to the allowance of the claims involved in this action, there were outstanding and unpaid warrants against the general bridge fund of Saunders county, and claims allowed against said general bridge fund upon which warrants had not yet been issued, in an amount in the aggregate exceeding the amount of money on hand in said bridge fund plus 85 per cent. of the levy on that day made for said fund.

"That on the said 22d day of August and

prior to the allowance of the claims involved in this action, the county board of Saunders county, Nebraska, allowed claims on the county bridge funds in the aggregate amount of \$29,360.18, and ordered the county clerk to issue warrants on the said fund for the payment of the same.

"That on August 22, 1919, there were outstanding unpaid warrants drawn upon the general bridge fund of Saunders county, Nebraska, \$30,253.04, and that there was a balance of \$322.39 in cash in said fund.

"That the amount of levy for the year 1919 for the county bridge fund was four mills on the dollar valuation, and for the emergency bridge fund one mill on the dollar valuation.

"That on the 22d day of August, 1919, the total amount of cash in the general bridge fund was \$322.39, and that the amount of cash in the emergency bridge fund on said day was the sum of \$11,626.36, making a total in said fund in the sum of \$11,948.75."

At the time of the levy, August 2, 1919, a special levy of five mills was made under the supposed authority of chapter 26, Laws 1919, and warrants to cover the claims in suit drawn upon the funds so attempted to be created; but this court held in the case of Beadle v. Sanders, 104 Neb. 427, 177 N. W. 789, that such levy was invalid.

The first question presented for decision involves the construction of section 2971, Rev. St. 1913, reading as follows:

"Bridges shall not be built, the aggregate cost of which shall exceed a sum greater than the amount of money on hand in the bridge fund derived from the levy of previous years, plus 85 per cent. of the levy of the current year, together with the amount of money in the district road fund in the district where such work is to be performed."

By section 6456 the levy for the county bridge fund is fixed at four mills on the dollar valuation, and the county is elsewhere (section 3001) authorized to levy not to exceed one mill as an emergency bridge fund, and the amounts realized from such levies have been stated above.

[1] Appellant contends that the county has no power to contract for bridges unless there is at the date of the contract sufficient money actually in the funds to pay for the same. It is not contended that the contracts of December 28 are invalid, but the claim is that, before any orders for the construction of bridges or culverts could be issued by the board under said contracts, there must be money in the funds to cover them, and that, inasmuch as the bridge fund for 1917 had been exhausted and the levy for 1918 not made, the orders given to appellee for the construction of bridges and culverts were illegal; the result of such construction of the statute being that from the date of the contract to the date of the levy for 1918 the commissioners had no power to order the construction of any such improvements.

[7] We do not think the construction com-

tended for is reasonable; it disregards entirely the words "plus 85 per cent. of the levy of the current year," which would be mere surplusage if the power to contract were measured only by the amount of money actually in the funds, and might just as well have been omitted. But effect must be given to every provision of the statute, and it seems to us that the language quoted was inserted for the purpose of stating a rule by which the extent of the power to contract was to be measured; the word "plus" indicates something added to that which has gone before, and in this connection undoubtedly grants a power to contract to an extent in addition to the actual money in the different funds referred to, measured by the current levy. Supposing the section read:

"Bridges shall not be built, the aggregate cost of which shall exceed a sum greater than 85 per cent. of the levy of the current year."

It think it would hardly be contended that the language would suggest that the money must be actually in the fund; in other words, we think the words "plus 85 per cent. of the levy of the current year" merely furnishes a measure; and if it had read "plus a sum equal to 85 per cent. of the levy" the meaning would be perfectly clear.

[2] What then was the power of the county commissioners with reference to the construction and repair of bridges and culverts under the contracts in question? In January, 1918, an annual estimate was made, as required by law, of the expenses of the county for the ensuing year, including \$80,000 for bridge fund and \$20,000 for emergency bridge fund, which estimate formed the basis for the levy of taxes for that year. It would seem, therefore, that the commissioners were authorized to order bridge and culvert construction up to an amount within the estimate and not in excess of the amount authorized by the statute to be levied; in other words, the levy for that year, when made, having produced for bridge fund only \$51,500.51, any orders in excess of that amount would be invalid.

It was held in *Austin Mfg. Co. v. Brown County*, 65 Neb. 60, 90 N. W. 929, opinion by Kirkpatrick, C., that it was not "unlawful for a county board, after estimate made and prior to its meeting as a board of equalization, to anticipate the levy for the current year, and contract an indebtedness upon a particular fund within the estimate, although there is at the time no money in the treasury to the credit of such fund for the payment of the indebtedness, if in contracting such indebtedness the board remain within the limits prescribed by the Constitution and the statutes." This case was cited with approval by Epperson, C., in *Roberts v. Thompson*, 82 Neb. 458, 118 N. W. 106. The decision in *Austin Mfg. Co. v. Brown County*, however, was criticized by Hastings, C. (who

had concurred in it), in the case of *Clark v. Lancaster County*, 69 Neb. 717, 96 N. W. 593, in a discussion as to what was meant by the words "current year," in which he concluded that they meant the year from levy to levy rather than the calendar year, and held that the section in question "gives no authority to the board to take into account the levy of the current calendar year prior to the making of such levy" in the making of contracts for bridge building. But this holding is subject to the same criticism which the learned commissioner makes of the *Brown County Case*, to wit, that the opinion went further than was necessary for the determination of that case. In the *Clark Case* the court held that, where the county commissioners had entered into a yearly contract for the construction of bridges, they were without power to cancel that contract with the consent of the contractor and let a new one covering a portion of the improvements included in the first contract; but, the contractor having rendered services and materials in good faith, was permitted to recover the reasonable value thereof. We think, however, the current year refers to the period of time during which the contracts are to be performed and the indebtedness incurred, and that the uncertainty as to the precise limits of the power of the county commissioners growing out of the fact that the levy for that year is not made until August is not greater than generally exists in human affairs; the total valuation for the county for the year previous and the number of mills which may be levied for the purpose furnish a reasonably certain basis from which to calculate the limit to which contracts may extend.

[8] Section 6420 requires the assessment for taxation on April 1; section 6437 provides for the county board of equalization to sit in June; and section 6456 requires that the sitting be continued until the state board of equalization has acted, whose sessions begin the third Monday of July (section 6447), after which "the county board shall levy the necessary taxes for the current year" (section 6456). It was said in *State v. Cornell*, 54 Neb. 647, 75 N. W. 25:

"A consideration of the various provisions of the revenue law relating to the levy, collection, and disbursement of the public moneys of the county, the statute requiring the usual levy of taxes for county purposes to be made annually upon estimates prepared by the county board in January of each year, and forbidding such board from contracting any indebtedness for any object not enumerated in such yearly estimate of expenditures, * * * make it reasonably certain that the lawmakers intended that the fiscal period of a county should correspond to the calendar year."

It follows that "current year" as used in the revenue statute means the fiscal year, and that the same words in section 2971, and

"ensuing year" in section 954, all refer to the fiscal or calendar year; and the second syllabus in *Clark v. Lancaster Co.*, supra, is disapproved.

A county may make a valid contract to be paid out of available funds in the treasury, or with the proceeds of taxes that have been or may lawfully be levied during the year the contract is made. *Manly Building Co. v. Newton*, 114 Ga. 245, 40 S. E. 274; *Board of Commissioners v. Sauer*, 8 Okl. 409, 58 Pac. 625.

[3, 6] If the contracts were valid when made and orders for construction given thereunder not in excess of the levy for 1918, then the fact that the bridge fund for 1918 was exhausted through the payment of warrants issued for work done in 1917 or previous years would be immaterial. It is unquestionably the theory of our revenue laws that each calendar year, which is the county fiscal year (*State v. Cornell*, 54 Neb. 647, 75 N. W. 25), shall take care of itself, and the expenses provided for by the yearly estimate shall be paid out of the funds raised by the levy for that year; in fact, it has been the law of this state since the decision of *State v. Harvey*, 12 Neb. 81,¹ that the fund arising from the levy of one year cannot be legally used to pay the warrants of preceding years, at least until all of the expenditures contemplated by the yearly estimate have been met. See, also, *State v. Clark*, 79 Neb. 263, 112 N. W. 857, holding:

"A county warrant issued against the general fund of a certain year is not payable out of the general fund of a subsequent year, unless included in the estimate of the latter year, or unless, after deducting the items included in such estimate, sufficient remains to pay such warrant."

The contractor in this case had a right to expect payment from the levy for the year 1918, and, it not appearing that the claims for bridge construction in 1917 and previous years were included in the estimate for 1918, the payment of warrants covering such claims out of 1918 bridge fund was illegal and the rights of plaintiff cannot be affected thereby. *Pope County v. Sloan*, 92 Ill. 177.

There is no warrant for the proposition that the allowance of these claims by the county commissioners was irregular and erroneous; the case of *State v. Farrington*, 80 Neb. 628, 114 N. W. 1100, does not so hold, but merely, if erroneous, that would not prevent the issuance of a writ to compel levy of a tax to pay the claims. The better reasoning would require the holding that under section 952, subd. 5, Rev. St. 1913, the board may audit and settle claims as soon as the work is completed, though no warrant may issue until after levy; however, an erroneous judgment does not require a reversal unless prejudice is shown.

¹ 10 N. W. 406.

[4] In 1919, section 2971, supra, was amended by adding the following:

"Provided, however, if any county has before January first, 1919, entered into any contract for bridge construction or repair in excess of the amount herein permitted to be expended, and the county has received the benefits accruing by virtue of said contracts and the work has been done in accordance with such contract, prior to January 1, 1919, said contracts are hereby validated and made the obligations of the county, and the county board may levy a special tax not to exceed five mills in any one year until sufficient moneys are raised to pay said indebtedness. No estimate shall be required preceding this levy, and the taxes so arising from said levy shall be placed in a special fund to be used for the sole purpose of paying said indebtedness and shall be applied thereto as collected." Laws 1919, c. 26.

[8] It would seem, therefore, that, regardless of the question of the validity of the orders for bridge and culvert construction, the Legislature has declared the bridge orders, at least, valid claims against the county. But appellant contends that the validating act does not cover claims for culvert construction; the language being, "contract for bridge construction or repair." This brings us to the second question presented, the determination of which involves the construction of the validating act in connection, of course, with the other provisions of the statute of which, as an amendment, it forms a part. In view of our holding that the commissioners were authorized to anticipate the levy for the year 1918 in issuing the orders in question, and that such orders were valid, it will not be necessary to decide this question. In the opinion of the writer, however, the validating act is broad enough to cover both bridge and culvert construction for the reasons: (1) A culvert is easily within Webster's definition of a bridge:

"A structure erected over a depression or an obstacle, as over a river, chasm, roadway, railroad, etc., carrying a roadway for passengers, vehicles," etc.

Of course, a culvert, strictly speaking, is a conduit for passage of water, or a way, but with respect to its use in a highway may be, and generally is, a structure carrying a roadway—it bridges a chasm in the road. If the structure over a ditch consists of longitudinal stringers with planks across, it is a bridge. Is it any less a bridge, in a general sense, if it consisted of a box of four sides, laid transversely to the road? The primary object in each case is to carry the road over the ditch. (2) The other sections of the statute of which it forms a part deal with both kinds of improvements, both of which are to be paid for from the same fund, and the statute does not pretend to determine how much of such fund shall be devoted to the construction of bridges and how much

to culverts, and the amount limited for bridges alone is therefore not determinable; (3) and while the validating act uses the term "bridges" only, it is dealing with the total fund, and the evident intent of the Legislature was to validate all contracts which might lawfully be paid out of such fund but for the fact that they were excessive. Appellant cites a number of cases involving construction of statutes, to the effect that a culvert is not a bridge, but they were all cases involving the liability of municipal corporations for damages by reason of defective bridges, calling for a strict construction of the statutes declaring liability; the statute in question is remedial and should receive a liberal construction.

[5] The last contention of appellant is that the county is not liable for interest, and in this we think it is right. There is no question but that as a general rule counties are not liable for interest on claims against them. 15 C. J. 862, § 375; 1 Dillon, Municipal Corporations (5th Ed.) § 35 (23); Seton v. Hoyt, 34 Or. 286, 55 Pac. 967, 75 Am. St. Rep. 641, 43 L. R. A. 634. And this on the ground that a county is essentially an arm or agency of the state, and only liable for interest when so provided by statute, or by a contract therefor lawfully entered into. Section 5638, Rev. St. 1913, is as follows:

"All warrants issued by the county board shall, upon being presented for payment, if there is not sufficient funds in the treasury to pay the same, be indorsed by the treasurer, 'not paid for want of funds,' and the treasurer shall also indorse thereon the date of such presentation and sign his name thereto. Warrants so indorsed shall draw interest from the date of such indorsement, at the rate of seven per cent. per annum until paid. No account or claim whatsoever against a county, which has been allowed by the board, shall draw interest until a warrant shall have been drawn in payment thereof and indorsed as herein provided."

Whether or not this is an inhibition against interest before the allowance of the claim might be a nice question, but it certainly grants no affirmative or inferential authority to make such allowance. Appellee refers to *State v. Farrington*, 86 Neb. 653, 126 N. W. 91, but the question was disposed of on the doctrine of the law of the

case as announced on the former appeal (*State v. Farrington*, 80 Neb. 628, 114 N. W. 1100), and there interest was allowed sub silentio. The question was not argued nor presented in the briefs, and no mention of it is contained in the syllabus; furthermore, it was an application for mandamus to compel the county commissioners to levy a tax to pay a claim which had been allowed, including interest, and from which no appeal had been taken. *Heald v. Polk County*, 46 Neb. 28, 64 N. W. 376. Under these conditions neither case can be considered as authority upon the question. *Grand Island Gas. Co. v. West*, 28 Neb. 852, 45 N. W. 242, and *Murphy v. Omaha*, 83 Neb. 402, 50 N. W. 265, are cited, but these cases are distinguishable from the fact that cities are municipal corporations, while a county is not. The distinction is well pointed out in *Woods v. Colfax Co.*, 10 Neb. 552, 7 N. W. 269, where it was sought to hold the county liable for the negligence of its agents. See, also, *Davie v. Douglas County*, 98 Neb. 479, 153 N. W. 509, L. R. A. 1916B, 1261. An interesting discussion of the question at issue will be found in *Reichert v. Milwaukee County*, 159 Wis. 25, 150 N. W. 401. It is an undoubted hardship upon appellee to deny a recovery of interest, but we are unable to find any authority for its allowance in the statute or the law.

While we hold the orders upon which these claims arose were valid, the latter, together with similar claims for previous years, make up an excess of the amount permitted to be expended and come within the purview of the validating act; and therefore the county commissioners would be authorized to provide for their payment either under said act, in which case no estimate is necessary, or under their general powers to levy a tax for debts of previous years, in which case they should be included in the yearly estimate; the levy, of course, must not exceed the constitutional limit, nor unduly restrict other funds for carrying on governmental functions.

Judgment modified so as to allow plaintiff \$48,830.88 and interest thereon from July 15, 1920.

Affirmed as modified.

HAMRE v. CITY OF THIEF RIVER FALLS
et al. (STREETER, Intervener).
(No. 22601.)

(Supreme Court of Minnesota. Sept. 8, 1921.)

(Syllabus by the Court.)

1. Municipal corporations §302(1)—Where resolution for paving was approved before time, it goes into effect for failure of the mayor to return to council.

A resolution to pave, passed by the city council on March 19, 1920, was approved by the mayor on March 23, 1920. The law forbids the mayor to sign the same within four days after its presentation to him, but provides that, if not returned within ten days after presentation, it shall take effect without being approved. It is held the approval was nugatory, and the resolution cannot be considered as returned, either as approved or vetoed, and went into effect as for failure of the mayor to act.

2. Municipal corporations §323(3)—In a suit to enjoin paving, evidence that the work was undertaken when prices were their highest was properly excluded.

The offer to prove that the paving was undertaken when prices were the highest was rightly excluded.

3. Municipal corporations §323(2)—Paving improvement will not be enjoined for error in the plan of assessment, the law giving another remedy.

If the plan proposed to be adopted in assessing the cost of the pavement is wrong, the law gives a remedy in the assessment proceeding.

4. Municipal corporations §323(1)—Performance of paving contract will not be enjoined because of city finances.

The condition of the city treasury is not a material question in this action.

5. No reversible error shown.

No reversible error is found in the record.

(Additional Syllabus by Editorial Staff.)

6. Municipal corporations §293(4)—Direction to clerk to give notice that council would consider paving resolution need not be approved by the mayor; "ordinance, order, or resolution."

An order or direction that the city clerk give notice that the council will on a date specified consider a paving resolution is a mere ministerial direction to an officer, and need not be approved by the mayor, not being an "ordinance, order, or resolution," which must be signed by that official.

Appeal from District Court, Pennington County; Andrew Grindelund, Judge.

Action by T. P. Hamre against the City of Thief River Falls and others, in which George C. Streeter intervened. From a judgment for defendant, plaintiff and intervener appeal. Affirmed.

E. M. Stanton, of Thief River Falls, for appellants.

H. O. Chommie, of Thief River Falls, for respondents city and officials.

Shaw, Safford, Ray & Shaw, of Minneapolis, for respondent Bitulithic & Contracting, Limited.

HOLT, J. Suit by plaintiff, a taxpayer of Thief River Falls, a city organized under chapter 8, Laws 1895, and amendatory acts, to enjoin the performance of a paving contract made by the city with the Bitulithic & Contracting, Limited, a corporation. The city and its officers, the corporation named, and also another corporation, which undertook to sell city certificates to finance the improvement, are defendants. The corporation last referred to has no longer any interest in the litigation, and the matters relating to it need not be noticed.

Before coming to a consideration of the questions presented upon this appeal, it is necessary to refer to some of the steps taken in court as to this paving proposition. The present appeal is by an intervener, who came into the case as soon as the summons was served. Plaintiff's complaint is lengthy and alleges various grounds for challenging the proceedings leading up to the paving contract. The intervener is, like plaintiff, a taxpayer, owning lots abutting the streets to be paved, and his complaint in intervention contains the very same allegations contained in plaintiff's complaint, with the addition of certain facts which the court found true in respect to other actions previously brought by other taxpayers and property owners, represented by the attorney who represents the present plaintiff. The latter facts are in short these:

Immediately after the resolution to pave was adopted by the city and the bid of the Bitulithic Corporation accepted, M. V. Evenson and other taxpayers and abutting owners brought suit in behalf of themselves and others similarly situated to enjoin the paving. The complaint stated in substance the same grounds as in this action. When the plaintiffs therein applied for a temporary injunction, a demurrer to their complaint was heard also. June 8, 1920, the court denied the application and sustained the demurrer. An appeal to this court was perfected, but was by stipulation dismissed "with prejudice." In February, 1921, the same attorney, in behalf of Oen Mercantile Company, began a suit against defendants substantially in the same form as in the Evenson and the present cases. It was set for trial June 30, 1921, but when reached the plaintiff, against defendants' objection, dismissed the suit, and on the same day started the present action. As soon as the intervener herein served the complaint of intervention, he

obtained an order to show cause why a temporary injunction should not issue. When this came up for hearing the court was requested by intervenor and defendants to hear the cause on the merits. This was done over the objections and protests of plaintiff. The court concluded that there had been an effort to delay an adjudication, heard the evidence, and made findings, in substance, holding valid all steps taken in ordering the pavement and executing the contract for the improvement.

The intervenor appealed from the judgment entered on the findings, and joined with defendants in a request for a speedy hearing. Plaintiff has taken a separate appeal. He was given the opportunity to submit his appeal with intervenor's, or to file a brief as *amicus curiæ*. He chose the latter. We remark here that no assignments of error not available to the intervenor can be urged by plaintiff as *amicus curiæ*, such as the ones that the court could not hear the cause on its merits on the motion for a temporary injunction, for intervenor requested that be done; or that there was error in dismissing plaintiff's complaint on the merits, for that does not affect intervenor. It is patent that there has been an effort to prevent the contemplated pavement by protracted litigation. It is also clear that intervenor came in to block such effort. We need say no more about the tactics pursued, or intervenor's standing in court, except that the intervention is unquestionably proper. Intervenor occupies the same relation as plaintiff to the proposed paving, and stands to lose or gain by a determination of the issues tendered by plaintiff's complaint.

[1] The main point relied on by intervenor for a reversal is that the mayor acted prematurely when he approved the resolution ordering the pavement laid. If this resolution is invalid, no subsequent action of the city council or mayor could give authority to proceed with the paving. The resolution was passed by the city council on March 19, 1920, and the approval was dated March 23d. The following sections of chapter 8, Laws 1895, are pertinent:

"Every ordinance, order and resolution shall, before it takes effect, be presented to the mayor for approval. If he approves he shall sign the same, but if he disapprove it, he shall return it to the city council with his objections thereto." Section 59.

"No ordinance, order or resolution shall be signed by the mayor within four (4) days after the same is presented to him, and if the same shall not be returned by him on the tenth (10th) day (Sunday excepted) after it shall have been presented to him, it shall have the same force and effect as if approved by him." Section 61.

"The city clerk shall indorse upon each such ordinance, order and resolution the time when the same was delivered to the mayor, and the

time when it was returned to his office by the mayor." Section 62.

The approval of the mayor was premature. If section 61 be mandatory, the approval was nugatory, and of no more effect than if some other person had undertaken to sign an approval thereon. There was then not a return of the resolution, either duly approved or vetoed within ten days after its presentation, and it thereupon became effective under the last clause of the section. That the resolution was presented to the mayor is indicated by his signature thereon, even though it has not the legal effect of an approval. The failure, if such there be, of the city clerk to comply with section 62, could not invalidate the resolution. After the resolution was presented to the mayor, he could prevent or hinder its taking effect only in one way, by returning it vetoed within ten days. That alone would have given rise to further action by the council. The law should not be so construed that by a premature approval of an ordinance or resolution and returning it within the ten days from its presentation a mayor could effectively tie the hands of the city council on the proposition, for such a premature approval cannot be held a veto.

[2] The court rightly excluded proof offered that the improvement was undertaken when prices therefor were the highest. There was no averment nor offer of proof that the city council members were actuated by improper motives or exercised their judgment arbitrarily.

[3] That the official charged with the duty of assessing the cost to the abutting property intends to adopt some method that appellant considers illegal cannot be a ground for injunctive relief now. The law provides for a hearing when the time arrives for making the assessment. Chapter 65, Laws 1919. There is an adequate remedy at law, and the objection here made is premature.

[4] That the financial condition of the city is not a material issue in this action seems to follow from the decision in *Pike v. City of Marshall*, 178 N. W. 1006, for the abutting property owners and not the city will ultimately pay nearly the whole of the cost. That decision also determines adversely to appellant other grounds alleged in the pleading for relief.

[5] It is intimated that the direction or order to the city clerk, found in the minutes of the council meeting of February 24, 1920, to publish the notice to property owners that the meeting of March 19, 1920, would be held to consider and determine whether this paving should be done, invalidated all subsequent proceedings, because such direction or order was not approved by the mayor. This so-called order does not come within the meaning of the words "ordinance, order or resolution" in the sections above cited. It

is a mere direction to an agent or officer of the city to do a ministerial or administrative act. *Fairchild v. City of St. Paul*, 48 Minn. 540, 49 N. W. 325.

Judgment affirmed.

MAXWELL v. MAXWELL et al. (No. 21427.)

(Supreme Court of Nebraska. July 20, 1921.)

(Syllabus by the Court.)

1. Appearance $\S$ 9(3) — Pleading of matter amounting to demurrer is general appearance.

Where, in a motion to quash the service of summons upon him, a defendant pleads matter amounting to a demurrer to the petition, his appearance is general and the court has jurisdiction of his person. *Bankers' Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484, followed.

2. Conversion $\S$ 19(2)—Devise to wife for life, with direction for sale at her death, worked equitable conversion as of testator's death.

A testator devised and bequeathed real estate and personality in this state to his wife for her life, directing that, at her death, all the property be sold and the proceeds divided equally among his children. *Held*, that the direction to sell worked an equitable conversion of the real estate into personality at the time of the testator's death.

3. Divorce $\S$ 249(3)—Undivided remainder in property held not in custodia legis to prevent its being awarded as alimony.

Where an unambiguous will, by the terms of which the real estate thereby devised becomes equitably converted into personality, has been admitted to probate without objection, and the estate thereby conveyed has been fully ascertained and inventoried by the executor, and all debts have been paid, and administration has been fully completed except final distribution, which is delayed only by the existence of the life estate, an undivided remainder in the estate is not in the custody of the county court so that the district court may not award it to the wife of the remainderman in a suit by her for divorce.

4. Divorce $\S$ 249(3) — In suit for divorce, court may award to wife property in which her husband had remainder.

Under such circumstances and conditions the court, upon granting a divorce to an innocent wife, has power to award to her the husband's undivided interest in remainder, in appropriate proceedings in which the property is fully identified and the court has jurisdiction of the parties.

5. Death $\S$ 4—Presumption of death held unwarranted.

Evidence examined, and *held* that, under the facts and circumstances, the presumption of death from seven years' continued absence did not arise.

(Additional Syllabus by Editorial Staff.)

6. Divorce $\S$ 252 — Undivided remainder in realty directed to be sold is equitably converted into "personal estate," authorizing award to wife on divorce.

The words "personal estate," as used in Rev. St. 1913, $\S$ 1584, authorizing an award to an innocent wife, on divorce, of part of the husband's personal estate, is one of wide signification, and embraces everything, not real estate, which has an exchangeable value, or goes to make up one's wealth or estate, and includes an undivided interest in remainder in real estate under a will directing sale and division of proceeds on death of the life tenant, thereby working an equitable conversion into personality.

Appeal from District Court, Dodge County; Button, Judge.

Action by Mae H. Maxwell against Jacob A. Maxwell and Henry E. Maxwell, as executor of the last will and testament of Samuel Maxwell, deceased, and trustee for Jacob A. Maxwell. From a judgment for plaintiff, defendant Henry E. Maxwell appeals. Affirmed.

Morsman & Maxwell, of Omaha, for appellant.

Abbott, Rohn & Robins, of Fremont, for appellee.

CAIN, C. On September 1, 1918, the plaintiff, Mae Maxwell, filed her petition in the district court for Dodge county, Nebraska, against her husband, Jacob A. Maxwell, and Henry E. Maxwell, as executor of the last will of Samuel Maxwell, deceased, and trustee of the estate. The object of her suit was to obtain a divorce and the custody of their two minor children, and to have awarded to her the undivided one-ninth interest of her husband in the estate of his deceased father, Samuel Maxwell, which was alleged to be in the possession and under the control of the defendant Henry E. Maxwell as executor and trustee. The defendant husband did not appear, and trial was had to the court upon plaintiff's petition and the answer thereto of Henry E. Maxwell. The court found in plaintiff's favor, granting her a divorce and custody of the minor children, and assigned and awarded to her the undivided one-ninth interest of her husband in the estate of his father. The defendant Henry E. Maxwell alone appeals.

The points argued in appellant's brief and relied upon by him for a reversal may be conveniently stated as follows: (a) That the lower court erred in overruling his special appearance and motion to quash the service of summons made upon him in Douglas county. (b) That as the will of Samuel Maxwell gave his widow, Elizabeth A. Maxwell, a life estate in all his property, and directed that upon her death all the property should be

sold and converted into money, an equitable conversion thereof took place upon the testator's death, and that it is now all personalty, and that as final distribution of the estate has not been made by the county court of Dodge county, where the administration is pending final distribution, the property sought to be awarded to the plaintiff in this suit is in custodia legis, and hence cannot be reached by this or any other process; that, on account of a possible conflict between the judgment rendered in this case and the judgment of the county court of Dodge county to be rendered on final distribution, he may be required to pay the money twice. (d) That there is no legal way by which the interest of the defendant husband in his father's estate can be reached by or awarded to plaintiff. (e) That the defendant Jacob A. Maxwell having been absent and unheard of for more than seven years, the legal presumption of his death obtains and defeats the suit.

Consideration of these questions requires a somewhat extended statement of the petition. On September 21, 1918, the plaintiff filed her positively verified petition against defendants, setting forth the following facts, which are sustained by the evidence, to wit: That she was married to the defendant Jacob A. Maxwell in Lincoln on November 23, 1898, and thereafter in 1906 they removed to Dodge county, where she has ever since resided; that plaintiff and her husband resided together in Fremont until April 9, 1911; that three children were born to them, one a daughter who is now of age, another daughter 16 years of age, and a son 14 years of age; that these children have resided at Fremont with their mother at all times since April 9, 1911, on which latter date the defendant husband, being then an able-bodied man of the age of 43 years, deserted and abandoned plaintiff and his children, and ever since has been willfully absent from them without just cause or excuse and has not contributed to their support; that after her husband's desertion plaintiff secured employment as a clerk in a local store, and for the seven years next before the filing of the petition has by her earnings wholly supported and maintained herself and the children, and that the whereabouts of the defendant husband has been unknown to her ever since his departure, notwithstanding that she has made investigation and inquiry to ascertain the same. As bearing upon the interest of her husband in his father's estate, the plaintiff in her petition further alleged that Samuel Maxwell, father of her husband, died testate on February 11, 1901, a resident of Fremont, in Dodge county, and seized of real and personal property; that by his will, after making certain specific bequests, he gave and bequeathed all the residue of his property to his widow, Elizabeth A. Maxwell, for life, and directed that on her death the es-

tate be sold and converted into cash and distributed in equal shares to his nine children, of whom the defendant Jacob A. Maxwell is one; that said will was duly admitted to probate in the county court of Dodge county, Nebraska, in the year 1901, and the defendant Henry E. Maxwell, the executor named therein, was duly appointed and qualified as such executor; that due notice to creditors was given and all claims barred and all debts and charges paid. The petition further avers, and there is some evidence tending to support the averment, that Henry Maxwell, more than ten years before the commencement of this action, fully completed the administration of the estate except final distribution, and that at about that time it was mutually agreed between him and the other heirs that he should continue in possession and control of the assets of the estate, paying the widow an allowance from the income thereof, and on her death convert the property into cash as provided by the will; that, while defendant Henry E. Maxwell continues in his office as executor of the estate, he does so as trustee of the property for the widow and children; that there is now in his hands more than \$20,000 in cash, mortgages, and other securities, together with 260 acres of land in Cass county and 22 acres in Dodge county, Nebraska, which are fully described in the petition and of which the testator died seized. The petition further alleges that the value of the one-ninth interest of the defendant Jacob A. Maxwell in the estate is \$10,000, and that plaintiff has no property whatever for the support and maintenance of herself and children. There were other allegations upon which to found an injunction against the defendant executor disposing of any of the property. Plaintiff prayed for an absolute divorce, custody of the minor children, and that the court award and decree to her the undivided one-ninth interest and share of Jacob A. Maxwell in the estate of Samuel Maxwell, deceased, for the support and maintenance of herself and minor children and as alimony and as her distributive share of the property of her husband, and that the defendant executor be required to answer as to the property of defendant Jacob A. Maxwell in his possession and be ordered and directed to pay over to plaintiff on the death of the widow, Elizabeth, one-ninth part of said estate, and be perpetually enjoined from delivering or surrendering the same to Jacob A. Maxwell, or any one other than the plaintiff; and that notice be given to defendant Henry E. Maxwell, and for other relief. The widow, Elizabeth, is still living.

Upon the filing of this petition a temporary restraining order was granted by the court enjoining the defendant Jacob A. Maxwell from collecting, receiving, or assigning any part of his undivided interest, and also ordering that a copy of the order, together with

a copy of the petition in the cause, be served upon the defendant Henry E. Maxwell, which was done on February 26, 1919. On February 18, 1919, another order was entered enjoining the appellant from delivering or surrendering to Jacob A. Maxwell or to any one else any part of the undivided one-ninth interest. On March 24, 1919, Henry E. Maxwell, the appellant, filed a motion to quash the service of the summons made upon him by the sheriff of Douglas county, and objecting to the jurisdiction of the court over his person. The grounds of this motion were that the summons was issued and served without authority of law, and is null and void, and that the appellant then was, and for more than 30 years theretofore, had been a resident of Douglas county, and at no time a resident of Dodge county. Then follows the fourth ground of the motion, which is as follows:

"That the allegations of the plaintiff's petition herein show on their face that the will of said Samuel Maxwell, deceased, worked an equitable conversion of his real estate into personalty at his death, and that the legal title to the whole of said estate is vested in this impleaded defendant as executor of said will, subject to the life estate of Elizabeth A. Maxwell, until the final settlement of said estate and distribution thereof, pursuant to the terms of said will."

[1] On May 10, 1919, this motion was overruled, and on May 15, 1919, plaintiff filed a motion and affidavit for service by publication on the defendant Jacob A. Maxwell and an order for such service was made on the same day. On June 6, 1919, proof of publication of the notice was filed. It will be borne in mind that the summons was served upon the defendant Henry E. Maxwell in Douglas county on February 26, 1919, and that application for service by publication upon the defendant Jacob A. Maxwell was not made until May 15, 1919. Appellant contends that the service was invalid and the issuance of the summons unauthorized for the reason that the action under section 7580, Rev. St. 1913, could not be deemed to be commenced or brought until the date of the first publication of the notice, and hence that the action could not be deemed "rightly brought" under section 7627, Rev. St. 1913, at the time the summons was issued. In a word, appellant contends that the summons was prematurely issued and the service thereof should have been quashed. On the other hand, appellee contends that, as plaintiff was a resident of Dodge county, and the action was one for divorce, under section 1567, Rev. St. 1913, the action was rightly brought within the meaning of section 7627 on the filing of her petition, and, under the authority of *Eager v. Eager*, 74 Neb. 827, 105 N. W. 636, 107 N. W. 254, holding that the district court may send its original process to any part of the state unless restricted by statute, that the court's

order of September 21, 1918, directing that service of summons be had in Douglas county upon the defendant Henry E. Maxwell was a valid order in the exercise of the court's original powers as a court of equity. We, however, do not think it necessary to discuss these respective contentions for the reason that we have come to the conclusion that the motion to quash the service invoked the powers of the court on the merits of the controversy and constituted a general appearance, thereby waiving all defects.

We have set out the allegations of the petition at some length as they are for the most part not seriously denied and are established by the evidence. The fourth ground of the motion to quash, which we have heretofore set out, in our judgment, amounted to a general demurrer to the petition. Referring to the allegations of the petition it invoked the legal proposition that the will, by directing the sale of the real estate, worked an equitable conversion of all the real estate into personalty at the time of the testator's death, and the legal title to which was vested in the defendant executor, subject only to the life estate of the widow, Elizabeth, until the final settlement and distribution of the estate, thereby putting the property beyond the reach of plaintiff's action. The necessary inference from these statements is that the petition failed to state a cause of action against appellant and, as to him, should be dismissed. It is true that no dismissal was asked, but it is likewise true that none is asked by a general demurrer. We are convinced that the moving defendant entered upon the merits of the controversy in assigning his fourth ground, which brought him within the rule of this court as constituting a general appearance. *Bankers' Life Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484, was a case in many respects very similar, and the remarks of Sullivan, Judge, in that opinion are peculiarly applicable to this case. The rule there laid down is as follows:

"If a defendant invoke the judgment of the court in any manner, upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general."

This rule is supported by other decisions of this court: *Lillie v. Modern Woodmen of America*, 89 Neb. 1, 130 N. W. 1004; *Rakow v. Tate*, 93 Neb. 198, 140 N. W. 162. Unless the appellant intended to invoke the powers of the court by the fourth ground of his motion and secure a dismissal of the action as to himself, it was meaningless or surplusage. We hold that it was an entry upon the merits of the case, and therefore constituted a voluntary general appearance, and that there was no error of the lower court in overruling the motion. After appellant's motion to quash was overruled, he filed an answer, ap-

peared at the trial, cross-examined plaintiff's witness, and even testified himself.

[2] The will of Samuel Maxwell contained the following:

"On the death of my beloved wife all my estate of every name and kind shall be sold and the proceeds thereof divided equally among my children"

—and appellant contends that this provision worked an equitable conversion of the real estate into personalty at the time of the testator's death. In this we think appellant is right. *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751; *In re Estate of Willits*, 88 Neb. 805, 130 N. W. 757, 33 L. R. A. (N. S.) 321; *Gotchall v. Gotchall*, 98 Neb. 730, 154 N. W. 243; *Coyne v. Davis*, 98 Neb. 763, 154 N. W. 547. And in this opinion we shall treat the undivided one-ninth interest as personalty.

[3] Appellant next contends that the property is in custodia legis, and, hence, "cannot be reached by attachment, garnishment, or other legal process," citing, among others, the cases of *Sturtevant v. Bohn Sash & Door Co.*, 59 Neb. 82, 80 N. W. 273, *Veith v. Ress*, 60 Neb. 52, 82 N. W. 116, and *Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424, 72 N. W. 588, in support of his contention. In the *Sturtevant Case* money was about to be paid to the clerk of the district court to be distributed under its decree, and this court held that it was in custodia legis, and, hence, not subject to garnishment process issued from the county court, citing the *Hier Case*, which we shall presently notice in support of its conclusion. In the *Veith Case* this court held that partnership property in the hands of a receiver was in the custody of the law and could not be reached by garnishment. The reason for the rule is well stated in the opinion in the *Hier Case* in the following language:

"The rule that personal property in custodia legis is not subject to attachment or garnishment was adopted for the protection of the officer, and to avoid collision of authority."

It must, we think, be conceded that, if the judgment of the district court in this case will conflict with any lawful judgment of the county court of Dodge county hereafter to be rendered on final distribution, this property is in custodia legis and beyond the reach of process in this case. But we do not think such a conflict of judicial authority legally possible. The disposition of the estate is definitely fixed by the terms of the will alone, and does not depend upon any possible order or judgment of the county court. The will is unambiguous, and has been duly admitted to probate without objection, and all parties have acquiesced in its provisions. There are no rival claimants and no creditors, and a complete inventory of the estate was made. Besides, this is a divorce action, and the judgment is merely for the purpose of fixing the

status of the parties to it and the wife's interest in the property. Appellant suggests the supposititious contingency of the death of Jacob A. Maxwell before the order of final distribution is made in the county court and before the order is made directing him to pay the one-ninth share in cash to the heirs. We do not think such an order within the range of lawful possibility, since the judgment of the district court, considered either as an enforced assignment of the husband's one-ninth interest to the wife or as an adjudication of her interest in his property, exhausts the fund and there would be nothing for the heirs to take. Every married man in this state holds his property subject to the inchoate interest of his wife therein, which interest comes into existence either upon his death or a divorce on any ground except the wife's adultery. His estate descends or is devised or bequeathed subject to this interest and, if it is the whole of a fund, as in this case, the heir takes no interest therein. If considered as an assignment or an appropriation, the result is that the husband will not die seised of it and the heirs have no interest. This sufficiently distinguishes the instant case from the cases cited. Our conclusion on this point is that this one-ninth interest is not in custodia legis within the meaning of the rule. There is, therefore, no possibility that appellant will have to pay this money twice.

[4] Appellant next contends that there are no legal means whatever by which this undivided interest of Jacob A. Maxwell can be reached and appropriated to the support of his wife and children, and suggests that the only way by which this judgment may be sustained is by judicial legislation, but we think his contention is without merit. Section 1584, Rev. St. 1913, is as follows:

"Upon every divorce from the bonds of matrimony for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, from any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case."

[6] It will be noted that the foregoing section expressly empowers the court, upon granting a divorce where the wife is innocent of adultery, to award her "personal estate of the husband." We think the undivided one-ninth interest of the husband is personal estate within the meaning of the section quoted, and that, under it, the court had jurisdiction to award it to the plaintiff. The term "personal estate" is one of wide signification and includes everything, not real estate,

which has an exchangeable value or goes to make up one's wealth or estate. 32 Cyc. 648; *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670. And, even if the defendant husband's interest were regarded as real estate, the objection would still be unavailing, since section 1587, Rev. St. 1913, by clear, reasonable inference, authorized the court to award real estate of the husband to an innocent wife upon a divorce being granted, where the decree awards it to her in express terms. *Cizek v. Cizek*, 76 Neb. 797, 107 N. W. 1012, cited by appellant, relates solely to real estate, and, also, was decided before the enactment of section 1587, and, hence, has no bearing upon this case.

In *Gaster v. Estate of Gaster*, 92 Neb. 6, 11, 137 N. W. 900, 902, this court said with reference to section 1587, Rev. St. 1913;

"The amended section leaves it to the discretion of the court to award to the innocent party a share or interest in the real estate of the guilty party."

In *Rhoades v. Rhoades*, 78 Neb. 495, 111 N. W. 122, 126 Am. St. Rep. 611, this court held that an innocent wife could maintain an action for alimony, where she sought merely the appropriation of real estate of her husband, upon service by publication, and further held as follows:

"Service by publication is authorized by section 77 of the Code in an action by a wife for alimony and support of her child against the husband, who deserted his family and became a nonresident of the state, where the only relief sought is the appropriation of the real estate of the husband, situated in the county where the action is brought, to the payment of the amount that should be allowed for such alimony and support. Such an action is substantially one in rem, and the court has jurisdiction upon the completion of the service by publication to decree the relief sought.

"In such an action, residence of the wife in the county where the property of the husband is situated is not required."

In re *Estate of Strahan*, 93 Neb. 828, 142 N. W. 678, this court held:

"Under the present law the interest of the wife in the personal property of her husband is similar to that of a silent partner."

In *Hays v. Hays*, 75 Neb. 728, 106 N. W. 773, this court said:

"Where a court has jurisdiction of the parties, its authority to grant a divorce carries with it authority to adjust the property rights of the parties with respect to personal property within its jurisdiction."

It is too firmly established in the jurisprudence of this state to be questioned that in a divorce suit, where the court has jurisdiction of the parties, it has power to adjust all their respective property interests.

The case of *Catton v. Catton*, 69 Wash. 130, 124 Pac. 387, is much like the instant

case in this respect. In the *Catton Case*, the wife brought an action for divorce in King county, seeking to appropriate certain real estate in Grant county and other real estate and personal property in Pierce county. Defendant transferred his Pierce county property to a third person and some of his property was taken under execution. By supplemental bill plaintiff brought in the transferees and the sheriff who held the execution to restrain them from disposing of the property. The decree granted the wife a divorce, found the transfers fraudulent and void, and awarded the wife certain of the property. The Washington statute is similar to our own, and the court in sustaining the decree said:

"The disposition of the property of the parties is an incident to the divorce. Where the property is brought into the action by description, the court thereafter acquires jurisdiction over it. Otherwise it would be necessary to bring an action in each county where the parties may have property. This was not the intention of the statute. Section 204, Rem. & Bal. Code, which provides that actions for possession of, or affecting the title to, real estate shall be commenced in the county where the subject of the action is situated, clearly does not apply to divorce actions, because the residence of the plaintiff determines where such action shall be brought. The superior court of King county, therefore, had jurisdiction over the property of the parties in Pierce county."

In *Wesner v. O'Brien*, 56 Kan. 724, 44 Pac. 1090, 32 L. R. A. 289, 54 Am. St. Rep. 604, the court sustained a judgment rendered on constructive service which appropriated land in that state of a nonresident defendant for his wife's alimony though the land was not situated in the county where the action was brought and no step was taken to bring the property within the control of the court other than the commencement of the suit and publication of the notice. The court said:

"A seizure of land in such a case is little more than a form. The essential matter is that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice which warns the defendant that one of the purposes of the proceeding is the sequestration of the land. It refers interested parties to the petition, in which the land is definitely described, and wherein it is asked that the land be set apart as alimony. A formal seizure is no more essential to the jurisdiction of the court in a proceeding of this kind than in an action to quiet title to land based alone on constructive service."

We think this reasoning conclusive. In the instant case, both the petition and the published notice set forth the purposes of the action with particularity, definitely described and identified the property sought to be appropriated, referred to the will of Samuel Maxwell and its probate, and that it directed the property devised thereby and

described in the petition to be sold upon the death of the widow and the proceeds to be divided equally among the nine children, of whom the defendant husband was one. We think this sufficient to bring the undivided one-ninth interest of the defendant husband within the jurisdiction of the court. Other cases on the subject are: *Twing v. O'Meara*, 59 Iowa, 326, 13 N. W. 321; *Blackinton v. Blackinton*, 141 Mass. 432, 5 N. E. 830, 55 Am. Rep. 445; *Longbotham v. Longbotham*, 119 Minn. 139, 137 N. W. 887; *Thurstun v. Thurstun*, 58 Minn. 279, 59 N. W. 1017; *Sanford v. Sanford*, 5 Day (Conn.) 353.

[5] At the time of the trial in the lower court the defendant and husband had been absent and unheard of for about eight years, and from this fact appellant argues that the presumption of death must be indulged, which, of course, would bar the suit. In considering this proposition, it is necessary to refer to the evidence. The evidence shows that, when this husband left his wife and children on April 9, 1911, there were local pressing bills against him for the necessities of life; that plaintiff had told him that, if he could not make a living for the family, she could, but would not, make a living for him also; that she was on the point of writing appellant about the situation; that he had been working for Marshall Brothers, of Arlington, in the nursery business, and told plaintiff that he had \$500 coming to him from them, when, in fact, he was indebted to them to the extent of \$481, which appellant afterwards paid and charged against his distributive share of the estate; that he had been careless in his personal habits; that he left stealthily, leaving his team at Niobrara. After he left plaintiff secured a clerkship in a store and, ever since, has continuously worked for wages, and from her earnings, not only paid up the local bills, but supported herself and the children and educated them. Under these circumstances we think that there are reasons other than death to account for his continued absence and silence. It is quite possible that appellant cannot invoke the presumption of death as against the wife, but, for the purpose of this opinion, we assume that he can. The presumption of death does not obtain in every case of a person being absent and unheard from for a period of seven years. It depends upon the circumstances. In *McLaughlin v. Sovereign Camp*, W. O. W., 97 Neb. 71, 149 N. W. 112, this court said:

"The best authorities, with substantial unanimity, hold that whether seven years' continued absence from one's usual place of residence will raise the presumption of death must depend largely upon the circumstances and conditions of each particular case."

We hold that the circumstances and conditions of the instant case are sufficient to

rebut any presumption of death that might arise from the husband's continued absence and silence, and that it does not obtain. This seems too clear to require the citation of authorities, but they will be found in *L. R. A.* 1915B, 740 (*Modern Woodmen of America v. Ghromley*). Also, *Seeds v. Grand Lodge*, A. O. U. W., 93 Iowa, 175, 61 N. W. 411.

While there is no one here to challenge the sufficiency of the evidence to sustain the decree of divorce, we have nevertheless examined it and find that it is amply sufficient.

There is no error in the record, and the judgment of the district court is right, and we recommend that it be affirmed.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and this opinion is adopted by and made the opinion of the court.

Affirmed.

JOHNSON v. GERMAN. (No. 4870.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Judgment $\Leftarrow$ 160—Affidavit of merits aided by proposed answer held sufficient for vacating default judgment.

It is sufficient that affidavit of merits on motion to set aside a default judgment and for leave to answer the merits, while not complying strictly with the usual form, when taken with the proposed answer, contains enough to show that defendant believes that he has a meritorious defense, and that he is anxious to defend.

2. Appeal and error $\Leftarrow$ 957(1)—Judgment $\Leftarrow$ 139—No abuse of discretion in setting aside default.

There is no abuse of discretion in setting aside a default judgment and permitting answer and defense on the merits, for which alone the order will be disturbed on appeal, where immediately after commencement of the action defendant employed counsel and directed him to take all necessary steps, but pending unsuccessful negotiations for a settlement time to answer expired, without answer being filed.

Appeal from Circuit Court, Yankton County; R. B. Tripp, Judge.

Action by Israel Johnson against Roy German. From an order vacating default judgment, plaintiff appeals. Affirmed.

Howard Warren, of Yankton, for appellant.

H. A. Doyle, of Yankton, for respondent.

POLLEY, P. J. This is an appeal from an order vacating a judgment entered on default. The action was brought for the re-

covery of 14 pigs of which both plaintiff and defendant claim to be the owner. The summons and complaint, together with an affidavit and undertaking in claim and delivery, were served on the 4th day of December, 1920. The pigs were taken by the sheriff, but within the time allowed by law defendant furnished a redelivery bond, and the pigs were returned to him. Immediately after the commencement of the action defendant employed counsel and directed him to take charge of the case and take whatever steps that might be necessary to protect his rights. Some negotiations tending to bring about a settlement of the controversy took place, and an attempt was made to have the matter settled by arbitration, but without success. In the meantime the time for answering had expired, and judgment had been entered by default. Upon learning of the entry of judgment defendant promptly moved to set aside the judgment and for leave to answer. The failure to answer within the time prescribed by law was negligence, but it was negligence for which defendant was in no wise responsible, and under the circumstances above shown was excusable. The attempt to settle the case out of court and save the expense and delay of litigation appears to have been sincere on the part of defendant's counsel, and it was commendable under the circumstances.

[1] It is contended by appellant that the affidavit of merits is not sufficient. The affidavit does not strictly comply with the usual form used in such cases, but it, together with the proposed answer, contains enough to show that the defendant believes that he has a meritorious defense to the action, and that he is anxious to defend the same.

[2] It has repeatedly been held by this court that an order setting aside a default judgment and permitting a defendant to answer and defend on the merits will not be disturbed unless there has been an abuse of discretion by the trial court. Under the circumstances shown by the record in this case, we are of the opinion that there has been no abuse of discretion, and that the defendant ought to be given an opportunity to answer and defend in the action.

The order appealed from is affirmed.

MILLER v. SIOUX FALLS TRACTION SYSTEM. (No. 4689.) *

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Street railroads §103(3)—"Last clear chance doctrine" defined and held inapplicable.

The doctrine of last clear chance implies that plaintiff was negligent, that through such

negligence he was in a place of peril, and that the motorman discovered such peril in time so that by the exercise of ordinary care he could have avoided the accident; and therefore though defendant's motorman saw an automobile approaching the crossing, but had no way of knowing that the driver intended to drive onto the track in front of the car until he drove upon track, when it was too late to stop the car in time to avoid the accident, defendant was not liable; the motorman not having had actual knowledge of the driver's peril.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

2. Negligence §83—Knowledge of peril necessary under last clear chance doctrine.

Under the last clear chance doctrine, the defendant must have had actual knowledge of plaintiff's peril, and is not liable merely because he ought to have known thereof; the mere fact that he could have discovered the peril being insufficient.

Appeal from Circuit Court, Minnehaha County; L. L. Fleeger, Judge.

Action by L. D. Miller against the Sioux Falls Traction System. From judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Judgment and order reversed.

Boyce, Warren & Fairbank, of Sioux Falls, for appellant.

Parlman & Parlman, of Sioux Falls, for respondent.

POLLEY, P. J. Plaintiff brings this action to recover damages for injuries to his person and also injuries to an auto ambulance owned and driven by him, resulting from a collision with a street car owned and operated by the defendant in Sioux Falls. Plaintiff had judgment for substantial damages, and defendant appeals.

[1, 2] The plaintiff contends that he is entitled to recover under the doctrine of "the last clear chance," and the court instructed the jury upon this theory. This instruction was erroneous. There is no evidence to support this theory. The doctrine of "the last clear chance" implies negligence on the part of the plaintiff, and that through such negligence he was in a place of peril. It also implies that the motorman discovered plaintiff's peril in time so that by the exercise of ordinary care he could have avoided the accident. There is no evidence in the record to support any such theory. The motorman, assuming that he saw plaintiff as he approached the crossing, had no way of knowing that plaintiff intended to drive onto the track in front of the car, and plaintiff was not in peril until he did drive upon the track. But then it was too late to stop the car in time to avoid the accident. In *Herbert v. S. P. Ry. Co.*, 121 Cal. 227, 53 Pac.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied October 19, 1921.

651, the Supreme Court of California states the doctrine of "last clear chance" in the following language:

"Doubtless, notwithstanding the negligence of a plaintiff has put him in peril, yet if his danger is perceived by the defendant in time, so that by the exercise of ordinary diligence on his part injury can be avoided, the defendant will be held for the injury. But that is based upon the fact that a defendant did actually know of the danger—not upon the proposition that he could have discovered the peril of the plaintiff, but of the remissness on his part. Under this rule, a defendant is not liable because he ought to have known."

We believe this a correct statement of this doctrine. The facts shown by the record do not bring the case within this rule, and the instruction complained of is prejudicial to the appellant. *Twitchell v. Thompson*, 78 Or. 285, 153 Pac. 45; *Berry, Automobiles*, §§ 201, 202; *Underwood v. Oskaloosa Traction Co.*, 157 Iowa, 352, 137 N. W. 933.

The judgment and order appealed from are reversed.

WHITING, J., concurs in result.

**FREDERICK v. ROCK ISLAND SAV.
BANK et al. (No. 4374.)***

(Supreme Court of South Dakota. Aug. 31, 1921.)

Indians § 18—Conclusiveness of Secretary of Interior's decision of heirship of allottee stated.

Decision of the Secretary of the Interior, on hearing as to heirship, as to who were the heirs of an intestate Indian allottee, which U. S. Comp. St. § 4226, declares shall be final and conclusive, can be avoided, in an action to determine ownership of the allotted lands, only on the ground of fraud in procuring the decision, error of law, or absence of substantial evidence to sustain it.

Polley, P. J., dissenting.

Appeal from Circuit Court, Charles Mix County; Robert B. Tripp, Judge.

Suit by Mary Frederick against the Rock Island Savings Bank and others. From an adverse judgment, plaintiff appeals. Affirmed.

G. M. Caster, of Lake Andes, and E. E. Wagner, of Sioux City, Iowa, for appellant.

Stafford, Schoede & Stafford, of Rock Island, Ill., French, Orvis & French of Yankton, L. M. Gable, of Wagner, and C. M. Stillwill, of Sioux City, Iowa for respondents.

WHITING, J. This is a suit to determine the ownership of an interest in several tracts

of land in Charles Mix county. The lands in question were allotted to certain members of the Yankton Band of Sioux Indians under the general allotment act of February 8, 1887. The allottees died, and their interests were succeeded to by an Indian named Wahehe. All the parties hereto claim under Wahehe. Wahehe died leaving surviving him certain brothers and sisters and also heirs of a deceased sister. These parties were heirs at law of Wahehe. He also left surviving him an Indian woman known as Silver Woman. Plaintiff is a daughter of Silver Woman, and claims that, because of a marriage existing between her mother and Wahehe, at the time of his death, her mother became entitled to an interest in said land, and that upon the death of her mother such interest passed to her as her mother's sole heir.

In 1907 the brothers, sisters, and heirs of the deceased sister of Wahehe by their deed purported to sell and convey the whole of said allotments to defendants' predecessor in interest. It is undisputed that this deed conveyed whatever interest the grantors had in said lands. This deed was approved by the Secretary of the Interior. Upon findings of the trial court, it entered conclusions and judgment for defendants. The only question before us is whether the findings supported the conclusions and judgment.

The trial court found that in 1911 plaintiff instituted proceedings in the Indian Department, claiming that an error had been made in a previous ascertainment of the heirs of Wahehe. A hearing was had in the Indian Department, evidence was taken, and eventually a decision was rendered which was approved by the Secretary of the Interior. The substance of this decision was that Silver Woman was not the wife of Wahehe. A motion for a rehearing was filed on behalf of plaintiff, which motion was in 1916 denied.

By the act of June 25, 1910 (36 Stat. 855; U. S. Comp. St. § 4226), Congress provided:

"That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee-simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

That such act is constitutional, that the decision of the Secretary thereunder is conclusive and final, and that such decision can only be avoided upon the ground of fraud, error of law, or absence of substantial evidence to sustain it seems to be the settled law. *Dixon v. Cox* (C. C. A.) 268 Fed. 283, and cases cited therein. There is no claim that such decision was procured by fraud, and no showing of any error of law in such

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 22, 1921.

decision or any want of evidence to sustain it is made.

It matters not, therefore, that, as a matter of fact, the Secretary of the Interior may have erred in his decision. This court is now without authority to correct any such error even though the findings of the trial court in this action might be such as to satisfy us that the Secretary of the Interior erred and that Silver Woman was in fact the wife of Wahehe. It stands adjudicated for all time, so far as the title to this land is concerned, that appellant never had any interest therein. *Thompson v. Lake Madison Chautauqua Ass'n*, 41 S. D. 351, 170 N. W. 578.

The judgment appealed from is affirmed.

POLLEY, P. J., dissents.

STATE v. FRITZ. (No. 4886.)

(Supreme Court of South Dakota. Sept. 2, 1921.)

1. Rape $\S$ 41—Prosecutrix's testimony as to her own age competent.

In a prosecution for rape, prosecutrix's testimony as to her own age was competent and proper evidence.

2. Rape $\S$ 48(1)—Evidence of complaint admissible as corroborative testimony, if made within reasonable time.

In a prosecution for rape, evidence of the female's complaint, when not too remote in time, is admissible, not necessarily as part of the *res gestæ*, but as a circumstance tending to corroborate her testimony, if made within a reasonable time; the mere lapse of time after the injury not being the test of the admissibility of such evidence.

3. Rape $\S$ 48(1)—Surrounding circumstances considered in determining reasonable time for making complaint.

In determining what would be a reasonable time within which the prosecutrix in a rape case should have made complaint, so as to make evidence of complaint admissible, the surrounding circumstances should be considered.

4. Rape $\S$ 48(1)—Evidence of female's complaint made week after the crime held admissible.

Where, at the time of the commission of a rape, prosecutrix was a country girl of 15, working in the hayfield as a laborer at defendant's home, a complaint to a woman friend at the home of a neighbor on Sunday, a week after the offense, was made within a reasonable time, so as to render evidence of complaint admissible.

Appeal from Circuit Court, Campbell County; J. H. Botton, Judge.

Jacob Fritz was convicted of statutory rape, and from the judgment and an order denying a new trial he appeals. Affirmed.

Kirby, Kirby & Kirby, of Sioux Falls, for appellant.

Byron S. Payne, Atty. Gen., and A. H. Wells, State's Atty., of Mound City, for the State.

McCOY, J. From a conviction of the crime of statutory rape, defendant appeals.

[1] Error is first assigned in permitting the complaining witness to testify, over the objections of defendant, as to her own age. We are of the opinion that the testimony of the prosecutrix as to her own age was competent and proper evidence. 33 Cyc. 1473; *State v. Scroggs*, 123 Iowa, 649, 96 N. W. 723; *State v. McClain*, 49 Kan. 730, 31 Pac. 790; *Commonwealth v. Hollis*, 170 Mass. 433, 49 N. E. 632; *People v. Ratz*, 115 Cal. 182, 46 Pac. 915; *People v. Allison* (Cal. App.) 185 Pac. 992; *State v. Vinn*, 50 Mont. 27, 144 Pac. 773.

[2, 3] Over the objections of defendant the prosecutrix was permitted to testify that she made complaint as to the commission of said offense to a woman friend a week after the commission thereof. It is contended by appellant that such complaint was too remote to be competent evidence. In a prosecution for rape, evidence of the complaint of the female, when not too remote in point of time, is admissible, not necessarily as a part of the *res gestæ*, but as a circumstance tending to corroborate her testimony. The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of the evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. *Commonwealth v. Cleary*, 172 Mass. 175, 51 N. E. 746; *State v. Krantz*, 138 Minn. 114, 164 N. W. 579; *Pettus v. State*, 58 Tex. Cr. R. 546, 126 S. W. 868, 137 Am. St. Rep. 978; *Bailey v. Com.*, 82 Va. 107, 3 Am. St. Rep. 87; *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622; 1 Wharton, Crim. Law p. 917.

[4] It appears from the evidence that at the time of the commission of the offense complained of the prosecutrix was a country girl of the age of 15 years, who was working in the hayfield as a laborer at the home of appellant, and that the complaint was made to a woman friend, whom she met at the home of a neighbor on Sunday. We are of the view that under such circumstances, the complaint was made within a reasonable time. All other assignments of error have been considered.

Finding no prejudicial error in the record, the judgment and order appealed from are affirmed.

WHITING, J., not sitting.

HAMANN v. EGAN. (No. 4397.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

Exchange of property ¶8—Retention of money due to protect against a mortgage and a judgment held justified.

Where under contract of exchange of realty, defendant assumed a mortgage for \$20,000 and was to pay plaintiff \$4,500, but could retain what he had to pay in excess of liens amounting to \$20,000 against the land, he may retain part of the money agreed to be paid to reimburse for a payment in excess of the specified amount, and also to protect himself against an unpaid judgment for \$3,000, constituting a lien on the land.

Appeal from Circuit Court, Minnehaha County; John T. Medin, Judge.

Action by Ida Hamann against George W. Egan. From judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Kirby, Kirby & Kirby, of Sioux Falls, for appellant.

Boyce, Warren & Fairbank, of Sioux Falls, for respondent.

WHITING, J. Plaintiff seeks the rescission of an exchange of real estate. Findings and judgment of the circuit court were for defendant, and plaintiff has appealed from the judgment and an order denying a new trial.

The only thing assigned by appellant as ground for reversal is the insufficiency of the evidence to support certain of the findings. Much of appellant's argument is based on facts which she maintains the evidence supports. There being no record of any request for findings or any error assigned because of failure of trial court to make findings on matters not covered by the findings made, we are not concerned with what the court might have found.

The only ground for rescission alleged in appellant's complaint was fraud. The trial court found against appellant on this ground, and rightfully, as there was not a scintilla of evidence to support such charge. The most that could be claimed by appellant was that respondent had not fully carried out the terms of a contract fairly entered into. Respondent was to receive appellant's land subject to \$20,000 incumbrance. He was to pay appellant \$4,500 as the agreed difference in values of lands, but from this \$4,500 he was to pay off all excess of \$20,000 that there might be against the land he received. He has paid \$2,238.22, which the court found applicable on the \$4,500. Only a small part of this \$2,238.22 is questioned by appellant.

The evidence fully sustains the court's finding. The court also found that there was mortgage incumbrance of \$20,701.60 still against the land. This would leave \$701.60 to be deducted from the balance due appellant. We are of the opinion that \$200, of this \$701.60 is not chargeable against appellant, and that the trial court erred to this extent; but such error would not alter appellant's rights in this action. That which the trial court rightfully found justified respondent in withholding the balance of the \$4,500.00 was the fact that the title to the land received by him was beclouded by two lis pendens representing alleged liens against the land in a sum far in excess of the said balance. It appeared, upon the trial, but not before, that the judgment in one of the actions in which the lis pendens were issued had been paid; but it remained, as yet, an open question as to whether the judgment in the other action was a lien upon such land. Such judgment was for over \$3,000. Respondent was fully warranted in retaining the balance of the \$4,500 to pay off the \$501.60 mortgage incumbrance, and to protect himself against the above-mentioned judgment, especially as it appeared that he had brought an action to determine whether such judgment constituted a lien on the land.

The judgment and order appealed from are affirmed.

FIRST NAT. BANK OF NORTH YAKIMA, WASH., v. BLACK HILLS TRUST & SAVINGS BANK. (No. 4901.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

Bills and notes ¶86—Bank on promise to pay individual's draft did not become liable on draft drawn by company.

Where defendant bank wired plaintiff bank that it would pay drafts drawn by one George Posey, it did not become liable on a draft drawn by George T. Posey & Co.

Appeal from Circuit Court, Lawrence County; James McNenny, Judge.

Action by the First National Bank of North Yakima, Wash., against the Black Hills Trust & Savings Bank. From order sustaining demurrer to the complaint, plaintiff appeals. Order affirmed.

Buell & Denu, of Rapid City, for appellant. Martin & Mason, of Deadwood, for respondent.

WHITING, J. Appeal from an order sustaining a demurrer to a complaint. The complaint confesses the following facts: George

T. Posey & Co. was either a copartnership or corporation doing business in the state of Washington; the Black Hills Mercantile Company was a company doing business in the state of South Dakota; plaintiff was a banking corporation doing business at the same place as did George T. Posey & Co.; defendant was a banking company doing business at the same place as did the Black Hills Mercantile Company, which was one of its customers; the mercantile company ordered several car loads of apples from Posey & Co.; in order to enable the mercantile company to purchase these apples, defendant sent plaintiff a telegram to the effect that it would honor a draft on the mercantile company for the apples on their arrival, if the apples were as represented; to this plaintiff answered that it could not accept a conditional guaranty; defendant then wired plaintiff that it would pay drafts drawn by George Posey on the mercantile company for apples; relying upon this last telegram, plaintiff honored a draft drawn by George T. Posey & Co. on the said mercantile company, and forwarded same to defendant for collection; payment was refused by the mercantile company; plaintiff has been unable to collect of Posey & Co., which is insolvent; demand has been made upon defendant for the payment of the amount of such draft; and such payment has been refused.

Plaintiff, appellant in this court, contends, in support of its claim of liability on the part of respondent, that respondent's liability is the same as though the draft which respondent agreed to pay was a draft to be drawn on itself, and not on the mercantile company; respondent contends that the rule of liability is entirely different because of the fact that this was a draft drawn on a third party. Respondent also urges other grounds upon which it contends the ruling of the trial court was correct. We find it unnecessary to consider any ground urged on behalf of respondent, other than one which, to our minds, is conclusive on this appeal. Respondent wired that it would pay drafts drawn by George Posey. The draft that forms the basis of this suit was drawn by "George T. Posey & Co." Respondent never promised or guaranteed the payment of drafts drawn by such company.

The order appealed from is affirmed.

IN RE JACOBSON'S WILL. (No. 4891.)
(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Insane persons §33(1)—Petition and notice to incompetent person held necessary to give jurisdiction for appointment of guardian.

Under Rev. Code 1919, § 3505, providing that, when it is represented to any county court,

upon verified petition, that a person is mentally incompetent to manage his property, the judge shall cause notice to be given to the supposed incompetent, it is necessary to file a petition and have notice given to the supposed incompetent in order to give the county court jurisdiction for the appointment of a guardian.

2. Judgment §489—Decision may be attacked on account of lack of jurisdiction in any proceeding.

The decision of a court void because of lack of jurisdiction is a nullity, and may be attacked in any proceeding in which its validity is drawn into question.

3. Appeal and error §926(3)—Ruling of trial court presumed to be correct until contrary is shown.

In a case involving the legality of the appointment of a guardian for an incompetent person, where the order of the county court appointing such guardian was not set out in the record, it is presumed, in support of the ruling of the trial court in admitting evidence that there was no record showing the filing of a petition, that the order did not recite such filing.

4. Evidence §157(3)—Evidence of absence of records showing filing of petition for appointment of guardian held admissible.

Evidence, based on lack of records, of failure to file a petition in a proceeding to have a guardian for an incompetent person appointed, although negative, is competent.

Appeal from Circuit Court, Marshall County; Raymond L. Dillman, Acting Judge.

In the matter of the contest of the last will and testament of Carrie Jacobson, also known as Carrie Viken, deceased. From a judgment admitting the will to probate, and from an order denying a new trial, contestants appeal. Affirmed.

Van Slyke & Agor, of Aberdeen, for appellants.

M. J. Staven and Gardner & Jones, all of Britton, for respondent.

WHITING, J. One Carrie Jacobson died testate. Upon the offer of her will for probate, a contest was interposed. The county court admitted the will to probate, and contestants appealed to the circuit court, where in a new trial was had. That court also admitted the will to probate, and from its judgment and order denying a new trial this appeal was taken.

The only objection to the probate of the will that is relied upon on this appeal is based upon the alleged testamentary incompetency of deceased.

Were it not for a certain order of county court of this state, dated some six years prior to the execution of this will and in which a guardian for the person and property of testatrix was appointed, there would be lit-

tle for our consideration, as the evidence—other than such order—fully supported the finding of the court that “testatrix was of sound mind and was mentally and physically competent to make and execute her last will and testament.”

The order appointing a guardian was made when testatrix was over 80 years old, and recited that she was “unable, because of physical and mental feebleness, to guard her own affairs.” Section 88, R. C. 1919, provides:

“After his incapacity has been judicially determined, a person of unsound mind can make no conveyance. * * * But if actually restored to capacity, he may make a will, though his restoration is not thus determined.”

Appellants contend that, under the above statute, the burden was upon proponents to show that deceased, at time of executing the will, was “actually restored to capacity,” and also contend that the evidence is not sufficient to show that she was mentally any stronger when the will was made than at the time the guardian was appointed. This contention of appellants presents the question of whether an adjudication that one was “unable because of physical and mental feebleness to guard his own affairs” was a determination of “incapacity” under said section 88, and also the question—provided it must be assumed that such finding was one of incapacity under said section 88—as to whether the evidence was sufficient to overcome the presumption that one who was mentally incapable when over 80 years of age would remain so during the remainder of her life.

The trial court, over the objection that it was a collateral attack on the order of a court made in another proceeding, allowed proponent to show by the clerk of courts that there was no record showing that any petition for appointment of guardian ever had been filed in the proceeding wherein the above mentioned order was made. Proponent contends that: (a) If there was no proper petition, the order appointing a guardian was made without jurisdiction and was an absolute nullity; (b) that he had a right to attack such judgment in this proceeding; and (c) that, in support of such attack, he had a right to prove want of such petition.

[1] The statute under which a guardian for an incompetent could be appointed when this order was made is now section 3505, R. C. 1919, which provides:

“When it is represented to any county court, upon verified petition of any relative or friend, that any person is * * * from any cause mentally incompetent to manage his property, the judge must cause notice to be given to the

supposed * * * incompetent person of the time and place of hearing such petition, * * * and such person, if able to attend, must be produced before him on the hearing.”

It is only through the filing of the petition and the giving of the notice that the court can acquire jurisdiction in the particular matter. That an order made without jurisdiction is in fact a nullity is beyond question.

“Unless jurisdiction exist, the judgment is not due process of law.” 15 R. C. L. 842.

And, as stated in Van Fleet on Collateral Attack, § 16:

“The oath of all officers, executive, legislative, and judicial, compels them to disregard it.”

[2] It is also the settled law that the decision of a court not having jurisdiction, being void, may be attacked in any proceeding in which a person seeks to assert a right under such pretended adjudication; it may be attacked in any suit in which its validity is drawn in question. 15 R. C. L. 843.

[3] But there is much conflict in the authorities as to the right, on such an attack, to introduce record or other proof, outside of the judgment itself, to establish the lack of jurisdiction of a court of general jurisdiction. It is not necessary for us to go as deeply into this subject as we might otherwise be required to do, owing to the condition of the record before us. The order appointing the guardian is not set out in full in the record. Every presumption in favor of the ruling of the trial court must be indulged in. We are not called upon to decide whether a recitation of jurisdictional facts contained in a judgment can be questioned by parol. The appellant not having furnished us with a copy of such order, we will assume that it contains no recitals as to the filing of a petition and the giving of a notice. There was therefore, at best, the mere presumption, unsupported by any record proof, that the court acquired jurisdiction to make the order.

[4] Upon the other hand, there was evidence, negative in its nature, but based upon the records, or rather lack of records, sufficient to warrant the trial judge in finding as a fact, and we must presume he did find, that no petition was ever filed. Such evidence was competent and was properly received. *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149.

We have considered all the assignments of error, and find none not discussed herein that presents anything which, if error, should affect the decision of the trial court.

The order and judgment appealed from are affirmed.

STATE v. DOLL (No. 4873.)

(Supreme Court of South Dakota. Sept. 2, 1921.)

Criminal law ¶1206(4), 1218—Under statute permitting both fine and imprisonment, fine may be coupled with either penitentiary or county jail sentence.

Under Rev. Code 1919, § 4081, making manslaughter in second degree punishable by imprisonment in state penitentiary not more than four years, or in a county jail not exceeding one year, or by a fine, or by both "such" fine and imprisonment, such fine may be coupled with either penitentiary or county jail sentence, insertion of the word "such" working no change in the law embodied in Penal Code of Dakota 1864-65, § 259, Pen. Code 1877, § 261, Comp. Laws 1887, § 6461, and Rev. Pen. Code 1903, § 265, from which the word was omitted, though contained in the draft of the Field Penal Code proposed by the New York commissioners in 1864, and adopted by the Dakota Legislature in 1865.

Appeal from Circuit Court, Pennington County; Walter G. Miser, Judge.

Charles Doll was convicted of manslaughter in the second degree, and he appeals. Affirmed.

Robert C. Hayes and John T. Heffron, both of Deadwood, for appellant.

Byron S. Payne, Atty. Gen., and E. R. Winans, Asst. Atty. Gen., for respondent.

GATES, J. Defendant was convicted of the crime of manslaughter in the second degree, and was sentenced to imprisonment in the penitentiary for the period of four years and to pay a fine of \$1,000. He appeals from the judgment and asks that it be modified by striking out the fine. Section 4031, Rev. Code 1919, reads as follows:

"Every person guilty of manslaughter in the second degree is punishable by imprisonment in the state penitentiary not more than four years, and not less than two years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

It is the contention of appellant that the imposition of a fine may only be coupled with a county jail sentence, and not with a penitentiary sentence. The basis of his argument is the change made by the code commission of 1919 in inserting the word "such" in the clause "or by both such fine and imprisonment." Beginning with Penal Code of Dakota 1864-65, § 259, and in Penal Code 1877, § 261, Comp. L. 1887, § 6461, and in Rev. Pen. Code 1903, § 265, the word "such" was omitted, although it was contained in the draft of the Field Penal Code proposed by the New York commissioners in December,

1864, which was adopted by the Dakota Legislative Assembly on January 11, 1865.

To our minds there has been no change in the law by the insertion of said word "such." It has at all times been the legislative intent that the fine might be coupled with either the penitentiary sentence or the county jail sentence. Such is clearly the legal as well as the grammatical construction of the section. The judgment is affirmed.

WHITING, J., not sitting.

SHEFFIELD v. MODERN WOODMEN OF AMERICA (GILLETTE et al., Interveners). (No. 4857.) *

(Supreme Court of South Dakota. Aug. 31, 1921.)

Insurance ¶784(2) — Beneficiary designated in application for issuance of new certificate held not entitled to recover on member's death prior to cancellation of old certificate.

The by-laws of a beneficiary association prohibited the designation of beneficiaries in the alternative, made a niece not a blood relative within the first degree ineligible, and provided that no change in beneficiary should be effective until issuance of new certificate. The society refused a member's request for cancellation of an old and issuance of a new certificate to the member's sister or niece on the ground that the beneficiaries were named in the alternative, and that the niece had been named without tracing the relationship of niece and member back to a common ancestor. The member died before the old certificate had been returned. *Held*, that the member's sister could not recover under the rule that equity decrees that done which ought to have been done.

Appeal from Circuit Court, Moody County; L. L. Fleeger, Judge.

Action by Florence Sheffield against the Modern Woodmen of America, in which Maggie Gillette and others intervened. Judgment for plaintiff, and interveners appeal. Reversed and remanded, with directions.

Rice & Rice, of Flandreau, and Brady, Robertson & Bonner, of Minneapolis, Minn., for appellants.

Frederick A. Warren, of Flandreau, and Bates, Johnson & Simons, of Sioux Falls, for respondent.

GATES, J. For many years prior to his death one James A. Gillette was a member of the defendant corporation, the Modern Woodmen of America, holding a \$3,000 benefit certificate payable at his death to his heirs at law. On July 12, 1918, he executed the following change of beneficiary on the reverse side of the certificate in accordance with the form prescribed by the society:

"I, James A. Gillette, the neighbor to whom this benefit certificate was issued, do hereby surrender and request the cancellation of this benefit certificate, and order that a new one shall be issued, in the amount of three thousand dollars, and shall be made payable to Florence Sheffield or Clara Louise Sheffield, who is related to me as sister and niece.

"James A. Gillette."

The certificate was forwarded by the local clerk of the society to the head office, where it was received on July 16, 1918. The insured died on July 18, 1918. On July 19, 1918, the head clerk returned the certificate to the local clerk with the following letter:

"Your letter of July 18th is received, inclosing Neighbor J. A. Gillette's request for change of beneficiary, for which I thank you. Much to my regret, the request is not acceptable owing to the fact that designations of beneficiaries in the alternative are not acceptable, under the society by-laws.

"I am, therefore, returning Neighbor Gillette's benefit certificate herewith, having attached to it a substitute request which please have him fill in and return at once.

"If Neighbor Gillette wishes to designate Miss Clara L. Sheffield as one of his beneficiaries in the substitute request, he should write a letter tracing clearly and definitely the relationship existing between them back to their common ancestor, as a niece is not eligible to be a beneficiary unless the relationship exists by blood and is not further removed than the first degree."

The niece, Clara Louise Sheffield, had been dead nearly five months prior to the death of insured.

In January, 1919, an action was begun by Florence Sheffield, whose true name is Flora Sheffield, against the defendant society for the recovery of the amount of the insurance under said benefit certificate and alleged substitution of beneficiary. The heirs at law were permitted to, and did, intervene, and served their complaint in intervention upon the society and upon plaintiff. The plaintiff answered. The society neither answered the original complaint nor the complaint in intervention, but made a formal appearance. Trial to the court without a jury. Judgment was entered in favor of plaintiff, from which the interveners have appealed.

The by-laws of the defendant corporation provide:

"No payment shall be made upon any benefit certificate to any person who does not bear the relationship as wife, surviving child, legally adopted child, heir, blood relative, or person dependent upon or member of the family of the member at the time of his death. * * *

"No change in the designation of beneficiary shall be effective until a new certificate has been issued by the head clerk and within the lifetime of the member. Any attempt by a member to change the payee of the benefits of his benefit certificate by will or other testamentary document, contract, agreement, assignment, or otherwise than by strict compli-

ance with the provisions of this section shall be absolutely null and void. Any agreement entered into by the member by the terms of which he attempts to assign the benefits or any portion thereof agreed to be paid under the certificate to any other person than the beneficiary designated in the certificate shall be absolutely void. * * *

"In case of change of beneficiary or beneficiaries, the liability of this society shall continue under the old certificate until the new certificate shall have been issued by the head clerk."

In *Stemler v. Stemler*, 31 S. D. 595, 141 N. W. 780, this court, after quoting the substance of the above by-laws, said:

"This was a contract the parties had a right to make, and in order to effect a change of beneficiary this provision of the contract must be substantially complied with. There was no delivery of the old certificate to the head clerk or issuance of a new one during the lifetime of the insured member, and the old certificate was therefore in full force and effect at the time of the death of the said insured, and the right of the plaintiff to the proceeds of said original benefit certificate immediately upon such death became vested in plaintiff."

It is clear that the alleged change in beneficiaries was not accomplished during the lifetime of the deceased in accordance with the rules of the order and contract of the parties, and, unless this case falls within the following exception to the rule, the court erred in entering judgment for the plaintiff.

In *Stemler v. Stemler*, *supra*, we further said:

"There is another class of cases that constitute an exception to the general rule, wherein the courts apply the equitable rule by decreeing that to be done which ought in equity to have been done. In cases where the insured has lost the original certificate, or where the original certificate is in the hands of some third party who will not or cannot deliver the same to the insured, he has been excused from making the actual surrender of the original certificate, and where, prior to his death, he has done everything within his power to comply with the requirements of his contract, where he has presented to the insurer the facts and requested the change of beneficiary prior to his death, and there remained nothing else to be done or that could have been done on his part, and nothing to be done on the part of the insurer except the issuance of the new certificate, under such circumstances the courts have decreed that that should be treated as done which should have been done, and held that the change of beneficiary had legally taken place, although, as a matter of fact, the new certificate had not been issued. *Holden v. M. B. A.*, *supra*. Respondent contends the case present falls within the exception to the general rule last mentioned. We are of the opinion that this contention is not tenable. In the cases falling within this exception, all those matters and things which require the insurer to act in the matter of issuing the new certificate must have been done, performed, and in existence, and brought to the attention

of the insurer prior to the time of the death of the insured, so as to place the insurer in the position where it ought to have issued the new certificate prior to the death of the insured. The time never arrived during the lifetime of Jacob Stemler, under the circumstances of this case, when the Modern Woodmen was required to or ought to have issued the new certificate, and the case at bar, therefore, is not within the exception to the general rule."

In order to justify the application of this equitable exception to the rule, we should be obliged to hold that the action of the company in refusing its assent to the application for change of beneficiary was arbitrary and capricious. When the insured submitted an ambiguous request for substitution of beneficiaries, it cannot fairly be said that he had done all that he could or should have done to effect the change. Consequently the groundwork falls upon which the equitable maxim rests, and the maxim has no application. We do not think the company acted arbitrarily in refusing to approve a substitution in the alternative. To have assented thereto would have constituted an invitation for litigation.

In *Kemper v. M. W. A.*, 70 Kan. 119, 78 Pac. 452, the court said:

"The contract ought to be sanctioned, as it makes certain who the beneficiary is and prevents complications and difficulties arising in determining the rights of conflicting claimants."

Neither do we think it arbitrary or capricious for the company to require a showing that, if a niece was to be made beneficiary, she must be a blood relative, and not a niece by marriage.

We are of the opinion that no reason is shown for bringing this case within the equitable exceptions to the rule, and that the decision in *Stemler v. Stemler*, supra, controls this case.

The judgment is reversed, and the cause is remanded, with directions to enter judgment against the defendant corporation in favor of interveners.

Costs will be taxed in this court and in the trial court in favor of interveners and against respondent.

WHITING, J., not sitting.

REHDER v. HANSEN et al. (No. 4750.)

(Supreme Court of South Dakota. Sept. 2, 1921.)

1. Appeal and error $\S$ 1002—Verdict on conflicting evidence conclusive.

A verdict of a properly instructed jury in a negligence case, based on conflicting evidence, will not be disturbed on appeal.

2. Trial $\S$ 178—Not directing verdict as to one defendant until after verdict as to other defendant improper as piecemeal submission of case.

In an action against the owner of an automobile and his son, the driver, for injuries to plaintiff, a passenger in another car, which was wrecked while the two were racing, procedure whereby the court withdrew the case from the jury as to defendant father, submitted it to the jury as to the other defendant, the son, and, after verdict in favor of the son had been returned, directed verdict in favor of the father, was improper as submitting the case piecemeal; if the court was of opinion there was no evidence against the father, it should have directed verdict in his favor.

3. Appeal and error $\S$ 1061(4) — Piecemeal submission of case not prejudicial to plaintiff.

In an action against the owner of an automobile and his son, the driver, for injuries to plaintiff, a passenger in another car, which was wrecked while the two were racing, improper procedure followed by the court in submitting the case to the jury piecemeal as to the two defendants, father and son, held not prejudicial to plaintiff, who, under the findings, was not entitled to recover against either defendant.

Appeal from Circuit Court, Charles Mix County; R. B. Tripp, Judge.

Action by Henry Rehder against Theodore Hansen and another. Verdict for defendants, and from an order denying his motion for new trial, plaintiff appeals. Judgment and order affirmed.

Caster & Cassidy, of Lake Andes, and A. B. Beck, of Geddes, for appellant.

F. B. Morgan, of Wagner, and C. M. Stillwill, of Sioux City, Ia., for respondents.

POLLEY, P. J. Plaintiff was injured in an automobile wreck on a public highway in Charles Mix county. He claims that the wreck was caused by the negligence of the defendants, and brings this action to recover damages for the injuries he sustained. The defendants denied that there was negligence on their part, and alleged that the wreck was caused by the negligence of the driver of the wrecked car.

The plaintiff was riding in a Ford roadster, which was owned and was being driven by James Buus. The defendant, Harold Hansen, was driving an Elgin Six that was owned by his father, Theodore Hansen, who is the other defendant, but who was not in the car at the time of the accident. Both cars were going in the same direction, with the Ford car ahead. The road at that particular place appears to have been practically level and fairly smooth, and there were two roadways, or tracks, some 8 to 10 feet apart and about parallel for some distance, then converging into a single track. The Ford car was on the left-hand track, while the

Elgin was on the right-hand track. The Elgin was trying to pass the Ford; the Ford was trying to keep ahead. Both cars seem to have been running to about the limit of their speed, and that both cars were running at a dangerously careless speed is clear beyond any question. The Elgin car gained on the Ford and finally passed it, at about the point where the two roadways joined. It appears that the ground along the left-hand side of the roadway was rough, or rutty, though it is not claimed that it was so rough as to be dangerous for a car passing over it at a reasonable rate of speed. The occupants of the Ford car testified that as the Elgin car passed the Ford it turned to the left into the roadway in front of the Ford car, or "cut in," as the witnesses stated, so that in order to avoid a collision the Ford car was compelled to turn out of the roadway to the left, and the instant the wheels encountered the rough ground the car turned over, and its occupants, including the plaintiff, were severely injured. The occupants of the Elgin car denied that their car "cut in" in front of the Ford car, or crowded it out of the track, and testified that there was no time when there was less than two feet of clear space between the cars, and that they had passed the Ford and were in the road ahead of it before the Ford car turned over. The defendant Harold Hansen, who was driving the Elgin was only 16 years old, and it is alleged in the complaint that he was careless, negligent, and incompetent to operate the said Elgin car, and that defendant, Theodore Hansen, was guilty of actionable negligence in permitting him to operate it.

At the close of the testimony, the court, without directing a verdict for the defendant Theodore Hansen, withdrew the case, so far as the said defendant was concerned, from the consideration of the jury.

In reply to certain special interrogatories, the jury found that at the time of the accident the Ford car was being driven in excess of 25 miles per hour, and that plaintiff acquiesced in such rate of speed. They found that the Elgin car was being driven at 40 miles an hour, and at the time of the accident it was 133½ feet from the Ford, and that the cause of the accident was contributory negligence. The jury returned a general verdict in favor of the defendant Harold Hansen, and the court then directed a verdict in favor of the other defendant. No judgment has yet been entered, but from an order denying his motion for new trial plaintiff appeals.

Appellant's assignments of error present various serious propositions of law that are argued in his briefs, but in our view a consideration of said matters is not necessary to a determination of the case. Under the allegations of the complaint and the evidence

as it appears from the record, appellant's right to recover depends upon the answer to the single question, Did the Elgin "cut in" in front of the Ford in such a way as to compel the Ford to turn out of the track to avoid a collision? Upon this question the evidence is conflicting, and the court instructed the jury as follows:

"If you find from the evidence that the Ford or Buus car was being driven in excess of 25 miles an hour, and that plaintiff, Rehder, concurred or acquiesced, express or implied, in its being so driven, and that fast driving was the cause of the accident, the plaintiff cannot legally recover, for the law does not sanction such driving.

"Or if you should find that the Buus car turned over some distance after the Elgin car had passed, and that the passing of the Elgin car in no way contributed to the accident, or the Ford car's being turned over, the plaintiff cannot recover even though you should find Harold passed the Buus car on the right side or was running at a rate of speed in excess of 25 miles an hour.

"But, on the other hand, if you find by a preponderance of evidence, that the facts are as contended by the plaintiff Rehder, that he was without fault contributing to the Ford car's turning over, and that the accident was due to the driver of the Ford car turning to the left in order to save them from Harold's cutting into them on the right, at a rate of speed in excess of 25 miles per hour, plaintiff would be entitled to recover."

[1] These instructions properly placed upon the plaintiff the burden of proving the allegations of the complaint, and the jury found that he had not sustained this burden, and this finding is conclusive upon the court. The verdict does not acquit the defendants of negligence, but it does find that the accident resulted from the negligence of the driver of the Ford car and not the negligence of the defendants. At the trial, a witness, who arrived at the scene of the accident immediately after its occurrence, testified that when the plaintiff was being removed from the wreck he said that, "This is our own damn foolishness." Plaintiff denied having made such remark, but whether he made it or not, it clearly describes the situation, and applies with equal force to all of the occupants of both cars.

[2, 3] One assignment is grounded upon the manner in which the trial court submitted the case to the jury. At the close of all the testimony the defendant Theodore Hansen moved for a directed verdict, on the ground that there was no evidence tending to prove that he had been guilty of any negligence. In reply to this motion the court addressed the jury as follows:

"Gentlemen of the jury, the case so far as relates to the father, Theodore Hansen, will be withdrawn from your consideration for the present."

The case was then submitted to the jury as to the other defendant. After the verdict in favor of Harold Hansen had been returned, the court directed a verdict in favor of the other defendant. This submitted the case to the jury piecemeal, and should not be countenanced. If the court was of the opinion that there was no evidence against the defendant Theodore Hansen, it was the duty of the court as a matter of law to direct a verdict in his favor, without waiting to see what the jury would do in regard to the other defendant, but in this case the appellant was not prejudiced by the course followed by the court, because, under the findings of the jury in reply to the special interrogatories, the plaintiff was not entitled to recover against either of the defendants.

The judgment and order appealed from are affirmed.

MCCAULL-DINSMORE CO. v. HEYLER.
(No. 4883.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Contracts $\S$ 10(4)—Requiring seller to deliver goods on buyer's order, without obligation on buyer's part to accept goods, void for want of mutuality.

A contract requiring the seller to sell and deliver goods when ordered by buyer, without requiring the buyer to accept or become liable for any portion of the goods, held void for want of mutuality.

2. Contracts $\S$ 10(4)—Void for want of mutuality for failure to obligate buyer to order goods became binding on buyer's order of goods.

A contract requiring the seller to deliver goods on buyer's order, which was void for want of mutuality for failure to obligate buyer to order such goods, became a valid contract on buyer's order of the goods, since by ordering the goods buyer bound himself to accept and become liable therefor.

3. Frauds, statute of $\S$ 129(8)—Acceptance and payment for goods took contract out of statute.

Buyer's acceptance of and payment for a portion of the goods took the contract out of the statute of frauds.

Appeal from Circuit Court, Brown County; Frank Anderson, Judge.

Action by the McCaull-Dinsmore Company against Harry G. Heyler. From a judgment for defendant, and from an order denying a motion for new trial, plaintiff appeals. Judgment and order reversed.

Geo. H. Fletcher and Ezra L. Baker, both of Aberdeen, for appellant.

McNulty & Campbell, of Aberdeen, for respondent.

POLLEY, P. J. Action to recover damages for failure to deliver a quantity of hay plaintiff claims defendant contracted to deliver. The trial court directed a verdict for defendant, and plaintiff appeals.

It is alleged in the complaint that during the month of November, 1919, plaintiff and defendant entered into a contract whereby defendant agreed to furnish to plaintiff such quantities of baled hay as plaintiff might require to supply its customers, until such time as defendant might notify plaintiff that he could supply no more. By the terms of the contract the hay was to be delivered on board the cars at Forbes, N. D., and at Summit and Beebe, S. D., at the following prices: At Forbes and Beebe, \$17.50, and at Summit, \$18, per ton. Relying upon this contract, plaintiff contracted to sell and deliver hay at various points in North Dakota and Montana in carload lots, and upon the sale of each carload placed an order for such hay with defendant. Defendant failed to deliver the hay when ordered, and plaintiff was compelled to purchase hay on the market to fill its orders, but at an advanced price, and this action is brought to recover the difference between the price at which defendant agreed to furnish the hay and the price plaintiff was obliged to pay on the market.

[1] Defendant's answer is a general denial, but his motion for a directed verdict was based upon the ground that there was no mutuality of agreement between plaintiff and defendant, and that the contract was within the statute of frauds and void because no part of it was in writing. As the contract originally stood, both these grounds were good; for the contract was wholly oral, and no part of the hay was delivered, nor any part of its purchase price paid at the time the contract is claimed to have been made. Neither was there any mutuality of agreement, for, while the defendant might have loaded the hay on the cars at the three stations mentioned in the contract, and tendered it to plaintiff in any quantity, still plaintiff was under no obligation to accept or become liable for any of it.

[2] But, to obviate these objections, plaintiff showed that after the making of the contract, and prior to the 26th day of November, 1919, plaintiff actually did order from defendant and direct the loading and shipment of 89 cars of hay at the prices specified in the contract; that on the said 26th day of November plaintiff and defendant had a conversation, in which defendant positively agreed to load and ship the said 89 cars of hay that had already been ordered by plaintiff. Under this agreement, if it was made,

plaintiff bound itself to accept and become liable for the said 89 cars of hay. This supplied the element of mutuality that theretofore had been lacking.

[3] To take the case out of the statute of frauds, plaintiff showed that after the agreement made on the 26th day of November, 1919, defendant did ship at plaintiff's direction 9 cars of hay. All of this hay, however, except 2 cars, was billed to plaintiff at prices materially higher than the prices that had been fixed by the alleged contract. All of these cars were accepted and paid for by plaintiff at the prices at which they were shipped. If these two cars were shipped pursuant to the said contract, it was such a part performance as took the case out of the statute of frauds.

The case should have gone to the jury upon three issues of fact: First, as to whether any contract at all had been entered into by plaintiff and defendant; second, as to whether the supplemental agreement, as claimed by plaintiff, which supplied the element of mutuality, was entered into on the 26th day of November; and, third, whether the 2 cars that were shipped were shipped pursuant to and as a part performance of the contract claimed by plaintiff.

The judgment and order appealed from are reversed.

FIRST NAT. BANK OF EGAN v. TAYLOR et al. (WALKIN, Intervener).*
(No. 4877.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

Appeal and error $\S$ 1011(1)—Findings on conflicting evidence not disturbed.

The trial court's findings of fact based on conflicting testimony not against the clear preponderance of the evidence will not be disturbed.

Appeal from Circuit Court, Day County; Frank Anderson, Judge.

Action by the First National Bank of Egan against A. I. Taylor, also known as Albert I. Taylor, and others, in which John Walkin intervened. From judgment for plaintiff and intervener, and order denying new trial, the defendants appeal. Judgment and order affirmed.

Parlman & Parlman, of Sioux Falls, for appellants.

Rice & Rice, of Flandreau, and Waddel & Dougherty, of Webster, for plaintiff and respondent.

Loucks, Hasche & Foley, of Watertown, for intervener and respondent.

McCOY, J. This action was instituted by plaintiff and also the intervener, as judgment creditors of Albert I. Taylor, defendant, to have certain real estate transfers and mortgages made by the said defendant Albert I. Taylor to the defendants John C. Taylor and Lottie Jennie Taylor set aside on the ground that such transfers and mortgages were made with the fraudulent intent and purpose of defrauding, hindering, and delaying the said creditors of the said Albert I. Taylor in the collection of their debts. The trial court made findings of fact and conclusions of law in favor of the plaintiff and the intervener. From a judgment in favor of plaintiff and intervener, and order denying new trial, the defendants appeal.

The vital question presented is the sufficiency of the evidence to sustain the findings of fact. The evidence is voluminous and quite conflicting, and it will serve no useful purpose to make a résumé thereof in this opinion. This appeal involves only questions of fact. On numerous occasions this court has held that it will not disturb findings of the trial court based on conflicting testimony. In this case the learned trial court saw and heard the witnesses testify, observed their demeanor on the witness stand, and gave such credence thereto as he deemed the same entitled. We cannot say that the findings as made are against the clear preponderance of the evidence. All assignments of error have been carefully considered.

Finding no prejudicial error in the record, the judgment and order appealed from are affirmed.

WHITING, J., not sitting.

CITY OF LEAD et al. v. WESTERN GAS & FUEL CO. (No. 4867.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

Municipal corporations $\S$ 690 — Irrevocable grant of franchise by municipal corporations held unconstitutional.

Under Const. art. 6, $\S$ 12, providing that no law making any irrevocable grant of privilege, franchise, or immunity shall be passed, and Const. art. 17, $\S$ 4, providing that the exercise of the police power shall never be abridged so as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state, the granting by a city of an irrevocable franchise for a term of years to a gas company to supply gas is invalid, and since the city is not bound by the franchise, neither is the gas company.

Appeal from Circuit Court, Lawrence County; James McNenny, Judge.

Suit by the City of Lead and others against the Western Gas & Fuel Company. From an order refusing an application of defendant to vacate an order appointing a receiver, and to require the restoration of its property, defendant appeals. Reversed.

John R. Russell and Rice & Wishart, all of Deadwood, and Adams, Follansbee, Hawley & Shorey, of Chicago, Ill., for appellant.

E. A. Steinback, of Lead, and Norman T. Mason, of Deadwood, for respondents.

GATES, J. The cities of Lead and Deadwood have been furnished gas by the defendant and its predecessors under franchise ordinances passed by those cities, the one a 20-year franchise from July, 1910; the other a 50-year franchise from January, 1914. In each ordinance the maximum rate of \$1.00 per thousand was fixed, or \$1.50 per thousand if paid within a certain time. In the spring of 1918 a temporary maximum rate of \$1.95 per thousand feet, or \$1.85 per thousand if paid within a certain time, was authorized by city ordinances to continue 18 months after the close of the World War and the consummation of peace.

On June 17, 1920, the defendant sent to the mayors of plaintiff cities the following telegram:

"The bondholders have operated the gas plant at Deadwood and Lead for several years at a loss hoping conditions would change; it is impossible for them to secure money to operate further, so will close down permanently July 1, 1920. If desired we will turn over the gas plant without charge to the cities of Deadwood and Lead to be operated by them at their own risk and expense until October 1st; property to be returned in as good condition as when taken over; you to pay us for unconsumed gas merchandise and fuel and supplies used. Collect bills payable July 1st for us. Kindly wire us your decision."

Plaintiff cities thereupon began this action to restrain defendant from ceasing the operation of the plant. A temporary receiver was appointed, who has since been in the operation of the plant. Defendant applied for an order vacating the appointment of the receiver and requiring the restoration of the property to it. Upon the defendant's showing, which was undisputed, the defendant had suffered a monthly loss from January, 1919, to the beginning of this action of from \$221.59 to \$1,998.77 in the operation of its plant, with the exception of one month, where the gain was \$218.92. The average monthly loss was nearly \$900. The appeal is by defendant from the order refusing such application.

The theory of respondent cities is that the franchise ordinances, which fixed the maximum rate allowed to be charged for gas, amounted to a contract which can be enforced even though by reason of changed

conditions the enforcement of it amounts to a confiscation of appellant's property. Respondents deny the right of appellant to discontinue operation of its plant, even though the franchise ordinances provide, as they do, that default by it for 30 days in compliance with the ordinances shall constitute a forfeiture of all its rights and privileges thereunder. They also contend that, even if the appellant had the right to discontinue the service of gas, they were entitled to a reasonable notice before such intent should be carried out, and that 13 days' notice thereof was not a reasonable notice.

The appellant contends that it is lawfully entitled to discontinue operation of its plant at any time, conceding that such discontinuance would operate as a termination of all its rights and privileges under the ordinances. It also denies the power of the respondent cities, under the law, to make a binding irrevocable contract fixing rates. It contends that the appointment of receiver was improvidently granted, and that mandamus or injunction would have been the remedy available to respondent cities.

It is conceded by appellant that clause 18 of section 6169, Rev. Code 1919, is the present provision of statute, which authorized respondent cities to fix the price at which gas should be sold, but it contends that such statute and the constitutional provisions herein cited do not permit the respondent cities to divest themselves for a definite period of their power to fix rates.

Section 12, art. 6, of our Constitution provides:

"No * * * law * * * making any irrevocable grant of privilege, franchise or immunity, shall be passed."

Section 4, art. 17, provides:

"The exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the state."

If by reason of these provisions there was no power in the Legislature to vest authority in municipal corporations to fix gas rates which should be irrevocable during a definite period, or if these constitutional provisions act directly upon the municipal corporations, the result is the same, and there would be no municipal authority to enter into such an irrevocable contract.

In *City of San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, 41 Sup. Ct. 428, 65 L. Ed. —, the late Chief Justice said:

"It follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate. Primarily the answer to that question must depend upon whether the ordinance of 1899, fixing the five-cent rate, was a contract.

That it was not, and could not be, we are of opinion is the necessary result of the provision of section 17, article 1, of the state Constitution, existing in 1899, prohibiting 'any irrevocable or uncontrollable grant of special privileges,' etc., when considered in the light of the irrevocable and uncontrollable elements which must necessarily inhere in the ordinance of 1899 to give it the contract consequence relied upon."

In *Southern Iowa Electric Co. v. City of Chariton*, 255 U. S. 539, 41 Sup. Ct. 400, 65 L. Ed. —, a case resting upon a statutory provision, "And these powers shall not be abridged by ordinance, resolution or contract," the Chief Justice said:

"The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state is urged by municipal corporations whose every power depends upon the state law."

In *City of Scranton v. Public Service Commission*, 268 Pa. 192, 110 Atl. 775, the court, after quoting a constitutional provision exactly like the above quoted portion from § 4, art. 17, said:

"But a municipality may not annex such terms to its consent as will deprive the commonwealth of its inherent police power to see that a street passenger railway company is not prevented from serving the public by the municipality's enforcement of conditions in a consenting ordinance that have become impossible of performance. What may have been a reasonable rate of fare at the time of the passage of a consenting ordinance may, under changed economical conditions, become confiscatory, and a street passenger railway company may not be able to serve the public on account of insufficient revenues, based upon the fare fixed in the ordinance. When such situation arises, as it has arisen and will arise again, there must be relief somewhere to the public, and it lies in the police power of the state, which is never to be abridged nor bartered away."

See, also, the opinion in *City of Mitchell v. Board of Railroad Commissioners*, 44 S. D. —, 184 N. W. 246. Handed down herewith.

It is very clear to us that we should follow the authorities above cited in the solution of the matter before us, and that in so doing it is clear that there was no contract as to gas rates between the appellant and

the respondent cities. Their mutual rights in that behalf are thus summarized in *City of San Antonio v. San Antonio Public Service Co.*, supra:

"The duty of an owner of private property used for the public service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal."

This conclusion necessitates the overruling of that portion of our decision in *City of Watertown v. Watertown Light & Power Co.*, 42 S. D. 220, 173 N. W. 739, which held that a contract as to rates existed. It may properly be stated that no question of constitutional inhibition was there raised.

Inasmuch as the foundation upon which the theory of respondent cities rests is removed, it follows that the trial court erred in the appointment of a receiver to operate appellant's plant, and that the order therefor was improvidently granted. The decision of other questions raised is not necessary at this time. It is suggested, as was suggested in the *San Antonio Case*, that animosities be laid aside, and that the parties should agree upon a reasonable rate for the furnishing of gas by appellant, fair to the cities and other consumers, and fair to appellant.

The order appealed from is reversed.

CITY OF MITCHELL v. BOARD OF RAILROAD COM'RS.

CITY OF HURON v. SAME.

(Nos. 4920, 4921.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

Telegraphs and telephones $\S$ 33(1)—Increase of rates specified in franchise from city within state's police power.

Though a city exercising its police power under Const. art. 10, § 8, by granting consent to the establishment of a telephone line may impose conditions which, when accepted, become binding contracts, such conditions are subject to the state's police power under article 17, § 4, exercised by the Legislature through the Board of Railroad Commissioners which has power to authorize the telephone company to charge rates in excess of the maximum specified in its franchise.

Certiorari by the City of Mitchell and also by the City of Huron against the Board of Railroad Commissioners. Proceedings dismissed.

Frank W. Mitchell and Lauritz Miller,
both of Mitchell, for City of Mitchell.

Fred Duffy, of Huron, for City of Huron.

Null & Royhl, of Huron, for Dakota Cent.
Telephone Co.

Byron S. Payne, Atty. Gen., and Oliver
E. Sweet, Asst. Atty. Gen., for Board of
Railroad Com'rs.

WHITING, J. The Dakota Central Telephone Company, hereinafter spoken of as the company, owns and operates telephone lines extending over various portions of this state, and included within its properties are local telephone systems in many of our cities; among such cities are Mitchell and Huron, hereinafter spoken of as plaintiffs. Prior to the late war, the systems in plaintiff cities were operated under franchises granted by plaintiffs, which franchises purported to fix the maximum rates that might be charged for telephone services. The company had accepted the rates as fixed by the Mitchell franchise. Whether it ever accepted those fixed in the Huron franchise is a matter now in dispute. When the federal government took over the telephone systems of the country, it raised the rates to be charged for telephone service throughout this state. In anticipation of the return of its lines to its control and management, the company, some months prior to such return, petitioned the Board of Railroad Commissioners of this state, hereinafter spoken of as the Board, and sought from such Board authority to continue such higher rates in effect when such lines should be returned to their control. A hearing was had at which the justness of the rates seems to have been thoroughly investigated. The Board granted the relief asked by such company. By certiorari proceedings, plaintiffs seek to have the legality of the action taken by such Board determined by this court. While a separate proceeding has been instituted by each plaintiff, the two were submitted together upon one set of printed records, and will both be disposed of in this decision.

For the purposes of this decision, we will assume that the company accepted the rates fixed in both franchises. It is unquestioned that the Board had, under the police power of the state, full power over the rates to be charged for telephone services in this state, unless such power has been limited by a constitutional provision hereinafter referred to. The real question before us is, Has the Board power to authorize a telephone company to charge rates for telephone service within a municipality in excess of the maximum rates specified in a franchise granted by such municipality and accepted by the telephone company?

Section 3, art. 10, of the state Constitution provides that—

"No * * * telephone line shall be constructed within the limits of any * * * city without the consent of its local authorities."

This court held, in *City of Mitchell v. Telephone Co.*, 25 S. D. 409, 127 N. W. 582, that a city had the right to impose conditions to its consent, and that the acceptance of such conditions was binding upon the telephone company. Relying upon the above holding, plaintiffs contend that there exists between them and the company valid and binding contracts which the Board is without power to impair. Plaintiffs urge that, by giving to them the power to refuse permission to the company to construct lines within their corporate limits, and therefore power to impose conditions upon the grant of such permission, the Constitution has lodged in plaintiffs the exercise of police power; and that, to the extent to which such power has been lodged in them, the Constitution has restricted the exercise of such power by any other state agency. Certainly, if this section of the Constitution has conferred upon these cities the power to fix charges for public service as a condition to allowing plaintiff to enter such cities, then a binding contract exists. *City of Watertown v. Watertown Light & Power Co.*, 42 S. D. 220, 173 N. W. 739; *Southern Iowa Electric Co. v. City of Charlton*, 255 U. S. 589, 41 Sup. Ct. Rep. 400, 65 L. Ed. —.

Of course it is conceded that the Constitution does not expressly confer such police power upon municipalities, and that, if it is conferred, it is by implication. Courts should hesitate to hold that a sovereign power of the state, the free exercise of which by the proper agencies of the state might be essential to the general welfare of the state, such as the police power, has, by implication, been taken from legislative control and lodged, even in part, with the municipalities of the state. Courts should also hesitate to hold that, by implication, the Constitution has conferred upon municipalities a power through the exercise of which it might be able to confiscate the property of public service corporations. As stated by the late Chief Justice White, in *City of San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, 41 Sup. Ct. 428:

"The fact is that all the contentions of the city * * * but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds; that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property."

By legislative enactment, certain police powers are expressly conferred on municipalities; but to so confer a power subject to

future legislative control is far different from conferring indefinite powers by implication.

To give the above section of the Constitution a construction that might and certainly frequently would bring about situations under which public service corporations enjoyed rights in conflict with the general well-being of the state would render it inconsistent with section 4, art. 17, of such Constitution, which specifically provides that—

"The exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state."

The state of Pennsylvania has constitutional provision (Const. art. 17, § 9) the same as section 3, art. 10, supra. In a case on all fours with this one, except that street car rates were involved, being the case of *City of Scranton v. Public Service Commission*, 268 Pa. 192, 110 Atl. 775, the court declared:

"While the constitutional provision requiring the consent of a municipality to the construction of a street railway within its limits is clear and can have but one meaning, it must be read in connection with the equally clear third section of article 16 of the Constitution, which declares that—

"The exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state.' * * *

"Street passenger railways have become necessities. * * * Though this is so, they cannot be operated in any municipality without its consent. With such consent they may be, and, as between the local authorities and the railway companies, there may be attached to it terms and conditions which must be performed by the companies, but a municipality may not annex such terms to its consent as will deprive the commonwealth of its inherent police power to see that a street passenger railway company is not prevented from serving the public by the municipality's enforcement of conditions in a consenting ordinance that have become impossible of performance. What may have been a reasonable rate of fare at the time of the passage of a consenting ordinance may, under changed economical conditions, become confiscatory, and a street passenger railway company may not be able to serve the public on account of insufficient revenues, based upon the fare fixed in the ordinance. When such situation arises, as it has arisen and will arise again, there must be relief somewhere to the public, and it lies in the police power of the state, which is never to be abridged nor bartered away."

See, also, *City of San Antonio v. San Antonio Public Service Co.*, supra.

In *City of Woodburn v. Public Service Commission*, 82 Or. 114, 161 Pac. 391, L. R. A. 1917C, 98, the court said:

"When examining the contention urged by the municipality, we must not lose sight of the fact that the right to regulate rates by changing them from time to time as the welfare of the public may require is essentially a police power; and, since the right to regulate rates is an inherent element of sovereignty, when seeking to ascertain whether this part of the police power has been conferred upon the city, either with or without limitation, we are constantly governed by the rule that the delegation of the sovereign right to regulate rates must be clear and express, and all doubts must be resolved against the city. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; *Milwaukee Elec. Ry. v. Wisconsin R. R. Com.*, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254; *Benwood v. Public Service Commission*, 75 W. Va. 127, 83 S. E. 295, L. R. A. 1915C, 261; *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 78; *City of Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 129 N. W. 925. Quoting from *Charleston Consol. Ry. & Lighting Co. v. City Council*, 92 S. C. 127, 75 S. E. 390:

"The state's power to regulate by compulsion the charges of public service corporations is one of such vast and increasing importance to the public that the courts will not attribute to the state the intention to part with it or to delegate it unless the intention is clearly and unmistakably expressed."

We are of the opinion that section 3, art. 10, gave to plaintiffs no police power whatsoever. We should so hold even in the absence of section 4, art. 17, as we agree that any delegation of police power must be clear and express, and certainly, in the light of section 4, art. 17, we could not hold that the people intended, by section 3, art. 10, to do by implication the very thing which, by section 4, art. 17, they forbid the Legislature from doing. We are therefore of the opinion that, while plaintiffs had the right, when granting permission to the company to establish lines within their territory, to impose conditions which, when accepted, became binding contracts, such conditions must not conflict with the provisions of section 4, art. 17, of the Constitution. *Southern Iowa Electric Co. v. City of Chariton*, 255 U. S. 539, 41 Sup. Ct. Rep. 400, 65 L. Ed. —; *City of Lead, etc., v. Western Gas & Fuel Co.*, 44 S. D. —, 184 N. W. 244, handed down herewith.

It follows that the Board acted within its jurisdiction in making the orders sought to be reviewed, and that the present proceedings should be dismissed. They are dismissed, at plaintiffs' costs.

OLDHAM et al. v. EGAN et al. (No. 4906.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

Specific performance §114(1)—Complaint for specific performance of contract to convey real estate held not sufficiently definite to state cause of action on any theory.

In an action for specific performance of a contract and bond for a deed, the complaint, which did not allege whether or not defendants had delivered a deed, but only that defendant wholly failed to comply with the terms of the contract and bond, "and" wholly failed to execute and deliver a good and merchantable title, was so indefinite and uncertain that it failed to state a cause of action, since, if he wholly failed to comply with the terms of the contract and bond, he necessarily failed to deliver a deed, in which case the action might be a local action in equity to compel specific performance, while, if a deed had been delivered which did not convey merchantable title, the remedy would be a transitory action at law, based on a breach of the covenants of warranty in the deed and provisions of the bond guaranteeing the conveyance of a merchantable title.

Appeal from Circuit Court, Tripp County; N. D. Burch, Judge.

Action by Harold A. Oldham and others against Geo. W. Egan and others. From an order overruling a demurrer to the complaint, defendants appeal. Reversed without prejudice to filing an amended complaint.

Kirby, Kirby & Kirby, of Sioux Falls, for appellants.

Hannett & Hannett, of Winner, and W. J. Hooper, of Gregory, for respondents.

McCOY, J. From an order overruling a demurrer to the complaint defendants appeal. In substance the complaint states that on the 21st day of April, 1919, the defendant Egan and plaintiffs entered into a contract whereby the said Egan agreed to sell and convey to plaintiffs certain described real estate for the purchase price of \$143,000, payable as follows: \$15,000 cash; \$28,000 May 1, 1919; and the balance of \$100,000 to be paid by notes, secured by first mortgages on the said real estate, payable May 1, 1929; that it was further mutually agreed that on failure of title for any cause, or should the government refuse to approve the original sale or fail to issue patents for said land, then said contract should be canceled and settled by the prompt return of all money paid by the purchasers; that upon compliance with the terms of said contract by plaintiffs the said Egan would make, execute, and deliver to said plaintiffs a good and sufficient warranty deed and abstract, showing perfect title to the above-described

premises, conveying the same to the plaintiffs free and clear of incumbrances, except as above mentioned; that in the event of the plaintiffs' failure to pay said purchase money as above stated, they should forfeit any money paid upon said contract, and any rights in and to said real estate, unless the said Egan should otherwise elect. The said complaint also further contained the allegations that said Egan was the owner of said land; that the consideration agreed to be paid for the said land was an adequate consideration; that at the time of the execution of said contract said plaintiffs were and had at all times been ready and willing to comply with the terms of said contract; that the said Egan was unable to comply with the terms of said contract and furnish a good and marketable title to said premises before May 1, 1919, and thereafter, as an inducement to these plaintiffs to deliver the notes and mortgages therein referred to, and as an inducement to plaintiffs to pay the said \$28,000 then due, the said defendants executed and delivered to the plaintiffs another contract in the nature of a bond, in substance reciting and providing that, whereas on the 21st day of April, 1919, the said Egan and these plaintiffs entered into the said agreement hereinbefore alleged, wherein and whereby the said Egan, together with his codefendants, bound themselves and agreed and guaranteed to the plaintiffs that the said Egan should, on or before the 2d day of February, 1920, deed said lands to plaintiffs, and furnish to said plaintiffs an abstract of title to the said premises showing perfect merchantable title in him, and therefore bound themselves and agreed to warrant the title to said real property to the full extent of the warranty contained in the said deed, conveying the same from said Egan to plaintiffs, with the exception only as to the incumbrance of \$100,000 placed thereon by the plaintiffs in their said mortgage to said Egan; that immediately upon the execution of said bond the said plaintiffs delivered to said Egan the notes and mortgages referred to in said contract, and said bond, and also paid to him the sum of \$28,000 therein specified; that the said defendants have wholly failed to comply with the terms of said contract and said bond, and have wholly failed to execute and deliver to the plaintiffs a good and merchantable title for said premises, or any part thereof; that the plaintiffs have paid to said Egan under said contract the sum of \$43,000, and also the sum of \$3,000 interest on said notes and mortgages; that the said Egan at the time he executed said contract and said bond well knew that he would not comply with the terms of said contract and furnish good and merchantable title as agreed to be done, which the plaintiffs did not know, but relied

upon the representations made by the said Egan, believing the same to be true; that at the time of the breach of said contract and said bond the said land was reasonably worth \$125 per acre; that before the commencement of this action the said plaintiff demanded of said defendants that they comply with the terms of said contract and furnish a good merchantable title to said land, but that they have failed and refused so to do. Plaintiff demanded judgment for specific performance, and on failure thereof a recovery of all payments and said notes. To which complaint the defendants interposed a demurrer on the grounds: First, that several causes have been improperly united; second, that said complaint does not state facts sufficient to constitute a cause of action in favor of said plaintiffs and against said defendants.

We are of the opinion that this complaint is very indefinite and uncertain, in that it fails to allege whether or not said Egan has delivered to plaintiffs a deed for said lands. The only portion of said complaint that might refer to a delivery of a deed is as follows:

"That said defendants have wholly failed to comply with the terms of said contract and the said bond, and have wholly failed to execute and deliver to plaintiffs a good and merchantable title for said premises or any part thereof."

Egan agreed both by the bond and the contract to deliver a deed of perfect merchantable title. If, as alleged, he wholly failed to comply with the terms of the contract and bond, he necessarily failed to deliver a deed. If he wholly failed to execute and deliver to plaintiff a good and merchantable title, he might have executed and delivered a deed of such title as he had, although the same might not have been merchantable. The clauses of the complaint are connected by the disjunctive "and," and might properly be construed as being independent of each other. If no deed at all has been delivered, the action might properly be a local action in equity to compel specific performance of the contract, and to compel the return of the payments and notes and mortgages. On the other hand, if a deed has been delivered, but the same does not convey merchantable title, then the remedy would be a transitory action at law, based on a breach of the covenants of warranty in the deed, and on the provisions of the bond guaranteeing the conveyance of a merchantable title. By reason of such indefiniteness in the allegations of the complaint we are constrained to the view that the demurrer should have been sustained on the ground alone that the same does not state facts sufficient to constitute a cause of action on any theory.

The order appealed from is reversed, with-

out prejudice to the serving and filing of an amended complaint in harmony with this decision.

WHITING, J., not sitting.

OLDHAM et al. v. REILEY et al. (No. 4905.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

Appeal and error $\Rightarrow$ 1043(8) — Denial of change of venue not prejudicial, where complaint on former appeal held not to state cause of action.

Where, on a former appeal, the Supreme Court held a complaint for specific performance of a contract to convey real estate so indefinite and uncertain that it failed to state a cause of action on any theory, an order of the trial court, on retrial, denying a motion for change of venue to the county in which defendants were served with summons, must be affirmed, whether the complaint, stated a cause of action for damages for breach of contract only, in which case defendants would be entitled to such change, under Rev. Code 1919, § 2327, or whether the action was for specific performance of a contract to convey real property situated in the county where the venue was laid, in which case the action would be triable in such county, under section 2325 subd. 1; there being no prejudicial error.

Appeal from Circuit Court, Tripp County; N. D. Burch, Judge.

Action by Harold A. Oldham and others against Eugene Reiley and others. From an order denying their motion for a change of venue, defendants appeal. Affirmed.

Kirby, Kirby & Kirby, of Sioux Falls, for appellants.

Hannett & Hannett, of Winner, and W. J. Hooper, of Gregory, for respondents.

SMITH, J. Appeal from an order denying appellant's motion for a change of venue from Tripp county to Minnehaha county. It is appellant's contention that the complaint states a cause of action for damages for breach of contract only, and that, as defendants were served with summons in Minnehaha county, they were entitled to a change of place of trial to that county under section 2327, Rev. Code 1919, while respondents contend that the action is for specific performance of a contract to convey real property situated in Tripp county, where the venue of the action is laid, and that the action is triable in that county under subdivision 1, § 2325, Rev. Code 1919.

In the same action a demurrer was filed to the complaint, which was overruled by the trial court, from which ruling an appeal was

taken, in which this court holds that the complaint is so indefinite and uncertain that it falls to state a cause of action on any theory. In such a situation appellant has failed to show prejudicial error, and the order of the trial court must be affirmed. For a statement of the pleadings see Harold A. Oldham et al. v. Geo. W. Egan et al., 184 N. W. 249.

WHITING, J., not sitting.

McDOWELL v. JAMESON et al.*

(Nos. 4816, 4817.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Execution $\S$ 245 — Assignee of mortgagee and successor of former owner estopped by laches from questioning validity of execution sale.

In an action by the assignee of a mortgagee of certain mining claims to foreclose the mortgage thereon and determine adverse claims of title to the property, defendant basing its claim of title on execution sale under judgments, plaintiff assignee and the successor in interest of the former owner of the property held estopped by their laches from maintaining the action, having stood by while extensive permanent improvements were made on the property.

2. Appeal and error $\S$ 854(2)—Proper judgment will not be reversed because based on wrong reason.

Where the judgment of a court is right according to the facts found, the appellate court will not reverse on the ground that the trial court has assigned an erroneous or other reason therefor.

Appeal from Circuit Court, Lawrence County; James McNenny, Judge.

Action by James McDowell against William R. Jameson and the Cutting Mining Company, impleaded with the Deadwood Gulch Mining Company. From a judgment for the Cutting Mining Company, plaintiff and the impleaded defendant appeal. Judgment and orders affirmed.

S. K. Grigsby and Davis, Lyon & Bradford, all of Sioux Falls, for appellant McDowell. Gaffy, Stephens & McNamee, of Pierre, for appellant Deadwood Gulch Mining Co. Martin & Mason, of Deadwood, for respondent.

McCOY, J. This action was instituted by plaintiff, as assignee of the mortgagee, to foreclose a certain real estate mortgage and to determine adverse claims of title to certain real estate, consisting of mining claims situated in Lawrence county. Two defendants, corporations, namely, Cutting Mining Company and the Deadwood Gulch Mining Company, interposed answers to the plaintiff's complaint. The defendant Cutting

Mining Company based its claim to title upon certain execution sales under judgments in favor of one Rogers against one Crabtree, a former owner of said real estate. The Deadwood Gulch Mining Company claims to be the successor in interest by virtue of mesne conveyances from the said Crabtree, said former owner. From findings and judgment in favor of the defendant Cutting Mining Company, the plaintiff and the defendant Deadwood Gulch Mining Company separately appeal. Both appellants, however, present their respective appeals by a single brief and appeal record.

Appellants assign the insufficiency of the evidence to sustain the findings of fact, and the insufficiency of the findings of fact to sustain the conclusions of law and the judgment. It is conceded by all the parties that they derive their claim of right and title from a common source. It appears that one Crabtree on and prior to the 6th day of January, 1904, was the owner and in possession of said real estate, and that at said time certain judgments in favor of one Rogers were duly entered and docketed against said Crabtree in the circuit court of Lawrence county; that thereafter, on the 7th day of November, 1907, one Lee, then claiming to be the owner in fee and in possession of said mining claims, executed and delivered a certain real estate mortgage upon said mining claims to secure the payment of \$50,000, payable five years after said date to the Western Investment Company; that thereafter the said Western Investment Company assigned the said mortgage and the indebtedness secured thereby to one Shaeffer, who thereafter assigned the same to the appellant McDowell. It is conceded by respondent that, unless the respondent and its predecessors in interest acquired title and the right to possession and ownership of said premises under and by virtue of certain tax deeds, execution sales, and sheriff's deeds issued thereunder, under certain judgments in favor of one Rogers and against said Crabtree, entered and docketed in Lawrence county on the 6th day of January, 1904, and under a certain other judgment quieting title in said Rogers, entered and docketed in 1912 in the circuit court of said county, the plaintiff, appellant, and the defendant Deadwood Gulch Mining Company should prevail in this action. Respondent also pleaded that the appellants were guilty of laches, and by reason thereof appellants should be estopped from making any claim of title or lien to the said premises adverse to respondent. Therefore the real material issue first to be determined in this case is whether or not the evidence and findings are sufficient to sustain the judgment in favor of the defendant Cutting Mining Company on the ground that the appellant plaintiff and ap-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 22, 1921.

pellant Deadwood Gulch Mining Company were guilty of laches.

[1] The trial court, from the findings of fact, concluded that the appellant plaintiff was estopped to maintain this action by reason of laches. We are of the opinion that this conclusion is fully sustained by the facts. It appears that the respondent Cutting Mining Company is the successor in interest of said Rogers; that Rogers and the Cutting Mining Company have been in the open, notorious, continuous, and exclusive possession of said premises at all times since 1911, in good faith claiming to be the owners thereof under the sheriff's deeds issued on execution sales of said premises to said Rogers under and by virtue of judgments in his favor against said Crabtree, the former owner; that from 1911 until the beginning of this action in 1919 the said Rogers and said Cutting Mining Company paid all taxes assessed and levied on said premises; that at the time said Rogers took possession of said premises the same were reasonably worth and of the value not to exceed \$6,000; that said Rogers and said Cutting Mining Company have during the time of such possession made permanent improvements and performed labor by constructing mining tunnels, shafts, and crosscuts, and other mining improvements and machinery, on said premises, in value exceeding \$70,000, and thereby increased the value of said mining claims to over \$200,000. All of the appellants of necessity must have had knowledge and be charged by law with notice of such possession by said Rogers and Cutting Mining Company, and of the said improvements and labor performed on said premises by them, and also of the claim of ownership made by them under such execution sales. In *Shelby v. Bowden*, 16 S. D. 531, 94 N. W. 416, *Farr v. Semmler*, 24 S. D. 290, 123 N. W. 835, and *Kenny v. McKenzie*, 25 S. D. 485, 127 N. W. 597, 49 L. R. A. (N. S.) 782, this court held that, where a mortgagor without objection permitted the purchaser at a foreclosure sale to take possession in good faith of the mortgaged premises so sold in such sale, pay the taxes, and make improvements thereon, hold possession of the same for many years, although less than the statutory limitation, and thereby greatly increasing the value of the premises, that then and under such circumstances the mortgagor, the former owner of such mortgaged premises, by reason of laches, was estopped to allege or claim, in a subsequent action, the invalidity of such foreclosure sale. We know of no reason why the same principle of law should not apply in this case as against the appellant plaintiff, and also against the appellant the Deadwood Gulch Mining Company, and estop them from now asserting the invalidity of the execution sales to Rogers.

[2] The conclusions of law made by the trial court do not base the judgment on the conclusion that the appellant Deadwood Gulch Mining Company was guilty of laches, but rendered judgment against said appellant on the theory that the judgment in the action to quiet title rendered in favor of said Rogers in 1912 was a bar to the said appellant claiming title in this action. However, the same facts and same evidence and same rules and principles of law in relation to laches and estoppel apply as well to the Deadwood Gulch Mining Company as to the appellant McDowell. If McDowell is estopped, so also is the Deadwood Gulch Mining Company. Where the judgment of a court is right according to the facts found, the appellate court will not reverse the same on the ground that the trial court has assigned an erroneous or other reason therefor. In *re Yankton-Clay County Drainage Ditch*, 38 S. D. 168, 160 N. W. 732. When it is found and determined that appellants are estopped to make and set up adverse claims of title and liens against the respondent Cutting Mining Company, it then becomes unnecessary and unavailing to pass upon any of the other assignments of error relating to the regularity of the procedure by which any of these parties acquired their rights.

The judgment and orders appealed from, under both appeals, are affirmed.

WHITING, J., not sitting.

MURPHY v. SIOUX FALLS SERUM CO. (No. 4806.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Druggist $\S$ 10 — Complaint held to state cause of action against manufacturer of serum.

In an action for death of plaintiff's hogs, caused by poisonous condition of serum manufactured by defendant with which the hogs had been vaccinated, complaint held to state a good cause of action in negligence in preparing the serum.

2. Druggist $\S$ 10 — Prima facie case made against serum manufacturer.

In an action for death of hogs vaccinated with serum manufactured by defendant, plaintiff, by showing that the serum was properly administered and that the malignant edema causing death developed at the place where the serum was injected, established a prima facie case, which the defendant could rebut by showing that the serum had been prepared according to the approved method and carefully prepared and properly tested, bottled, sealed, and labeled, and that all reasonable care had been exercised to exclude poisonous or deleterious matter.

(184 N.W.)

3. Druggist $\Leftrightarrow$ 10—Evidence of use of serum on other hogs without injury admissible.

In action for death of hogs following vaccination with serum manufactured by defendant, in which it was claimed that the defendant had been negligent in the manufacture thereof, defendant's testimony that the same identical lot of serum that had been used by plaintiff had been used on other hogs and that no injury had resulted held admissible.

McCoy, J., dissenting.

Appeal from Circuit Court, Bon Homme County; R. B. Tripp, Judge.

Action by Dennis Murphy against the Sioux Falls Serum Company. From judgment for plaintiff and from order denying motion for new trial, defendant appeals. Judgment and order reversed.

Lynch & Doyle and Louis H. Smith, all of Sioux Falls, for appellants.

C. C. Puckett, of Tyndall, and Shull, Gill, Sammis & Stilwell, of Sioux City, Iowa, for respondent.

POLLEY, P. J. Plaintiff employed a veterinary surgeon to vaccinate certain hogs for the prevention of hog cholera. The hogs were vaccinated with serum and virus manufactured by defendant. Immediately following the vaccination a considerable number of the hogs contracted malignant edema and died. Plaintiff, claiming that the death of his hogs resulted from the impure and poisonous condition of the serum used, brought this action against defendant for the recovery of the loss of his hogs. Plaintiff had judgment, and defendant appeals.

In his complaint plaintiff alleges:

"That the said virus and serum is an imminently dangerous and poisonous substance, and the defendant, by reason of the facts herein stated, owed a duty to the plaintiff to exercise the greatest of care in preparing the same and in hermetically sealing the bottles in which contained, and in all other respects to so handle the same as not to permit the same to become contaminated with poisonous substances, or permit its own chemical action to so change the substance as to inflict injury to the animals for which it was so prepared and intended; * * * that the said virus and serum was not free from impurities, but, on the contrary, the said defendant so prepared the same as to permit the same to be or become impure and contaminated with the germs of tetanus or other foreign or injurious substances, by reason whereof 90 of the said shoats became infected from and by means of the injection of said virus and serum and died from the effects thereof, without any fault or negligence on the part of this plaintiff, and notwithstanding that this plaintiff used and exercised due care in the treatment and care of the said shoats after they became so infected and in attempting to save them from the effects of such infection."

[1, 2] These allegations state a cause of action against defendant, and they also outline

and suggest the theory on which plaintiff founds his right of recovery; i. e., that defendant was guilty in some degree of negligence or want of care in preparing or preserving the virus or serum that was used by the plaintiff. Plaintiff proved the use of the serum, that it had been properly administered, and the death of his hogs, and rested. Defendant then moved for a directed verdict. This motion was overruled, and we think properly so. Plaintiff, by showing that the serum was properly administered, and that the malignant edema that caused the death of the hogs developed at the place where the serum was injected into the hog, made out a prima facie case.

[3] In order to rebut this prima facie case, it was competent for the defendant to show that the serum had been prepared according to the approved method of preparing serum, that it had been carefully prepared and properly tested, bottled, sealed, and labeled, and that all reasonable care had been exercised to prevent any poisonous or deleterious matter from entering into the same. Defendant offered to prove these facts, but the evidence offered was ruled out because the evidence, in the form in which it was offered, was incompetent. Defendant then offered to prove that some of the same identical lot of serum that was used on plaintiff's hogs had been used on other hogs and that no injury resulted. This was objected to as immaterial, and the objection sustained. This was error of a prejudicial nature. If it had been shown that some of the same identical serum that was used on defendant's hogs had been used on other hogs, and that no injurious results followed, the jury would have been warranted in inferring that plaintiff's hogs contracted the disease which caused their death from some other source than the use of the serum. It is shown by the evidence that the spores or bacilli of malignant edema exist on the ground, in the earth, and in dirt; that they may be picked up and carried about by any one on the feet and are carried about in the dust; that they are also on the skins of animals; and that the only way their presence may be detected is by microscopic examination. It is altogether possible that the spores of the disease that caused the death of the hogs may have been in the vessel that contained the serum when it was being used or they may have been in the syringe that was used to inject the serum into the hogs, or they may have been deposited in the serum by the wind while it was being used.

For the error in excluding the above testimony, a new trial must be awarded.

The judgment and order appealed from are reversed.

McCOY, J., dissents on the ground that appellant has pointed out no error.

LUMRY v. KRYZMARZICK.

(Supreme Court of North Dakota. June 22, 1921. Rehearing Denied Sept. 10, 1921.)

(*Syllabus by the Court.*)

1. Sales $\S$ 218 $\frac{1}{2}$ —Delivery indicates intention to pass title, but is not conclusive of immediate transfer.

In an action to recover the purchase price of a secondhand tractor plowing outfit alleged to have been sold and delivered to the defendant, where the evidence was conflicting as to the place where delivery was to be made—whether upon plaintiff's farm where the tractor was situated when the contract was made, or upon the defendant's farm some 25 or 30 miles distant—but where there was no dispute as to the obligation assumed by the seller to put the outfit in fair working condition for plowing, and where the evidence showed that the engine had never been put in fair working condition, it is held:

Delivery, in the sense of change of physical possession from the seller to the buyer, while a strong indication that the parties intend to pass title, is not conclusive of an intention to transfer title immediately.

2. Sales $\S$ 201(1)—Where seller was to repair after delivery, inferred that title was not to pass prior thereto.

Where, after delivery to the purchaser in the circumstances disclosed in the evidence, work of a substantial character remained to be done by the seller to put the property in a condition in which it would be of some use to the purchaser, it is a fair inference that the parties did not intend that title should pass until this work was done.

3. Sales $\S$ 347(6)—Buyer may defend for seller's breach notwithstanding prior failure to rescind.

Where title has not passed under a contract for the sale of specific property, and where the seller has been guilty of a substantial breach of the contract, the purchaser may defend an action for the price notwithstanding his prior failure to effect a rescission of the contract.

(*Additional Syllabus by Editorial Staff.*)

4. Sales $\S$ 200(4)—Buyer held not to have waived condition precedent requiring seller to furnish parts.

Where the supplying of parts for machinery sold was a condition precedent to the passing of title, held, that any acts of the defendant buyer in transporting the machinery for the purposes of convenience in performing the contract did not constitute a waiver of such condition precedent.

Appeal from District Court, McLean County; Nuessle, Judge.

Action by O. H. Lumry against Andrew Kryzmarzick. From a judgment for plaintiff and an order denying a motion for new trial, the defendant appeals. Reversed and remanded, with directions to enter a judgment of dismissal.

J. A. Hyland, of Bismarck, and R. L. Fraser, of Garrison, for appellant.

J. E. Nelson, of Garrison, for respondent.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying the defendant's motion for a new trial. The action is one to recover the purchase price of a secondhand gasoline tractor plowing outfit alleged to have been sold and delivered to the defendant in the spring of 1919. It was tried to the court without a jury. The facts are as follows:

The plaintiff is a dealer in implements at Garrison, N. D.; the defendant, a farmer living in the vicinity. In the fall of 1918, the defendant, being prospectively interested in the purchase of a tractor for the following year, talked with the plaintiff concerning the purchase of a 1912 model 45 horse power Mogul tractor which the plaintiff owned. The tractor had been acquired secondhand and was then located 8 or 9 miles south of Douglas upon the plaintiff's farm and some 25 or 30 miles distant from the defendant's farm. They also talked of the purchase and sale of a 10-bottom lever lift Oliver engine plow which was at the time situated at Roseglen, about 16 miles from the location of the engine. The plaintiff and defendant went to look at the engine. It had not been used that year, but the plaintiff stated, in answer to a query as to whether it would run, that one McDonald, who had previously run it for the plaintiff, said that he could start it in 15 minutes. The defendant inspected the machine particularly with reference to its bearings which, in his opinion, were not badly worn. Negotiations were renewed in February or March of the following winter, and some time in March an agreement was reached whereby the defendant agreed to pay \$1,600 for the engine, the plows, and a cook car; the plaintiff agreeing to turn the engine over to the defendant "in good working order." The evidence is conflicting as to the portion of the agreement relating to the delivery of the engine; the plaintiff contending that he agreed to deliver it upon his own place where it was then standing, and the defendant that delivery was to be made upon his farm which, as stated, was some 25 or 30 miles distant; and that the plaintiff not only agreed to do this but to start plowing with it. The plaintiff, at the defendant's request, made arrangements to have the plows moved to a certain corner where they could be picked up by the engine en route to the defendant's farm. Some time after the deal was made (about April 20th), the plaintiff sent Frank McDonald out to get the engine in shape for delivery. The ignition system was lacking, the plaintiff having taken off the magneto to preserve it. In making the sale he

agreed to repair the magneto, or, if it could not be made to work properly, that he would supply a new Atwater-Kent system.

McDonald, with a helper, worked on the engine 8 or 10 days before attempting to move it on the road to the defendant's place, and it required approximately 10 days more to move the engine to the defendant's farm. McDonald accounts for the time consumed on the road by stating that the weather was rainy, the roads muddy, and that they got stuck several times. The defendant sent for the extension arms and other parts that could be more conveniently hauled than taken with the tractor. McDonald was paid for the work done on the tractor by Lumry, the plaintiff, and it seems that he made out a separate bill to the defendant Kryzmarzick for moving the machinery amounting to about \$165, which account has never been paid by the defendant and is assigned to the plaintiff in this action but not included in the complaint. McDonald purchased from the Standard Oil Company some kerosene and gasoline needed for moving the machine, and directed it to be charged to the defendant. The defendant denies that he authorized this, but he paid the bill. When the machinery reached the defendant's farm, the plows were hitched on and McDonald started to plow. After going about 10 rods the engine stopped. McDonald says this was because the plows were not scouring, but the defendant contends it was because the engine did not have sufficient power to pull the plows. There were not as many plows attached as the engine was supposed to be capable of pulling. The engine had thus far been run on batteries, and as McDonald was leaving he took them off to use on another engine belonging to the plaintiff. Another ignition system was later put on. At the time McDonald left the engine with the defendant, he stated that there was a loose stud bolt on one of the cylinders, but that it would give no particular trouble and advised leaving it until the season's work was done, as it was then getting late. This stud bolt was later chiseled out by one Krause, a man the defendant had hired to operate the engine. One cylinder was found to be cracked and leaking; that is, water was leaking from the water jacket into the combustion chamber. It is claimed by the plaintiff that this crack was caused by the chiseling operations, and by the defendant that the crack was there before any work was done to remove the stud bolt; one of the plaintiff's witnesses testifying that he saw the crack before the studbolt was chiseled out. The plaintiff meanwhile had hired one Kitts to put an Atwater-Kent ignition system on the tractor, and while he was working with it, it became apparent that a new cylinder was required. The defendant requested the plaintiff to supply this cylin-

der and claims that he told the plaintiff that if he did not do so the deal would be off. The plaintiff agreed to furnish it. A cylinder was supplied, but it did not fit, and before it could be put on several inches had to be cut off one end and adjustments made for connecting it with the water pipes. It had originally been difficult to start the engine, a Ford automobile having been found useful for this purpose. But after the new cylinder was put in, it apparently could not be started with a small tractor capable of pulling six plows which the defendant attached to it by a belt for the purpose of turning the engine over. The tractor in question has not been used since, and the cook car has been blown to pieces. The defendant, through his attorney, very soon after the demonstrated inability of the tractor to work, served upon the plaintiff a purported rescission notice which was defective in that it did not include an offer to return the cook car. Soon after the settlement date this action was brought.

The trial court found in substance that the plaintiff warranted the engine to be in good working order; that the place of delivery agreed upon was the plaintiff's farm; that delivery was made thereat according to the terms of the contract; that the defendant accepted the property and removed it to his premises; that the engine was not at the time in good working order as warranted; and, as a conclusion of law, it was found that while there was a breach of warranty there was not a sufficient rescission of the sale contract. Judgment was entered for the plaintiff but without prejudice to the right of the defendant to bring an action for damages for breach of warranty.

[1, 2] We are of the opinion that the trial court erred in holding that there was an acceptance of the engine by the defendant. While the testimony is not harmonious on the subject as to where delivery was to be made, it is notable that the plaintiff testifies to no particular conversation with reference to this subject; his testimony consisting largely of the conclusion that he was to make delivery upon his place. The defendant testifies specifically that the agreement was that the engine was to be delivered to him upon his farm in fair working condition for plowing. It is to be noted in this connection that the engine was taken to the defendant's place by the man whom the plaintiff had employed to repair it. These repairs must have been somewhat extensive, for they required at least eight days of the time of the repair man and the helper. It is a matter of some significance, too, that though this repair man was working for wages at different jobs, he never pressed his claim upon the defendant, but assigned it to the plaintiff, and the plaintiff has not seen fit to include it in this action, though

it amounts to about \$165. The trial court laid stress on the fact that the defendant paid for the kerosene and gasoline that had been charged to him as showing that the moving of the engine was his obligation. To our minds this is not a strong circumstance, as the amount involved would be so small that the defendant might not care to protest its payment. The plaintiff, it must be borne in mind, had the burden of proof upon this question of delivery, and with the evidence in the condition it is, we are of the opinion that this burden was not sufficiently sustained.

The evidence, however, is conflicting, and the trial court found in favor of the plaintiff. It might therefore be reasonably urged that we should not disturb the finding of the trial court. Even though superior weight be given to the opinion of the trial court, in so far as credibility is involved, still we are of the opinion that the judgment is erroneous; for, in view of the facts which are clearly established, the case does not properly turn upon the technical circumstance as to where delivery was to be made or as to who was to pay the expenses of moving. Admittedly the engine, at the time it was moved, was not equipped with an ignition system. The plaintiff admits that he agreed to install the magnet in proper working condition or furnish a new Atwater-Kent system. Up to the time the machine was left on the defendant's place neither had been supplied, and consequently there was lacking a vital part of a gasoline or kerosene engine. It had been moved with batteries belonging to the plaintiff, and these were promptly taken for use on another of plaintiff's engines. By the time an ignition system was installed, the crack in the cylinder had been discovered, and the evidence concerning this crack raises a strong probability that it had been caused by frost. At least, this probability is as strong as that it had been caused by the removal of the broken stud bolt. The outstanding ultimate fact is that no tractor has been supplied to the defendant capable of doing satisfactory work plowing or in fair working condition for plowing. Whether the engine was in proper condition for plowing could not readily be determined by its performance on the road while moving, and it would hardly be a fair presumption that the defendant accepted it for this purpose with an ignition system lacking and with a cracked cylinder.

[4] The supplying of these parts was clearly a condition precedent to the passing of title to the defendant, and any acts of his by way of participation in transporting the machinery or in changing the physical position for the purposes of convenience in facilitating a full performance of the contract cannot be said to constitute a waiver of

their effect as conditions precedent. It is not shown that he made any inspection of the engine after the repairing was supposed to have been done and before McDonald started on the journey to his place. Clearly, he did not constitute McDonald his agent for the purpose of accepting the engine. At most, his authority on behalf of the defendant was limited to the mere transportation of the machinery to his place. McDonald indisputably was employed by the plaintiff to put the engine into deliverable condition, and any judgment he exercised with reference to its running condition would be a judgment exercised on behalf of the plaintiff, not the defendant. Certainly McDonald was not constituted both judge and jury to bind both parties by his action. There is, in fact, no evidence that the defendant ever accepted the engine in its present condition or that he was willing to accept it until it was rendered capable of doing the work for which the plaintiff agreed to supply it. The burden of putting it in that condition remained all the time on the plaintiff, and this burden amounted to a condition precedent to the passing of title. And, as stated, in our opinion its effect as a condition precedent is not modified or waived by any participation of the defendant in the physical delivery of the property. It is true that delivery is one of the strongest circumstances indicative of intention to transfer title immediately. *Williston on Sales*, § 265. But where delivery of physical possession is made only as a step in the performance of the contract and for the purpose of better enabling the seller to perform his remaining obligations, the delivery is conditional only and does not control the passing of title. And this is particularly true where the thing delivered is not capable of being used by the buyer without a more complete fulfillment of the seller's obligations. See *Kitson Machine Co. v. Holden*, 74 Vt. 104, 52 Atl. 271.

[3] Since, in our opinion, title did not pass to the defendant, it is immaterial whether the contract was properly rescinded or not. The notice of purported rescission which was promptly given was at any rate sufficient to apprise the plaintiff that the defendant refused to recognize the contract as being any longer binding upon him in view of the failure to perform on his part.

For the reasons stated, we are of the opinion that the judgment in favor of the plaintiff is erroneous, and it is reversed. The case is remanded, with directions to enter a judgment of dismissal; defendant to recover his costs.

ROBINSON, C. J., and CHRISTIANSON
and BRONSON, JJ., concur.
GRACE, J., concurs in the result.

MUNDON v. GREENAMEYER et al.*
(No. 4860.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Compromise and settlement $\S$ 24—Whether there was a settlement of buyer's claim for damages for breach of warranty held for the jury.

In an action by the buyer of cattle for breach of warranty of soundness and fitness, the question of whether the return of the cattle to the seller and the cancellation of the purchase-money notes, covering the full purchase price, was a complete settlement and adjustment of all claims, including the buyer's claim for damages, held for the jury.

2. Appeal and error $\S$ 994(2) — Appellate court will not review verdict involving passing on credibility of witnesses.

Where it was necessary for the jury in rendering verdict to pass upon the credibility of the witnesses, the verdict will not be disturbed.

3. Appeal and error $\S$ 1001(1)—Verdict not reversed where trial court would not have been justified in directing a different verdict.

A verdict will not be reversed on appeal, where the trial court would not have been justified in directing a different verdict.

4. Appeal and error $\S$ 1005(3) — Approved verdict on conflicting evidence conclusive.

Where the evidence is conflicting, and a motion for new trial has been denied, the verdict of the jury is conclusive on appeal, the only question in such case being whether there is sufficient evidence to support the verdict; evidence contradictory thereof being immaterial.

5. New trial $\S$ 106(1)—Newly discovered evidence held insufficient to change result.

Denial of motion for new trial on ground of newly discovered evidence was not error, where such evidence related to one defense, and there was sufficient evidence to sustain a different defense.

6. Appeal and error $\S$ 1052(3), 1056(4)—Errors relating to one defense harmless, where evidence is sufficient to sustain different defense.

Where there is evidence sufficient to sustain one of several distinct defenses, alleged error as to matters of evidence relating wholly to other defenses is irrelevant and becomes immaterial, and the wrongful exclusion or admission of such evidence would be nonprejudicial error.

7. Appeal and error $\S$ 1031(1) — Error presumed to affect only separate cause of action or defense to which it relates.

Under Rev. Code 1919, § 2544, it will be presumed that error affects only the one separate cause of action or defense to which it relates.

8. Appeal and error $\S$ 1032(1) — Appellant must show prejudicial error.

Under Rev. Code 1919, § 2544, where there were several distinct defenses, the plaintiff has

the burden, on appeal from a general verdict for defendant, to show from the record that the verdict of the jury was founded upon the particular defense to which the alleged errors relate, and not upon the defense wherein no error appears.

Appeal from Circuit Court, Spink County; Alva E. Taylor, Judge.

Action by N. E. Munden against A. G. Greenameyer and another. From judgment for defendants, and from order denying motion for new trial, plaintiff appeals. Affirmed.

See, also, 182 N. W. 630.

W. F. Bruell, of Redfield, for appellant.
M. Moriarty, of Redfield, for respondents.

SMITH, J. Plaintiff was engaged in farming and stockraising in Spink county. The defendants were dealers in cattle, and had on hand at Harrold a large herd of Herefords. In January, 1917, the plaintiff purchased of defendants 70 head of heifers out of said herd, which defendants stated would deliver calves during the spring of 1917; the agreed price was \$60 a head. Plaintiff also purchased two bulls, three years old, at the agreed price of \$100 per head. The total purchase price was \$4,400. Plaintiff paid no part of the purchase price, but gave his note and a chattel mortgage on the stock, due and payable in six months, with an agreement that the same should be renewed at maturity for an additional six months. Plaintiff stated to defendants that he was purchasing said stock to place on his farm for breeding purposes, and to secure a crop of calves the ensuing spring. The defendants selected the heifers from the herd, and assured plaintiff that they were suitable for breeding purposes, and were all right, and such as he desired. The cattle were delivered at Redfield, and placed upon plaintiff's farm about three miles north. The plaintiff had abundance of feed and water and good shelter and barns for the stock during the winter. During the calving season the spring of 1917, it developed that the heifers were afflicted with an infectious disease known as infectious abortion, by reason of which 4 of said heifers did not calve and 46 lost their calves, and only 20 produced healthy calves. When plaintiff learned that the cattle were diseased he communicated the facts to the defendants, who advised plaintiff to hold the cattle, assuring plaintiff that the cattle would get well, and he would come out all right, that the cattle would gain in weight and make plaintiff money at prices which could be obtained in the fall, and advised plaintiff to feed them and give them special care. The note and mortgage became due in July, and, in accordance with the agreement, was re-

newed for another six months, and another mortgage given on the cattle for the amount of principal and interest then due. In September, 1917, without notice to defendants, plaintiff shipped two carloads of said cattle to the defendants at Sioux City, whereupon the defendant Greenameyer, in charge of defendants' business at that place, received and sold said cattle, and advised plaintiff to feed the balance of the cattle, and that he would send a man up there to see about them; that thereafter in October defendants sent a man to Redfield, and the plaintiff turned over the balance of the cattle, including the calves, at which time plaintiff alleged it was understood that the notes and mortgage were to be surrendered to the plaintiff forthwith and canceled, and that the defendants were to reimburse plaintiff for such damage as he had sustained by reason of the purchase of the diseased cattle. Thereafter this suit was instituted by plaintiff to recover damages for the alleged breach of warranty of soundness and fitness of the stock for the purpose for which it was purchased.

The defendants by their answer admitted the purchase and sale of the stock as alleged by plaintiff, but denied that the same were diseased when delivered to plaintiff. By way of further defense the defendants alleged that the stock was turned over to them by plaintiff in the fall of 1917 and accepted in full settlement of the mortgage indebtedness, and of all claims and demands arising out of the transaction.

At the trial plaintiff testified that the cattle were turned over to defendants in full settlement and satisfaction of the note and mortgage, but not in satisfaction of his claim for damages arising from the breach of warranty. On the other hand, the defendant Greenameyer testified, in substance, that it was expressly agreed and understood that the transaction was to be a complete settlement and adjustment of all claims.

The trial court submitted this issue to the jury by the following instruction:

"The defendants in their answer further claim that some time during the fall of 1917 the defendant Greenameyer and the plaintiff had a conversation in which the matter of settlement of the entire cattle deal was considered and discussed, and that it was then agreed between the said parties that the plaintiff was to deliver or surrender to the defendants the remainder of the cattle and their offspring; that the defendant Greenameyer was to return and surrender to the plaintiff his notes given for the purchase price of the cattle, and that such exchanges of property were to complete and be full settlement of all matters connected with the purchase of said cattle by plaintiff from defendants. * * * I further instruct you as a matter of law that if you find that the cattle were surrendered to and accepted by the defendants in accordance with an agreement made between the parties, and that agreement

was as claimed by the defendants, your verdict must be in favor of the defendants, if you find that they have been ready, able, and willing to perform their part of the agreement."

The jury returned a verdict for defendants, and plaintiff appeals from the judgment and an order denying a new trial.

[1, 2] We are of the view that the evidence was sufficient to require a submission to the jury of the issue as to settlement. It involved the credibility of witnesses, and in such case the court is not warranted in disturbing the verdict of the jury. *Blackbody v. Maupin*, 38 S. D. 621, 162 N. W. 393; *Kamp v. Madison*, 38 S. D. 432, 161 N. W. 800.

[3, 4] A verdict will not be reversed on appeal, where the trial court would not have been justified in directing a different verdict. *Taylor v. White River Valley R. Co.*, 29 S. D. 12, 135 N. W. 758. The trial court by its instructions specifically and distinctly submitted the issue of settlement as a separate and independent defense, and the verdict upon that issue turned wholly upon the credibility of witnesses. Where the evidence is conflicting and the motion for a new trial has been denied, the verdict of the jury is conclusive upon appeal. *Peters v. Kirklakedes*, 27 S. D. 371, 131 N. W. 316; *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690. In such case the only question is whether there is sufficient evidence to support the verdict, and evidence contradictory thereof is wholly immaterial. *Oakland v. Nelson*, 28 N. D. 546, 149 N. W. 337. The trial court having denied a new trial, such verdict is conclusive upon this court. *Lunschen v. Barnhart*, 27 S. D. 449, 131 N. W. 501.

[5, 6] Plaintiff's motion for a new trial was based, in part, upon alleged newly discovered evidence. It is sufficient to observe that the newly discovered evidence relates wholly to matters other than the defense of settlement, and is irrelevant to that issue. Where there is evidence sufficient to sustain one of several distinct defenses, alleged errors as to matters of evidence relating wholly to other defenses is irrelevant and becomes immaterial, and the wrongful exclusion or admission of such evidence would be nonprejudicial error.

The case of *Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822, is relied upon as sustaining a contrary view. That case evidently was controlled by the common-law rule that prejudice is presumed when error appears. In *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835, Mr. Justice Gray remarked:

"By the common law, indeed, a general verdict and judgment upon several counts in a civil action must be reversed on writ of error if only one of the counts is bad. But Lord Mansfield 'exceedingly regretted that ever so inconvenient and ill-founded a rule should have been established,' and added, 'What makes this rule appear more absurd is that it does not hold in the case of criminal prosecutions.'"

The common-law rule has been abandoned, or changed by statute, in many states. *National Bank v. Whitney* (Cal. App.) 180 Pac. 845; *Googins v. Skillings*, 118 Me. 299, 108 Atl. 50; *Shelton v. Sydnor*, 126 Va. 625, 102 S. E. 83; *Cuddahy v. Gragg* (Cal. App.) 189 Pac. 721; *Ex parte Blodgett* (Iowa) 163 N. W. 342; *Cox v. Chase*, 99 Kan. 740, 163 Pac. 184.

These cases and many others which might be cited hold that the record must not only affirmatively disclose error, but also that the error was prejudicial. In *ex parte Blodgett*, supra, it is held that error does not raise a 'presumption of prejudice. The statutory rule in this state is that an exception must relate to a material point, and it must clearly appear from the record that the effect thereof "was prejudicial to the party excepting." Code 1919, § 2544.

[7, 8] The courts quite uniformly hold that a general verdict is presumed to be a general finding upon each of several causes of action, or upon each of several defenses pleaded. *Rhoads v. City of Metropolis*, 36 Ill. App. 123. Certainly it can hardly be presumed that an error which relates only to one of several causes of action, or to one of several defenses, is prejudicial to each separate cause of action, or to each separate defense. On the contrary, we think it must be presumed under our statute that such an error affects only the one separate cause of action or defense to which it relates. *Union Traction Co. v. Barnett* (Ind. App.) 127 N. E. 287. Under our statute the burden is upon appellant to make it appear from the record that the verdict of the jury was founded upon the particular defense to which the alleged errors relate, and not upon the defense wherein no error appears. Certainly appellant's record fails to do that in this case.

All the other numerous assignments of error in the record pertain to matters which arose in connection with issues other than that involved in the defense of settlement, and require no further consideration.

The order and judgment of the trial court are affirmed.

WHITING, J., not sitting.

STATE v. KENSTLER et al. (No. 4915.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Assault and battery §86—Evidence as to prior relations between defendant and prosecuting witness held admissible.

In a prosecution for assault, defended on the ground of self-defense, evidence as to whether there had not been a good deal of bad

blood existing between prosecuting witness and defendant for at least two years, arising from difficulties over the range which both were using, and as to whether prosecuting witness had not replevied the stock taken up by defendant and got away with it, without paying damages, and as to whether he had caused defendant's arrest for riding and injuring a horse, held proper, as against contention that the transactions were too remote to be relevant.

2. Assault and battery §86—Prosecuting witness' statement, showing hostility to defendant, admissible.

In prosecution for assault, defended on the ground of self-defense, evidence as to whether prosecuting witness had not, about two days before the trouble, stated that he was going out to defendant's place to see if he could not find certain horses, and that if he did not find them he was going to make defendant find them, and was going there heeled, held proper.

3. Witnesses §372(1)—Court, on cross-examination to show bias, cannot exclude evidence that is material and relevant.

The extent to which a witness may be cross-examined as to facts otherwise immaterial, for the purpose of testing his bias and credibility, is ordinarily within the discretion of the court, where no rule of law is violated; but the court cannot, in the exercise of such discretion, exclude evidence which is both material and relevant.

4. Assault and battery §86—Exclusion of defendant's evidence, showing hostility of prosecuting witness, prejudicial error.

In prosecution for assault, defended on the ground of self-defense, exclusion of defendant's evidence, tending to show hostility on the part of the prosecuting witness, held prejudicial error.

Appeal from Circuit Court, Butte County; James McNenny, Judge.

Paul Kenstler, Fritz Kenstler, and Arthur Kenstler were convicted of assault with a dangerous weapon with intent to do bodily harm, and from judgment of conviction, and from order denying a motion for new trial, they appeal. Judgment and order reversed.

E. H. Leaton, of Newell, and Dan McCutchen, of Bellefourche, for appellants.

Byron S. Payne, Atty. Gen., and Vernon R. Sickel, Asst. Atty. Gen., for the State.

SMITH, J. Appellants were convicted in the circuit court of Butte county upon an information charging them with the crime of assault with a dangerous weapon, with intent to do great bodily harm, and without justifiable or excusable cause, upon one Calhoun. Appellants and Calhoun were neighboring ranchers in Butte county. It appears that appellants had in their possession certain horses, taken by them as trespassing animals, belonging to Calhoun. Their residences were 7 or 8 miles apart. On

October 29, 1919, Calhoun left his home, on horseback, and went to the home of the defendants, to see about the horses. Calhoun was the sole witness for the state. He testified that when he arrived at the corral he was almost immediately assaulted by the defendant Fritz Kenstler; that Arthur Kenstler gave Fritz a club, with which Fritz struck Calhoun a number of times, breaking his arm; and that Paul Kenstler came up and joined in the assault.

Fritz Kenstler testified that Calhoun rode up to the corral and motioned him to come out, and when he got within about 10 feet of him Calhoun asked him about the horses, at the same time applying an opprobrious epithet; that Calhoun jumped off his horse and started for him; that Fritz ran toward the corral, but stopped and picked up a stick; that Calhoun struck at him, and he then struck Calhoun with the stick; that at the time the difficulty occurred his mother, father, and brother were working in another part of the corral and did not see the difficulty.

Upon cross-examination, appellants' counsel asked Calhoun whether, as a matter of fact, there had not been a good deal of bad blood existing between him and Paul Kenstler for at least two years before this last trouble, arising from difficulties over the range which both were using, and whether Calhoun had not replenished stock taken up by Kenstler, and got away with it without paying damages, and whether he had not caused Paul Kenstler to be arrested for riding and injuring a horse. To this class of evidence objections were interposed by the state, and sustained by the court, and errors are assigned.

Calhoun was also asked on cross-examination whether, about two days before the trouble, at a certain pool hall, he did not say to one Driscoll that he was going out to Kenstler's place to see if he could find the horses, and if he did not find them he was going to make Fritz find them, and was going there heeled. Objections sustained, and error assigned.

[1, 2] We are of the view that these rulings were erroneous and prejudicial.

"Evidence of the relations existing between accused and the person injured prior to the crime is admissible; but as a rule evidence of the relations existing between accused and persons not interested in or injured by the crime is irrelevant and inadmissible." 16 Corp. Juris, 546 (§ 1042).

"Hostility of a witness to a party against whom he is called may always be shown." State v. Scott, 37 N. D. 105, 163 N. W. 810.

Respondent urges that the time covered by the question, a period of two years or more, involves transactions too remote to be relevant to the issue.

"It is competent to show the state of feeling of a witness when called to testify for the

purpose of giving the jury all the facts necessary to a full and fair consideration of his evidence and enable them to determine the degree of credit to be accorded thereto." 28 R. C. L. 615 (§ 204).

"As to the time when the hostility of a witness to one of the parties must appear in order to make the evidence admissible, no hard and fast rule can be laid down. If the hostility arose a considerable period prior to the day of the trial, this would appear to be no reason for the exclusion of the evidence, if the hostility and prejudice had continued. But it would seem to be necessary to make it appear either that the hostility exists at the time of the trial, or that it has arisen so recently that it can be presumed to continue. Id. 617 (§ 205).

[3] It is also urged by respondent that the extent of the cross-examination is within the sound discretion of the trial court, and unless abused the judgment will not be disturbed on account of such rulings. The correct rule, however, is stated in a note to section 450, 1 Greenleaf on Evidence:

"The extent to which a witness may be cross-examined as to facts otherwise immaterial for the purpose of testing his bias and credibility is ordinarily within the discretion of the court, no rule of law being violated." *Consaull v. Sheldon*, 35 Neb. 247, 52 N. W. 1104.

Certainly a rule of law is violated by the exclusion of evidence which is both material and relevant. Evidence which is competent and relevant is admissible, the courts exercising no further discretionary power than to see to it that trials are kept within reasonable bounds as to the time they occupy and the range they cover.

"Evidence may be relevant, and yet its relevancy may be so slight and inconsequential that to receive it would be to distract attention that ought to be concentrated on what bears directly on vital points, and to confuse rather than to illuminate the case. In determining whether any particular testimony offered belongs to this category, a certain discretion is necessarily vested in the trial court." 16 Corp. Juris, 561 (§ 1086, F).

In *Richardson v. Gage*, 28 S. D. 390, 133 N. W. 692, Ann. Cas. 1914B, 534, this court held that:

"Personal ill will on the part of a witness toward a party to the action is evidence of bias which may affect credibility, and the right to elicit the fact on cross-examination may not often be denied without an abuse of discretion which would be deemed prejudicial to the litigant. * * * In such cases the proper scope for the exercise of discretion by the trial court is in limiting the cross-examination to a disclosure of such facts only as may show the existence of hostility, and rejecting any matters which might be pertinent only to a justification of hostility on the part of the witness, for it is the existence of the feeling which is material, and not the right or wrong in the transaction which occasions it."

[4] The rejection of Kenstler's evidence tending to show hostility on the part of Calhoun was also prejudicial error, within the ruling of this court in *State v. Smith*, 188 N. W. 878.

We are of the view that the rulings of the trial court were erroneous and prejudicial, and that the judgment and order of the trial court must be reversed.

WHITING, J., not sitting.

MILLS v. DAKOTA POWER CO. (No. 4912.)*

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Municipal corporations $\S$ 705(2)—Driver of truck on wrong side of street in approaching street intersection held negligent.

Under Laws 1919, c. 267, § 1, requiring automobile drivers in turning to the left into other street to pass to the right of and beyond the center of the intersection of the two streets, and Rev. Code 1919, § 8632, requiring the driver to go to the right of the middle of the road on approach of vehicle from other direction, and a city ordinance, requiring the driver to keep to the right of the center line of the street as far as possible, a truck driver, who approached a street intersection on the left side of the street, thereby colliding with an automobile turning into the street on which the truck was being driven from the intersecting street, close to the right side thereof, held negligent, since the automobile had the right of way in such case, and the truck driver should have apprehended the probability of another vehicle turning into the street in front of him from a cross street.

2. Municipal corporations $\S$ 705(2)—Automobile driver, turning into intersecting street to his right, not required to grant right of way to driver approaching from the right along intersecting street.

Laws 1919, c. 267, § 1, requiring automobile driver to grant the right of way at the street intersection to an automobile approaching from his right, does not apply where the driver to the left turns to his right into intersecting street as near the right-hand boundary of the road as possible, as required by such statute, since in such case he does not interfere with the driver approaching the intersection from his right, and who in approaching the intersection should be driving on the right-hand side of the street.

Appeal from Circuit Court, Pennington County; James McNenny, Judge.

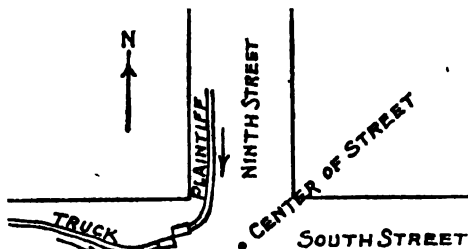
Action by Chester M. Mills against the Dakota Power Company, a corporation. From judgment for plaintiff and from an order denying a new trial, defendant appeals. Judgment and order affirmed.

Bangs & Wood and Thomas E. Eastman, all of Rapid City, for appellant.

Schrader & Lewis, of Rapid City, for respondent.

McCOY, J. Action to recover damages to an automobile resulting from a collision with a truck by reason of the alleged negligence of the driver of said truck. From a verdict and judgment in favor of plaintiff, defendant appeals.

The vital question presented is whether the evidence is sufficient to sustain the verdict under the instructions of the court, appellant's contention in substance being that, measured by the instructions given, the verdict should not be permitted to stand, for the reason there was no evidence whatsoever of negligence on the part of appellant, while on the contrary respondent was by the undisputed evidence shown to be guilty of contributory negligence of such a character as would preclude plaintiff from a recovery, that appellant, as a matter of law, had the right of way at this street intersection, and that respondent was at fault in not observing it. The record in substance shows the following facts: That the collision took place at or near the intersection of Ninth and South streets in the city of Rapid City, at a time when both vehicles were moving at a moderate rate of speed; that the following plat shows the relative position in the traveled portion of said streets of the course or path pursued by each of said vehicles immediately prior to the collision:



Plaintiff was traveling southward on the right side of Ninth street, and, desiring to turn and go west on South street, made the turn with his car wholly on the right side of the center line of the said streets, and was proceeding westward on South street when the collision occurred. Defendant's truck was traveling eastward on the left side of South street, and as he approached Ninth street said truck swung out towards and on the center line of South street. Both vehicles were to the north and right of the center line of South street at the time of the collision. The driver of defendant's truck testified that he did not intend turning north up Ninth street, but intended to continue eastward on South street. Respondent testified that when he first observed the truck swinging out toward the center of South street he thought it was the intention of the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 22, 1921.

driver of the truck to continue eastward on South street, but when said truck took a turn towards the north side of said street he then thought it intended turning up Ninth street. There was some conflict in the evidence as to the condition of the road, some conflict as to the exact location of the collision, and some conflict as to conversations of the drivers of said vehicles immediately after the collision. Whatever conflict there may be in the evidence, by the verdict of the jury, has been resolved in favor of plaintiff. As we view the evidence, it is immaterial whether the driver of the truck intended continuing eastward on South street or intended turning up Ninth street, as in either case respondent was entitled to the right of way on the right side of both streets over the course he intended to go. The respondent was, by the law of the road, at all times traveling in a place where he had a right to be, and where he had the right of way. Under the law of the road, defendant's truck, as far as it related to respondent, was at all times in a place where it had no right to be, and where it had no right of way as against respondent.

Section 1 of chapter 267, Laws 1919, so far as applicable to the evidence of this case, provides that—

"Every driver of a motor vehicle approaching the intersection of a street or highway shall grant the right of way at such intersection to any vehicle approaching such intersection from his right; * * * every driver of a motor vehicle turning into another street or highway to the right shall turn the corner as near the right-hand boundary of the road as possible. * * * Every driver of a motor vehicle turning into another street or highway to the left shall, before turning, pass, wherever possible, to the right and beyond the center of the intersection of the two streets or highways."

Section 8632, Code 1919, provides:

"Whenever one person shall meet another on any bridge or road, traveled by wagon, carriage, sled or other vehicle, each shall pass to the right of the middle of the traveled part of such bridge or road, so that the respective vehicles may pass each other without interference."

A city ordinance, not in conflict with any state statute, provides that—

"A driver of any vehicle in the city of Rapid City shall as far as possible keep to the right of the center line of the street along which he is traveling."

[1, 2] Under these provisions of the general statute, and the city ordinance, respondent was at all times observing the rules of the road. Respondent had the right to turn said corner as he did, and had no duty to apprehend that he would find the truck of appellant on the left side of South street. Respondent had the right of way on the

right side of Ninth street going southward, and also had the right of way on the right side of South street going westward. If appellant had been observing the rules of the road and had been on the right side of the center of South street going eastward, this collision would never have occurred. If respondent had intended continuing southward on Ninth street, it then would have been his duty to have given defendant's truck the right of way, but respondent, not intending to so continue southward across South street, was not required to take into consideration the appellant's right to the right of way at such street intersection as the route intended to be taken, and which was taken by respondent, would in no manner interfere with appellant's right of way to continue eastward on South street, if appellant had been where he should have been in going eastward on South street. Although the truck of appellant, in the absence of other vehicles, might properly have been moving on the left side of South street in going eastward, still it was the duty of the driver of the truck to apprehend the probability of another vehicle, having the right of way, turning into that side of the street in front of him from a cross street, and which would have immediately required the truck so headed eastward to cross over on to the right side of South street and give the right of way to such other vehicle. The instruction given correctly stated the law of the road, and was most favorable to appellant, if the jury found respondent at fault. We are of the opinion the verdict was sustained by the evidence under the instruction given.

Finding no prejudicial error in the record, the judgment and order appealed from are affirmed.

WHITING, J., not sitting.

HANSON v. HARRIS. (No. 4842.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Physicians and surgeons $\S$ 18(8)—Failure to restore injured limb to natural condition is not proof of malpractice.

In an action against a physician for malpractice, the mere fact that plaintiff's limb was not restored to its natural condition and usefulness is not proof of negligent treatment.

2. Physicians and surgeons $\S$ 15—Failure to take X-ray of injured knee, sufficiently examined by other means, held no negligence.

Failure to take an X-ray photograph of an injured knee, where there were no broken bones, and where defendant made a sufficient examination by opening the joint, and examined for broken bones with his finger, is not negligence.

3. Physicians and surgeons $\Leftarrow$ 18(8)—Evidence insufficient to show negligence.

In an action for malpractice in the treatment of an injured knee, evidence *held* insufficient to show negligence or want of skill in using a paste, some of which was afterwards found in the joint, or in failing to keep plaintiff's leg in splints.

Appeal from Circuit Court, Roberts County; Frank Anderson, Judge.

Action by Iver Hanson against H. G. Harris. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

See, also, 183 N. W. 115.

Batterton & Bunde and E. J. Turner, all of Sisseton, and Geo. S. Rix, of Milbank, for appellant.

Howard Babcock and O. R. Jorgenson, both of Sisseton, for respondent.

POLLEY, P. J. Action for the recovery of damages for alleged malpractice. Plaintiff had judgment, and defendant appeals.

Some time during the month of February, 1914, plaintiff was injured by having a wagon wheel run over his right knee. A physician was called, but the knee soon became badly swollen and inflamed and became very painful. About two weeks after the injury defendant was consulted and asked to treat plaintiff for the injury. Defendant was a practicing physician and surgeon, and owned and conducted a hospital at the town of Wilmot. He caused plaintiff to be removed to his hospital and at once examined the injured knee. At this time the knee appears to have been in a very serious condition. In addition to the swollen and inflamed condition of the knee, plaintiff had considerable fever. Defendant opened the knee joint and found a large cavity filled with what he termed "thin sero purulent pus." The cavity extended a distance of five inches above the knee. A number of abscesses containing pus had formed about the knee. Defendant made four incisions, and drained and cleaned out the abscesses, and applied the proper drainage and irrigation. He inserted his finger through the incisions into the cavity of the knee, and ascertained that there was no fracture of any of the bones; but the joint was badly infected, and the bone had become infected to some extent. The treatment of the abscesses by drainage and irrigation was continued, and in a few days the knee showed signs of improvement. The swelling went down and the temperature of the patient was reduced.

This condition continued until about ten days or two weeks after plaintiff entered the hospital, when defendant injected into the joint and into the abscesses and pus cavities about, the knee a preparation known as

"Beck's paste." From the description of this preparation contained in the record, "Beck's paste" appears to be a thin salve, composed of a mixture of one part powdered bismuth and two parts vaseline. The purpose of this application appears to have been to hasten the healing of the abscesses and incisions that had been made by the defendant, and this result appears to have followed; but soon thereafter another abscess formed farther down on the calf of the plaintiff's leg. This abscess was opened and drained, and proper irrigation applied, and it appears to have soon healed.

Defendant continued to treat the injured member until the 11th day of April, when plaintiff was discharged from the hospital as "cured." At this time plaintiff's knee was nearly stiff, and so bent that, when he stood up, only his toes would touch the ground. All the openings in the leg except the lower one were healed, and that healed soon after, and none of them ever opened again. Both plaintiff and defendant appear to have believed that so far as possible the leg was cured, and plaintiff appears to have been well satisfied with defendant's services.

When plaintiff left the hospital, he was walking on crutches, and it was not long until he began to feel considerable pain in his knee. He did not report this to defendant, but waited until some time during the following December, when he went to a hospital in Sisseton, where he had two surgeons, Glacier and Peterson by name, operate on his knee. The knee joint was again opened, and it was found that plaintiff had necrosis of the bones of the knee joint, especially the lower end of the femur. In other words, the infection of the joint had extended to the bones and caused the decay of a considerable quantity of the bone. One of the surgeons who performed the operation testified that he found small quantities of "Beck's paste" in the joint. All of the dead bone, together with the particles of paste found in the joint, were removed. This operation appears to have relieved plaintiff of much of the pain that he had suffered theretofore. His knee was straightened, and by using a brace that relieves the knee of his weight he has some use of his leg.

Some months later he had an X-ray picture made of his knee. Nothing was disclosed by this picture that was not already known, except that it showed that in the cavities that had been formed by the abscesses in the muscles about the knee joint some of the Beck's paste that had been injected by the defendant still remained. Later on Drs. Peterson and Glacier again operated on the knee and removed this paste.

At the time of the trial all the abscesses and sores about plaintiff's knee were healed. His knee was practically stiff, and could

be used but little, if any. Whether he can get around without the aid of a cane or crutch is not clear from the evidence; but by wearing a brace, that relieves the knee joint of the weight of his body, he can get around and perform some labor. But that his knee is permanently injured and that he is crippled for life is too plain to admit of question.

[1] It is alleged in plaintiff's complaint, and is now contended by plaintiff, that the condition of his leg was caused by the careless, unskillful, and negligent manner in which defendant had treated the injury. The evidence does not sustain these contentions. In *Dean v. Seeman*, 42 S. D. 577, 176 N. W. 649, we adopted the rule that is generally followed by the courts: That the mere fact that plaintiff's limb was not restored to its natural condition and usefulness does not prove, nor even imply, that appellant was negligent or unskillful. Physicians and surgeons are not to be held responsible for results, but only for the kind of service rendered by them. In treating a diseased limb:

"The implied contract between the surgeon and patient is not to restore it to its natural condition, but to use that degree of diligence and skill which is ordinarily possessed by the average of the members of the profession in similar localities, giving due consideration to the state of the art at the time."

[2] There is no claim made that defendant was not a capable, competent, and skillful surgeon. But it is claimed that he was negligent in his treatment of plaintiff's injury, in that he did not take an X-ray of plaintiff's knee at the time of the first operation. The undisputed evidence shows that the purpose of taking an X-ray of an injury is to ascertain facts that cannot be ascertained in any other way. The only fact that it is claimed could have been ascertained by taking an X-ray in this case is whether there was a fracture of any of the bones in or about the knee joint. But it was wholly unnecessary for that purpose, because defendant had opened the joint, inserted his finger, and ascertained that there was no broken bone. It is alleged in the complaint that plaintiff's "right leg was broken at or near the knee," and numerous references to a "broken bone" are made in respondent's brief; but there is no evidence to sustain such contention, and counsel for respondent admitted on the argument in this court that there was no fracture of any bone, and there is no merit whatever in this contention.

[3] Respondent contends that the use of Beck's paste was unnecessary, and under the circumstances was improper treatment. This contention is based on the theory that Beck's paste is a preparation that is intended to be applied to, and can properly be used only, in cases of chronic or tubercular abscesses, while the abscesses involved in this case

were what are known as acute abscesses. But appellant appears to have used it in the exercise of his best judgment that it was necessary to hasten the healing of the abscesses about the knee. That it accomplished this result there can be no possible doubt, nor is there any evidence that it had any evil results. It is true that after the paste was injected into the abscesses about the knee joint another abscess formed farther down on the leg; but there is no evidence that this was the result of the use of the paste. The surgeon who performed the second operation testified that he found some of the paste in the knee joint, and that it interfered with the action of the knee, but just how it could interfere with the action of a stiff knee does not appear. No witness who testified in the case ventured the opinion that there was anything that could have been done after defendant took charge of the case that would have prevented the knee from being stiff the remainder of plaintiff's life.

It is contended that, while plaintiff was under defendant's care at the hospital, he should have kept plaintiff's leg in splints, so that when it healed the knee would have been straight. This is on the theory that the knee would be entirely stiff, and that it would be better to have it straight than to be bent. The evidence shows that there was a splint on the leg for some time after plaintiff was in the hospital; but it appears to have been the belief of defendant at that time that the knee joint would not be entirely stiff after it healed, and the splint was removed. It appears from the testimony of plaintiff himself that when he left the hospital his knee was not rigid, that he could pull it back a little, and that defendant told him to go home and use his leg all he could, and try to straighten it out. There is no evidence, however, that he followed these directions, and no opinion was expressed by any witness that the leg would not have straightened out, if such directions had been followed.

Frequent mention is made in respondent's brief of loose pieces of bone having been left in the knee joint. This contention is wholly without merit. There is no evidence that there ever were any loose pieces of bone in the joint. The surgeon who operated on the joint eight months after plaintiff left defendant's hospital testifies that he did not find any loose bone in the joint, but that he did find decayed bone about the joint. This condition was the result of the infection in the joint, and so far as the evidence shows developed after plaintiff left defendant's hospital.

After a thorough analysis of the testimony in this case, we fail to find any facts that warrant the conclusion that the defendant was negligent or unskillful in his treatment of plaintiff's injury, or that any other course

of treatment known to the medical profession would have produced better results. Plaintiff has suffered much pain, and no doubt will continue to suffer great pain, and much inconvenience from the condition of his leg. No doubt his condition appealed strongly to the sympathies of the jury, as it certainly does to the sympathies of the court; but this does not justify the verdict against defendant.

The evidence does not justify a verdict against defendant, and it is not necessary to consider the assignments based upon the admission of immaterial evidence or the refusal to give requested instructions.

The judgment and order appealed from are reversed.

BRITTON MILLING CO. v. WILLIAMS.
(No. 4820.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Corporations §116—Statements by seller of stock held representations of fact.

Statements by seller of stock of newly organized corporation that the corporation had bought and was about to take over a certain flour mill, that arrangements had been entered into with a railroad for construction of a spur track, that the corporation would pay stockholders a higher price for grain than could be secured by them elsewhere, and would sell feed to subscribers at cost and at a less sum than such feed could be purchased elsewhere, and that notes executed for the purchase price of stock could be paid for out of dividends, were representations of fact, and not merely promises, except as to representation as to amount of the dividends, and constituted a good defense in action on the purchase-price note, not being so improbable that no reasonable person could have been influenced thereby.

2. Corporations §121(6)—Whether buyer of stock was induced by misrepresentations to sign purchase-money note held for jury.

In an action on a note given for the purchase price of corporate stock, defended on the ground of misrepresentations that stockholder could sell grain to corporation for more than could be obtained elsewhere, and receive a greater price for feed from the corporation than could be obtained elsewhere, and could pay note out of dividends, the question whether the seller made such representations, and as to whether the buyer was induced thereby to sign the note, held for the jury.

3. Bills and notes §516—Proof of possession and ownership of note prima facie case for plaintiff.

In an action on a note given for the purchase price of corporate stock, defended on the ground that the execution of the note was obtained by misrepresentations as to the corporation, plaintiff, by showing possession and

ownership of the note, established a prima facie case, which could be overcome only by a preponderance of the evidence in support of the defense.

4. Bills and notes §330—Holder in due course must have acquired note from payee or prior indorsee and not by issue or delivery from maker.

Under Negotiable Instruments Law, § 52 (Rev. Code 1919, § 1756), defining a holder in due course as one who has taken the instrument without notice of any infirmity in the instrument, or defect in the title of the person negotiating it, a holder in due course must have acquired the note by negotiation and transfer from the payee or a prior indorsee, and not by issue or delivery from the maker.

5. Bills and notes §330—Third party, to whom corporation selling stock causes note for purchase money to be made payable, held not a "holder in due course."

Where newly organized corporation caused note for purchase money of stock to be executed to another corporation, from whom it was purchasing a mill, to apply on purchase price of such mill, other corporation was not a "holder in due course," under Negotiable Instruments Law, § 52 (Rev. Code 1919, § 1756), since a holder in due course must have acquired the note by negotiation and transfer from the payee or a prior indorsee, and not by issue or delivery from the maker.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

Gates, J., dissenting.

Appeal from Circuit Court, Brown County; Frank Anderson, Judge.

Action by the Britton Milling Company against H. J. Williams. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Judgment and order reversed.

Harold W. King, of Britton, and McNulty & Campbell, of Aberdeen, for appellant.
Campbell & Walton, of Aberdeen, for respondent.

POLLEY, P. J. Action to recover on a promissory note. At the close of the testimony the court directed a verdict for the defendant, and from the judgment entered thereon and from an order denying a new trial plaintiff appeals.

The execution of the note by the defendant is admitted, but he claims that he was induced to sign the same by the false and fraudulent representations made by the party to whom he delivered the note, and that there was a lack of consideration for the same. The fraudulent representations claimed to have been made by the party who induced defendant to sign said note are alleged in defendant's answer in the following language:

"For further answer, by way of defense to the claim of the plaintiff herein, this defendant alleges that on or about the 2d day of November, 1917, one O. W. Bucklin visited this defendant, and requested and urged this defendant to subscribe for some shares of the capital stock of the Britton Co-operative Milling Company; the said O. W. Bucklin claiming to be the agent and representative of the Britton Co-operative Milling Company, a corporation, and in order to induce this defendant to subscribe for the capital stock in said milling company, falsely and fraudulently and for the purpose of deceiving and defrauding this defendant, made to the defendant, in substance, the following statements and promises, to wit: That the said Britton Co-operative Milling Company had bought and was about to take over the flouring mill located at Britton, S. D. That the said Britton Co-operative Milling Company had at said time arrangements entered into with the Great Northern Railway Company wherein and whereby a branch or spur railroad line would shortly be constructed by said railroad company from Burch, S. D., a distance of about four miles, and that upon completion of said branch railroad this defendant, if he became a stockholder in said Britton Co-operative Milling Company, and other stockholders residing on the line of the Great Northern Company near which this defendant resided, could and would be able to ship the grain raised by them directly over the Great Northern Railway to such mill at Britton, S. D., and that said Britton Co-operative Milling Company could, by reason of its being a manufacture, pay and would pay to stockholders therein a substantially higher price for grain, especially wheat, raised by them, than could be secured elsewhere.

"The said O. W. Bucklin further promised and represented to this defendant, as an inducement for him to buy stock in said Britton Co-operative Milling Company, that the said company would promptly thereafter ship and send to the Farmers' Elevator Company at Plana, S. D., near which this defendant resided, flour, bran, and feed for stock, and that said milling company would sell such feed to those subscribing for stock in the Britton Co-operative Milling Company at cost and for a substantially less sum than it could be purchased for elsewhere. And the said Bucklin, in order to induce this defendant to subscribe for the shares of capital stock of the said Britton Co-operative Milling Company, further offered and promised this defendant that, if he would subscribe for five shares of such stock of the par value of twenty-five dollars each and pay therefor one hundred fifty dollars (\$150), twenty-five dollars (\$25) thereof to be then paid in cash and the remaining one hundred twenty-five dollars (\$125) thereof to be represented by a note to the Britton Co-operative Milling Company, payable January 1, 1919, bearing interest at the rate of 8 per cent. per annum, that such five shares of stock would be, by said Britton Co-operative Milling Company, issued to him at once, and that such stock certificates should and would bear and entitle the defendant to 8 per cent. annual interest, and that the interest accruing to this defendant by virtue of the stock certificates would pay all in-

terest accruing on or to accrue upon the note above referred to, and that the dividends accruing on said stock would be sufficient to pay the principal of said note when the same became due, and further promised and agreed that the stock to be issued to him, this defendant, should be the capital stock of the Britton Co-operative Milling Company and that the twenty-five dollars (\$25) cash would be paid to the Britton Co-operative Milling Company, and that the note for one hundred twenty-five dollars (\$125), which this defendant was asked to execute, would be the property of and payable to the Britton Co-operative Milling Company.

"And the said O. W. Bucklin at said time, further promised and agreed with this defendant that, unless the sum of forty thousand dollars (\$40,000) worth of the capital stock of said Britton Co-operative Milling Company was taken and subscribed on or before December 1, 1917, his subscription for stock therein should be void. That, relying upon such statements, promises, and agreements so made by the said O. W. Bucklin, and believing them to be true, and not otherwise, this defendant, on said 2d day of November, 1917, paid to the said O. W. Bucklin the said sum of twenty-five dollars (\$25), and the said O. W. Bucklin prepared at said time a note for \$125, which was agreed to be payable to the Britton Co-operative Milling Company, but which said defendant now ascertained was by said Bucklin wrongfully and fraudulently made payable to Britton Milling Company, this plaintiff, delivered the same to said Bucklin."

It is then alleged that all the promises and agreements made by the said Bucklin were false and untrue, and were made for the purpose of deceiving defendant, and thereby inducing him to sign the said note; that he believed and relied upon such representations, and was thereby induced to execute said note.

[1-3] It is the contention of appellant that if the matters set up in the answer were established by the evidence—and appellant does not admit that they are—they are not sufficient to constitute a defense as against the note. It is claimed by appellant that the representations made by Bucklin were not representations of then existing facts, but were only promises and representations of what was to take place in the future, and therefore were not actionable. And it is further claimed that the said representations, if made as claimed, were so extravagant and improbable that no reasonable person could have been influenced thereby. This claim, however, is not true. Except as to the representations in regard to the amount of the dividends that would be paid on the stock, such representations were in regard to what purported to be then existing facts or were promises of acts to be performed by the Britton Co-operative Milling Company that constitute a part consideration for the note; nor do we believe that such promises were so extravagant or unreason-

able that they would not influence an ordinarily prudent person. Bucklin must have thought they would influence defendant; else, why did he make them? The fact that defendant would receive 8 per cent. on his investment, in addition to the very extravagant dividends promised by Bucklin, may have been one of the inducements that determined defendant to sign the note. But whether Bucklin made the representations alleged in the answer and testified to by defendant, and whether defendant was induced by such representations to sign the note, are questions of fact that should have been submitted under proper instructions to the jury. It is true that Bucklin did not deny having made the representations alleged in the answer; but, having been set up by defendant as an affirmative defense, defendant had the burden of proof to establish same, and whether he maintained such burden was a question for the jury. Plaintiff, by showing the possession and ownership of the note, made out a prima facie case, and this could be overcome only by a preponderance of the evidence in support of defendant's defense. The court erred in directing the verdict, and a new trial will be granted.

This disposes of the case, so far as this appeal is concerned; but it is contended by appellant that it is a holder of the note in "due course," and that in its hands said note is not subject to the defense set up by respondent, even though the same were established by a preponderance of the evidence. As this question will come up again in case of a new trial, and as both parties have fully presented it in their briefs, we deem it proper to dispose of it now.

Plaintiff's contention that it is a holder of the note in "due course" is based upon the following facts: Plaintiff appears to have been the owner of a flouring mill at Britton; the Britton Co-operative Milling Company was organized for the purpose of purchasing the mill and taking over the business of the appellant; the purchase was to be made with the proceeds of the sales of capital stock of the latter company; and the note in question was given by respondent in payment for capital stock in said company, but was made payable to the Britton Milling Company, and was accepted by appellant in part payment of the purchase price of the said mill. Whether appellant is a holder in "due course" depends upon the meaning of section 52 of our Negotiable Instruments Law (now section 1756, R. C. 1919). This section reads as follows:

"A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That it is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it has

been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Under the first three subdivisions of this section appellant would be a holder in "due course," because there is no question that when the note came into plaintiff's possession it was complete and regular upon its face, that it was not overdue and had not been dishonored, and that it had been taken in good faith and for value.

[4] But all of these provisions are qualified by subdivision 4. This subdivision clearly contemplates that, to be a holder in "due course," the holder must have acquired the note by negotiation and transfer from the payee or a prior indorsee, and not by issue or delivery from the maker. Therefore, under this law, the payee named in a note cannot be a holder in "due course." This precise question has never been passed upon by this court, but in *Shade v. Barnes*, 35 S. D. 142, 151 N. W. 42, L. R. A. 1915D, 271, we held that the mortgagee named in a real estate mortgage could not be an innocent purchaser for value as against the claims of fraud or no consideration. *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275.

[5] In *Herdman v. Wheeler*, [1902] 1 K. B. 361, it is held that a "holder in due course" should be construed to be applicable only to one who takes the instrument by negotiation from another who is a holder. Under our Negotiable Instruments Law, and the construction that has been put upon similar laws by other courts, the appellant is not a "holder in due course," and the note is subject to the same defenses that promissory notes generally are in the hands of the payee therein named.

The judgment and order appealed from are reversed.

WHITING, J., concurs in result.

GATES, J. I dissent from that portion of the opinion which directs a reversal. I think the judgment should be affirmed. We fully sustain the views of the trial court and of respondent as to the law of the case. Appellant in its brief treats the questions before us as pure questions of law. It does not contend that the trial court erred because it did not submit to the jury the question whether the representations were made and the question whether respondent relied upon the representations. It contends that the court erred in directing a verdict, because in legal effect the representations made were not representations on which respondent had the right to rely. Indeed, it contends

that a verdict should have been directed for it, if a request therefor had been made. In my opinion the reversal is based upon a ground not assigned as error.

BRITTON MILLING CO. v. WILLIAMS.
(No. 4821.)

(Supreme Court of South Dakota. Sept. 2, 1921.)

Appeal from Circuit Court, Brown County; Frank Anderson, Judge.

Action by the Britton Milling Company, a corporation, against E. G. Williams. From a judgment for defendant, and from an order, plaintiff appeals. Judgment and order reversed.

Harold W. King, of Britton, and McNulty & Campbell, of Aberdeen, for appellant.

Campbell & Walton, of Aberdeen, for respondent.

POLLEY, P. J. All the material facts in this case are identical with the facts in Britton Milling Co. v. H. J. Williams, 184 N. W. 265, No. 4820, handed down on the 31st day of August, and for the reasons therein stated the decision is the same.

The judgment and order appealed from are reversed.

GATES, J., dissents.

WHITING, J., not sitting.

WILHELM v. BANG, Sheriff, et al.

(Supreme Court of North Dakota. June 22, 1921. Rehearing Denied Sept. 10, 1921.)

(Syllabus by the Court.)

Sheriffs and constables §125(2)—Discovery of lost execution in clerk's custody held to warrant vacation of amercement judgment against sheriff for failure to return.

Where a judgment was entered against a sheriff in amercement proceedings and where the trial judge, at the time of ordering judgment, directed a stay of execution for 30 days within which time defendant might move to vacate, and during the pendency of the motion the execution, which had been lost and the failure to return which constituted the basis for the amercement judgment, was found in the custody of the clerk of the district court among excess files kept in a storage vault with a return indorsed thereon by the sheriff, it is held sufficient facts appeared to constitute a prima facie defense to the amercement proceedings, and that the action of the trial court in granting the motion to vacate the judgment was not an abuse of discretion.

Appeal from District Court, Dunn County; Thos. Pugh, Judge.

Amercement proceeding by Joseph Wilhelm against John Bang, Sheriff of Dunn County, N. D., and his surety. From an order vacating a judgment in favor of plaintiff, the latter appeals. Affirmed.

Halpern & Rigler, of Hebron, for appellant.

Tobias D. Casey, of Dickinson, for respondents.

BIRDZELL, J. This is an appeal from an order vacating a judgment in an amercement proceeding. It appears that the plaintiff in this action was, in December, 1917, the owner of a note and chattel mortgage upon a Ford automobile which had been given by one T. E. Flowers. An action was instituted to foreclose the mortgage and obtain a deficiency judgment. Upon the filing of the complaint a warrant of seizure was issued to the defendant Bang as sheriff of Dunn county, directing him to seize the mortgaged property. It later appeared that one Boyd claimed a lien upon the property for repairs, and a complaint in intervention was filed, setting up his claims. Flowers defaulted, and the action was prosecuted to judgment and judgment entered in favor of the plaintiff. On June 27, 1919, a special execution was issued, directing the sheriff to sell the automobile in satisfaction of the judgment. The execution was placed in the hands of the sheriff on July 1, 1919. Inquiries were later made by the plaintiff's attorney concerning the execution, and, it appearing from such inquiries that the execution had not been returned, summary proceedings in amercement were begun against the sheriff. The motion was postponed from time to time and was not decided by the trial court until near the expiration of the term of the judge to whom it was presented. Upon the showing made on behalf of the plaintiff judgment was ultimately entered, amercing the sheriff. At the time the judgment was entered the court stated that the execution would be stayed for 30 days to allow the defendant sheriff time to move for opening the judgment. Within the 30 days notice of motion to vacate the judgment was served upon the plaintiff's attorney. The motion was supported by the affidavit of the sheriff, which, among other things, stated that he had never been able to obtain possession of the automobile under the warrant of seizure, although he had made diligent search for the same; that he had not been able to obtain possession after diligent search under the special execution; that he immediately made out and signed a return of these facts, and it was his intention to file the return with the clerk of court of Dunn county, but that through some mis-

take the return, as the affiant was informed, was never filed with the clerk of court. It appears, however, that before the motion to vacate was decided, the execution was found among certain files of the clerk in the basement of the courthouse where excess files were kept and that it bore a return of the sheriff. The trial court indicated in a memorandum that this was sufficient ground to set aside the judgment. Hence the order vacating the judgment.

Under the state of facts presented upon this appeal, it appears to be clear that the trial court did not commit error in exercising its discretion by vacating the judgment, as the facts, if they should ultimately be determined in accordance with the prima facie showing, would constitute a defense to the amercement proceedings. It also appears that the defendant was not guilty of serious neglect in his failure to discover earlier the true facts with reference to the return, as he apparently relied upon the clerk to file the execution in its proper place.

The order appealed from is affirmed.

BRONSON, CHRISTIANSON, and GRACE, JJ., concur.

ROBINSON, C. J. (concurring specially). I do concur in the opinion as written by Mr. Justice BIRDZELL. I do also concur in the special opinion of myself and Mr. Justice GRACE in *Solberg v. Rettinger*, 40 N. D. 1, 168 N. W. 572. I wholly dissent from the amercement decision in *Lee v. Dolan*, 34 N. D. 449, 158 N. W. 1007. That decision does violence to our conscience and our sense of fairness and honesty. If the purpose of the amercement statute is to aid one person in robbing another, then it should be strictly construed or held void. It is high time for the courts to cease following bad precedents, piling error upon error and lading men with burdens that are grievous to be borne. It was for that evil practice the Master said: "Woe unto you, ye lawyers."

FIRST NAT. BANK OF NEW ROCKFORD v. HALLQUIST.

(Supreme Court of North Dakota. June 27, 1921. Rehearing Denied Sept. 10, 1921.)

(Syllabus by the Court.)

1. Homestead § 66 — Mortgage by husband and wife should not be deducted in determining value.

In determining the value of a homestead estate, a prior existing mortgage executed by both husband and wife should not be deducted.

2. Homestead § 117—Mortgage by husband alone is valid as to excess of lands above homestead.

A mortgage executed by the husband alone covering land which constitutes the homestead estate is valid as to the excess in value above the homestead estate.

Grace, J., dissenting.

Appeal from District Court, Eddy County; J. A. Coffey, Judge.

Action by the First National Bank of New Rockford against Peter P. Hallquist to foreclose a mortgage on a homestead. Judgment for plaintiff for the amount of the note with interest, and further that the mortgage be canceled of record, and the plaintiff appeals. Reversed and remanded.

N. J. Bothne, of New Rockford, for appellant.

R. F. Rinker, of New Rockford, for respondent.

Statement.

BRONSON, J. This is an action to foreclose a real estate mortgage. The record discloses the following:

The defendant is the owner of 160 acres of farm land in Eddy county. He is a married man with a family of six children. For many years he has occupied this land as his homestead. In 1915 the defendant together with his wife gave a mortgage upon the land to the Minneapolis Loan & Trust Company to secure a note for \$2,500 and interest. There is now unpaid upon this mortgage with interest \$2,650. There are also unpaid taxes for 1919 and 1920 amounting to \$213. In 1916 the defendant alone gave a mortgage to the plaintiff upon this land to secure \$1,675 and interest. There is due and unpaid upon this mortgage including interest over \$2,000. Witnesses variously testified that the value of the land including improvements was from \$45 to \$65 per acre. The defendant testified that the value was \$40 per acre. The trial court upon findings determined the value of the land to be \$7,200; that, after deducting the prior liens thereupon, the homestead did not exceed in value the homestead exemption; that, accordingly, plaintiff's mortgage signed by the husband alone, being a lien only for the amount above the statutory exemption, did not attach to the land. Judgment was ordered and entered in favor of the plaintiff for the amount of the note with interest and, further, that the mortgage be canceled of record. The plaintiff has appealed from the judgment.

Decision.

[1] Did the trial court err in deducting the prior existing incumbrance to determine the value of the homestead? It is to be noted that this prior mortgage to the trust

company was made by both husband and wife so that it operated to create a lien upon the homestead. When this mortgage so signed by husband and wife was executed, there then existed, following the findings of the trial court, the sum of \$2,200 over and above the value of the homestead estate in the land. To deduct this mortgage out of the excess value above the homestead estate would simply serve to place such mortgage in the position of a mortgage that did not cover the homestead estate. This court has heretofore held that in determining the value of the homestead estate existing incumbrances should not be deducted. *Calmer v. Calmer*, 15 N. D. 120, 127, 106 N. W. 684.

[2] That a conveyance by the husband without his wife joining, of lands including the homestead, is valid as to the excess of value of the land above the homestead exemption. *Severtson v. Peoples*, 28 N. D. 372, 384, 148 N. W. 1054. These cases, upon the question herein involved support the clear weight of the authorities. 21 Cyc. 551; 13 R. C. L. 635; 15 A. & E. Enc. Law (2d Ed.) 684; *Thompson on Homesteads and Exemptions*, § 477. It follows that the trial court erred in deducting prior existing incumbrances. It is true that a conveyance of a mortgage of a homestead in this state must be executed and acknowledged by both husband and wife. However, plaintiff's mortgage, so far as it covers the excess above the homestead estate, is not a mortgage upon the homestead and is therefore valid to such extent.

The judgment of the trial court is reversed, and the case remanded for further proceedings consonant with this opinion. The appellant will recover costs.

ROBINSON, C. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J. (dissenting). This action is one to foreclose a certain real estate mortgage. The defendant is the owner and occupant of a certain 160-acre tract of land, located in Eddy county. This is his homestead. It is exempt from judgment lien, and from execution or forced sale, except for the value thereof, in excess of \$5,000, except for debts secured by mechanic's or laborer's liens for work or labor done or material furnished exclusively for the improvement of the same; or on debts secured by a mortgage on the premises, executed and acknowledged by both husband and wife, or an unmarried claimant, who, in conditions specified in statutory provisions, may be permitted to make the claim of homestead exemption; or debts created for purchase price thereof, and for taxes accruing and levied thereon.

The material facts are as follows:

On February 15, 1916, defendant made and delivered his promissory note to plaintiff for

\$1,675, due December, 1, 1916, bearing interest at 9 per cent. per annum. On the same date to secure the payment of the note, he executed and delivered a mortgage on the land. At the time defendant signed the mortgage, he, together with his wife and six children, were residing on the land. His wife did not join with him in giving the mortgage. The mortgage was recorded. The note was not paid at maturity. Plaintiff served notice of intention to foreclose the mortgage, and in October, 1919, commenced the foreclosure thereof by action. The complaint is in the ordinary form, for the foreclosure of a real estate mortgage by action. Defendant answered, and among other things alleged that the mortgage was null and void for the reason that his wife had not joined therein, and that the land covered by the mortgage was exempt as a homestead. There was a prior valid mortgage of \$2,500, executed by defendant and wife, on which there was accumulated \$150 interest.

The case was tried to a court without a jury. It made findings of fact and determined that the land was worth \$7,200 and that it was subject to the \$2,500 prior mortgage and interest and unpaid taxes; and, after the deduction of these amounts, defendant had an interest in the land of less than \$5,000, and set aside the whole tract of land to defendant as exempt.

The court gave a personal judgment against the defendant for the amount of the note and interest. It also ordered and decreed that plaintiff's mortgage was no lien on the land.

A determination of whether plaintiff's mortgage is a lien on the land will dispose of the case, for if it is not a lien, no other question presented here will really be material.

Section 5608, C. L. 1913, provides:

"The homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

This identical statute was construed in the case of *Swingle v. Swingle*, 36 N. D. 611, 162 N. W. 912. See, also, *Farmers' Bank of Mercer County v. Knife River Lumber & Grain Co.*, 37 N. D. 371, 163 N. W. 1053; *Yusko et ux. v. Studt et al.*, 37 N. D. 221, 163 N. W. 1066; *Rasmussen v. Stone*, 30 N. D. 451, 152 N. W. 809; *Severtson v. Peoples*, 28 N. D. 372, 148 N. W. 1054.

In *Swingle v. Swingle*, supra, it in substance was held that the homestead, as defined by section 5608, can be conveyed or incumbered only where the instrument of conveyance is executed and acknowledged by both husband and wife. The mortgage here was executed and acknowledged by the husband only. It is certain that the land in

question is the homestead of the defendant and his wife. The mortgage, as so executed and delivered, was absolutely null and void.

Again, this court has, as early as 1906, settled the question that a mortgage similar to the one in the case at bar was absolutely null and void. In the case of *Garr, Scott & Co. v. Collin et al.*, 15 N. D. 627, 110 N. W. 81, this court, speaking through Judge Young, construed section 5608, C. L. 1913, which was section 5052, Rev. Codes 1905, and section 3608, Rev. Codes, 1899, and there used the following language:

"The Constitution of this state (section 208) charged the Legislature with the duty of protecting the homestead by suitable laws. One of the means adopted by the Legislature for accomplishing this end, and it is common to many states, is the requirement that a conveyance thereof shall not be effective unless signed by both husband and wife. There is no constitutional restriction in this state inhibiting this legislation. It, on the contrary, merely carried into effect the mandate of the Constitution. That it is competent for the Legislature, in the absence of constitutional restriction, to prohibit the alienation of the homestead without the wife's signature is well settled. * * * Section 5052, Rev. Codes 1905 [now 5608, C. L. 1913], in force when the mortgage in suit was given, required the wife's signature. She did not sign it. It was therefore invalid. In some states a conveyance of the homestead executed by the husband alone is not wholly void, but has the limited effect of transferring the husband's interest, but subject to the homestead estate. *Gee v. Moore*, 14 Cal. 472. In this state, however, a conveyance of the homestead which is not executed by both husband and wife is void."

The case from which we have just quoted is directly in point. The conveyance there involved, as here, was a mortgage, and it was determined to be invalid, and, for this reason, of no effect. The statute prohibiting the alienation of the homestead, unless the instrument of conveyance is signed and acknowledged by both husband and wife, a conveyance not so executed is wholly void, regardless of the value of the homestead.

Though the homestead exceed in value \$5,000, it cannot be incumbered, except both husband and wife join in the conveyance, though, according to the statutes hereinafter cited, it may be levied on under execution, for the enforcement of a judgment, and the interest of the claimants to the homestead, over and above \$5,000, subjected to the satisfaction of the judgment. See sections 5611 to 5620, both inclusive, C. L. 1913. But that is an entirely different matter than placing a voluntary incumbrance thereon, which only may be accomplished by compliance with the provisions of section 5608, supra.

But here arises, out of section 208 of the Constitution, a very important question, viz., Can a homestead, in any event, even though

it exceed in value \$5,000, be sold at a forced sale?

Section 208 of the Constitution provides that—

"The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law, and a reasonable amount of personal property; the kind and value shall be fixed by law. This section shall not be construed to prevent liens against the homestead for labor done and materials furnished in the improvement thereof, in such manner as may be prescribed by law."

It is thus seen that this constitutional provision requires the Legislature to pass laws exempting the homestead from forced sale.

Section 5616, C. L., provides in effect that where the homestead can be divided without material injury there shall be set off to the claimant thereof so much of the real property, including the residence, as will amount in value to the homestead exemption, and that an execution may be enforced against the remainder of the real property. In such case, of course there is no forced sale of the homestead.

But section 5617, C. L., provides, in substance, that where the homestead exceeds in value the amount of the homestead exemption, and where it cannot be divided without material injury, the court shall make an order directing its sale under execution; and section 5618 provides, in substance, that where the sale is thus made, the proceeds to the amount of the homestead exemption must be paid to the homestead claimant, and the residue applied to the satisfaction of the execution.

These two latter sections provide for a forced sale of the homestead, and thus directly contravene the provisions of section 208, and hence they are invalid. The object of that constitutional provision is to keep the homestead intact and to prohibit a forced sale of it. Its purpose is to protect the home and to prevent its disintegration. It were better that the creditor should lose his claim, even though the homestead exemption is of a greater value than \$5,000 and is indivisible, than that the home should be destroyed and the family set adrift.

True it is, if a conveyance, not executed and acknowledged by both husband and wife, should include a greater area of land than that allowed by law as a homestead, and in which the homestead was included, it would be void as against the homestead; it would, nevertheless, be valid as to that part which is in excess of the lawful area of the homestead. That question is not presented in this case. Here, the tract involved does not exceed in extent that prescribed in section 5605, C. L. 1913.

Assuming, however, that sections 5617 and

5618, *supra*, are not invalid and not contrary to the provisions of section 208 of the Constitution (though we are certain those sections are clearly invalid), nevertheless the plaintiff's mortgage is, for additional reasons, ineffective and nonenforceable, and this for the reasons now to be stated.

The trial court found that the value of the homestead was \$7,200. At the trial, testimony as to the value of the land was given by quite a number of witnesses. The trial court saw these witnesses and heard them testify; and, in the circumstances of this case, we think its finding as to value is determinative of that question.

In determining the value, for the purpose of ascertaining the extent of the exemption right, as it existed at the time of the trial, the trial court deducted the amount of prior incumbrance, which, as represented by a prior mortgage on the premises, executed and acknowledged by both husband and wife, was \$2,500 plus \$150 interest.

After this deduction, the value of the homestead exemption was less than \$5,000, and the trial court accordingly set the whole of the homestead aside as exempt, and afforded the appellant no relief, other than a personal judgment against the defendant, which if this holding is correct, would not be a lien against the homestead, nor could the plaintiff procure an execution on the judgment and levy on a homestead, nor proceed in any manner to sell the homestead to satisfy its claim, as the exemption, after the deduction of the prior incumbrance, did not exceed \$5,000.

We think the trial court's finding and conclusion in this regard is correct, for if the prior incumbrance of \$2,500, instead of being a mortgage, were a judgment, there could be no controversy concerning the correctness of the trial court's conclusion, for the prior judgment would be a lien on the value of the homestead in excess of \$5,000, and it could be sold on an execution issued on the prior judgment, for the satisfaction of it, in pursuance of law in that regard, as above referred to. So, too, could the \$2,500 prior mortgage be foreclosed, and the premises sold to satisfy it. In either case, there would be a sale of the premises to satisfy a lien, and, under either, when sale was made, the exemption remaining would be less than \$5,000.

We realize that a different holding was made in the case of *Calmer v. Calmer et al.*, 15 N. D. 127, 106 N. W. 684. We think, however, that the rule announced there is one which protects the creditor and not the claimants of the homestead. It is not difficult to see that, under that rule, the benefits intended to be preserved to homestead claimants,

under our statutes providing for homestead exemptions, and under section 208 of the Constitution, could be entirely withheld from them, and the purpose thereof largely defeated.

The provision of the Constitution and of our laws creating homestead and exemption rights should be liberally construed to effect their beneficent purpose, to wit, to protect the debtor and his family in the possession, ownership, and control of a homestead of definite area and value, to which creditors cannot resort by a process of levy of execution on a judgment and forced sale, except as to the excess of value, over and above \$5,000, and not then unless the homestead is divisible and the excess not theretofore conveyed by a conveyance executed and acknowledged by husband and wife or claimant.

The writer is of the opinion that justice and protection to homestead claimants require that the rule announced in *Calmer v. Calmer*, *supra*, be overruled, in so far as it holds that, in determining the value of the homestead exemption, existing incumbrances should not be deducted.

The appellant's mortgage being entirely null and void, for the reasons above set forth, the trial court properly ordered its satisfaction, discharge, and cancellation of record. It was unnecessary for respondent to make selection or file declaration of homestead exemption. His homestead consisted of a single tract of land. It was not necessary for him to file declaration of his homestead, or claim his homestead exemption, until his right thereto was in some way challenged.

The judgment appealed from should be affirmed.

STATE v. FRIEDMAN et al. (No. 21566.)

(Supreme Court of Minnesota. Sept. 10, 1920.)

On petition for rehearing. Denied.
For former opinion, see 178 N. W. 895.

PER CURIAM. The petition for a rehearing calls attention to inaccuracies in the statement of facts in the opinion.

The state claimed that the bolts threaded in Mirsky's shop were used in a contrivance similar to that by which he was swindled, and not in the identical one described in his testimony.

The trip to Duluth was made by Friedman and Paul after and not before Brown and Paul went there to meet Finkelstine.

These corrections do not change the main facts in the case upon which we held that there was sufficient evidence to support the verdict.

The petition is denied.

KELLY v. McKEOWN. (No. 22227.)

(Supreme Court of Minnesota. Sept. 23, 1921.)

*(Syllabus by the Court.)***Appeal and error** *§* 1199—Refusal to set aside judgment which had been affirmed on appeal, held proper.

The provision of section 7786, Gen. St. 1913, that the court "may, for the good cause shown, modify or set aside its judgments, orders, or proceedings," does not authorize a setting aside of a verdict and judgment after there has been a denial of a motion for a new trial which has been affirmed on appeal, and where the "good cause shown" is none other than one which was or might have been urged on the motion for a new trial and on the appeal.

Appeal from District Court, Hennepin County; Jos. W. Molyneaux, Judge.

Action by Raymond A. Kelly, as administrator, against Herbert B. McKeown, for the wrongful death of plaintiff's intestate. Verdict for defendant, plaintiff's motion for new trial denied, order affirmed on appeal, rehearing denied, and remittitur issued. Subsequently plaintiff petitioned to vacate and set aside the verdict and judgment and direct a new trial, which motion was denied, and plaintiff appeals. Order affirmed.

John F. Kelly, of St. Paul, for appellant.
Trafford N. Jayne, of Minneapolis, for respondent.

HOLT, J. This action for wrongful death was tried and verdict rendered for defendant. Plaintiff's motion for a new trial was denied, and upon appeal to this court the order was affirmed. Kelly, Adm'r, v. McKeown, 189 Minn. 285, 186 N. W. 329. An application for rehearing was denied, remittitur issued, and judgment on the verdict entered in the court below. More than two years after the entry of such judgment plaintiff petitioned the court to vacate and set aside the verdict and judgment and direct a retrial. The petition sets forth the grounds for relief and arguments in support thereof in essentially the language of the assignments of error and the briefs upon the former appeal.

Appellant insists that he is entitled to relief under section 7786, G. S. 1913, for "good cause shown." We think not. Every reason now urged for a retrial of the issues was urged, or could properly have been urged, in the motion for a new trial and in the appeal from the order denying a new trial. It is idle to consider whether the writs of coram nobis or audita querela may be made use of in this state. The authorized procedure in respect to motions for a new trial and appeals from the order made on such motions affords all the remedies plaintiff was entitled to to correct and relieve against any errors that may have inhered in the verdict.

It is true that both statutory and common-law procedure are but means to an end; namely, the right and just determination of a controversy between litigants. But neither law nor justice countenances the right of a person to repeatedly assert a cause of action in court. Every one is entitled to his day in court; that is, he is to have an opportunity to present proper evidence, and have his cause of action fully and fairly considered by the court and jury, if it be triable to a jury. And our statute gives in addition the right to review a trial both by the nisi prius court and by this court. Plaintiff has had this, and more, both courts having been importuned to reconsider the order and the decision. What he terms a fake verdict was not brought about by inadvertence, accident, surprise, or excusable neglect. Indeed, every substantial objection to its validity was in fact urged before the court below on the motions for a new trial and on the former appeal and determined adversely to plaintiff's contention. And, even were it not so, he had the right then to raise any and every ground on which the verdict might be set aside and a new trial had, and cannot again claim the right to attack the verdict for alleged errors of court or jury.

Order affirmed.

BREUNING v. CENTRAL WAREHOUSE LUMBER CO. (No. 22255.)

(Supreme Court of Minnesota. Sept. 15, 1921.)

*(Syllabus by Editorial Staff.)***Master and servant** *§* 417(1)—Certiorari remedy for review in compensation cases.

Certiorari, and not appeal, is the remedy for the review of proceedings in workmen's compensation cases. Gen. St. 1913, § 8225.

Appeal from District Court, Ramsey County; Ohas. C. Haupt, Judge.

Proceeding by Claire Breuning, employé, against the Central Warehouse Lumber Company, employer, for compensation for personal injuries. On appeal from an order vacating an order approving the settlement. Appeal dismissed.

Stevens & Stevens, of Minneapolis, for appellant.

K. G. McManigal, of St. Paul, and John P. Gardiner, Com'r of Labor, for respondent.

PER CURIAM. This is an appeal from an order vacating an order approving a settlement in a compensation case.

Certiorari is the remedy for the review of proceedings in compensation cases. G. S. 1913, § 8225.

Appeal dismissed.

BERRY et al. v. ROTH et al. (No. 22307.)
(Supreme Court of Minnesota. July 8, 1921.)

(Syllabus by the Court.)

Brokers ⇨102—Purchasers from agent held entitled to rescind for fraud, and recover amount paid to agent who was to receive excess over fixed price.

The plaintiffs, in the name of one of them as vendee, made a contract to purchase lands. The other party to the contract, as vendor, was the agent of the owner. The agent then made a contract to purchase of the owner. It was the understanding that the plaintiffs were the purchasers and the owner the seller. The two contracts were made as a part of the plan for effecting a sale and passing title. The agent by agreement with his principal was to have all of the sale price in excess of a fixed sum. The plaintiffs paid a part of the purchase price. The sale was induced by the fraud of the owner and his agent. It is held that the plaintiffs can maintain an action to rescind the contract made in the name of the agent as vendee and can recover of both defendants the amount which they paid to the agent in consummating the transaction, and that they are not limited to a recovery from each of the amount received by him.

Appeal from District Court, Hennepin County; J. W. Molyneaux, Judge.

Action by T. B. Berry and another against John Roth and another. Judgment for plaintiffs, and defendant named alone appeals. Affirmed.

Einar Hoidale, of Minneapolis, for appellant.

Geo. Nordlin, of St. Paul, for respondents.

DIBELL, J. This action was brought against John Roth and A. L. Huston to cancel for fraud a contract made in the name of Huston, as vendor, with P. A. Berry, one of the plaintiffs, as vendee, for the sale of lands in Pine county, and to recover from both defendants the amount which the plaintiffs paid. There were findings and judgment for the plaintiffs, and the defendant Roth appeals.

In 1918 John Roth was the owner of 240 acres of land in Pine county, and his son owned an 80, making up the half section, which had been deeded to him by his father some little while before. Roth was anxious to sell and it was understood between him and his son that the son's 80 would be put in with the rest to make up the half section. The defendant Huston was a land agent. Roth listed the half section at \$35 per acre net to him, Huston as his agent to receive as commission all of the sale price in excess. The plaintiffs were shown the land by both defendants. They understood that Roth was the owner. They claim that both of the de-

fendants made false representations as to the character of the lands such as would justify a rescission, or an action for damages. The court so found. The defendant makes no question of the sufficiency of the evidence to sustain the finding.

On February 8, 1919, Huston made a contract in his own name to sell the land to P. A. Berry, one of the plaintiffs. The understanding was that the two plaintiffs were making the purchase. It was also understood that Roth was the owner and the real seller. On February 21, 1919, Huston, to carry out the deal, took a contract from Roth to himself. Huston was Roth's agent. It was not understood that he was the purchaser. Roth received a part of the first payment and his son a part, and the rest of it went to Huston. They had a satisfactory understanding as to how payments were to be applied.

The defendant claims that since the action is one of rescission the plaintiffs can recover only from Huston, who received the money; or in any event can recover no more from the defendant appealing than the amount which he received. This contention we do not sustain.

The contract between Huston and Berry and the subsequent contract between Roth and Huston were parts of the general plan of effecting and completing the sale and passing title to the plaintiffs. Under the finding of the court it was the fraud of Roth and Huston which induced the sale. The contract, unless it was annulled, compelled performance by the plaintiff. Unless they were content to keep the land and sue for damages for the fraud, or keep the land and forego damages, it was necessary that they rescind. The rescission properly resulted in a decree for the repayment of the money which they had paid; and it is no unjust hardship upon Roth that he, as a party to the fraud and the real vendor, be required to refund the moneys obtained by him and his agent. No rule of law forbids such recovery. The granting of the contention of the defendant compels the plaintiffs to take a rescission of their contract with a money judgment for damages against Huston alone, or against Huston for a part and against Roth for a part; or, to keep the land, abide by the contract induced by fraud, and have damages appropriate to an action of deceit, or forego damages. That the final contract was made between Huston and P. A. Berry, and a second one between Huston and Roth, both for the purpose of carrying out the sale, instead of one contract directly with Roth, is unimportant. The defendants fraudulently induced the purchase, it was a purchase by the plaintiffs and not a purchase by Huston and a subsequent sale to the plaintiffs, and a judgment for a rescission with judgment

against Roth as well as against Huston for the money with which the plaintiffs were fraudulently induced to part was proper.

The material findings of the trial court are sustained, and the law was correctly applied. Judgment affirmed.

STATE v. DEAN. (No. 22343.)

(Supreme Court of Minnesota. July 8, 1921.)

(Syllabus by the Court.)

Sunday $\S$ 2, 4—Business of photographer held "work" within statute; Sunday observance statute held legitimate exercise of police power when applied to photographers.

The Sabbath day observance statute prohibits work on the Sabbath which interferes with the repose and religious liberty of the community and is not work of necessity or charity; and it prohibits certain work, though it does not disturb the community, upon the ground that a periodic cessation from usual labor makes for the physical and intellectual and moral welfare of mankind. The basis of the latter prohibition is in the police power of the state exercised for the general good. Applying the statute, it is held that the business of a photographer is work within its meaning; that conditions are such that competition substantially induces all studios to be open if some are; that a numerous body are affected if studios are kept open, and thereby deprived of a day of rest or recreation or religious observance; that the prohibition of the statute applies to photographers taking pictures on Sunday, and is a legitimate exercise of the police power; and the conviction of the defendant is sustained though his work was not so conducted as to interfere with the repose and religious liberty of the community.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Work.]

Appeal from Municipal Court of Minneapolis; E. A. Montgomery and F. E. Reed, Judges.

J. N. Dean was convicted of violating the Sabbath day observance statute, and he appeals. Affirmed.

Shearer, Byard & Troegner, of Minneapolis, for appellant.

Clifford L. Hilton, Atty. Gen., Jas. E. Markham, Asst. Atty. Gen., and Thomas B. Kilbride, of Minneapolis, for the State.

DIBELL, J. The defendant was convicted in the municipal court of Minneapolis of keeping open his photographic studio and doing the work of taking pictures therein on the Sabbath day. He appeals from the judgment of conviction and the order denying a new trial.

The relevant provisions of the law are G. S. 1913, §§ 8752, 8753. Section 8752, which is somewhat by way of preamble, prohibits the doing of "certain acts in § 8753 specified, which are serious interruptions of the repose and religious liberty of the community, and the doing of any of said acts on that day shall constitute Sabbath breaking." Section 8753 provides that—

"Hunting, shooting, fishing, playing, horse racing, gaming and other public sports, exercises, and shows; all noises disturbing the peace of the day; all trades, manufactures, and mechanical employments, except works of necessity performed in an orderly manner so as not to interfere with the repose and religious liberty of the community; all public selling or offering for sale of property, and all other labor except works of necessity and charity are prohibited on the Sabbath day."

It is expressly provided that meals may be served by caterers, and prepared tobacco, fruits, confectionery, newspapers, drugs and medicines may be sold. The sale of uncooked meats, groceries, clothing or boots is not permitted. Works of necessity or charity are defined as including "whatever is needful during the day for good order, health or comfort of the community." Barbering is expressly excluded from the definition. Baseball playing, in an orderly manner, not interfering with the peace, repose and comfort of the community, is expressly permitted within certain hours of the afternoon.

The so-called preamble came into the statutes through the Penal Code. It has been understood as evidencing a legislative policy not to require the strict cessation of all kinds of work, or to prohibit indulgence in recreation and amusements, when they do not interrupt the repose and religious liberty of the community. Thus in *State v. Chamberlain*, 112 Minn. 52, 127 N. W. 444, 30 L. R. A. (N. S.) 335, 21 Ann. Cas. 679, the words "other public sports, exercises, and shows" were held, by reason of the preceding words with which they were associated, to refer to out of door amusements and not to prohibit moving picture shows conducted in an orderly manner. And in *Houck v. Ingles*, 126 Minn. 257, 148 N. W. 100, it was held that a contract for advertising space on the curtain of a theater conducted in an orderly fashion on Sundays was not invalid. So it was held in *Holden v. O'Brien*, 86 Minn. 297, 90 N. W. 531, that the casual execution and delivery of a promissory note on the Sabbath was not prohibited. And in *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965, it was held that a private casual sale was not forbidden.

There is another aspect in which the Sabbath day observance statute is to be viewed. It is conceded that a periodic idle day, when people cease their usual activities and devote themselves to rest or recreation or amuse-

ment or association with their fellows, or give attention to what they deem religious duties or privileges, is best for the physical and moral and social welfare of the community. A statute which fixes a rest day with this thought in mind is enacted in the exercise of the police power. The foundation principle is well stated in *State v. Pettit*, 74 Minn. 376, 77 N. W. 225, where the provision of the statute prohibiting barbering on the Sabbath was held valid. There Justice Mitchell said:

"The ground upon which such legislation is generally upheld is that it is a sanitary measure, and as such a legitimate exercise of the police power. It proceeds upon the theory, entertained by most of those who have investigated the subject, that the physical, intellectual and moral welfare of mankind requires a periodical day of rest from labor, and, as some particular day must be fixed, the one most naturally selected is that which is regarded as sacred by the greatest number of citizens, and which by custom is generally devoted to religious worship, or rest and recreation, as this causes the least interference with business or existing customs."

And further on Justice Mitchell said:

"The object of the law is not so much to protect those who can rest at pleasure as to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. Moreover, if the law was not obligatory upon all, and those who desired to do so were permitted to engage in their usual vocation on Sunday, others engaged in the same kind of labor or business might, against their wishes, be compelled, by the laws of competition in business, to do likewise."

The defendant's studio was on the third floor of a building in Minneapolis. On a Sunday two men, one of whom was the state's only witness, went to the studio, apparently in quest of evidence. They tried the entrance door. It was locked. The defendant came from a side door into the hall. Upon inquiry he said he would take their pictures, though the studio was not supposed to be open. There was a lady present. It does not clearly appear that she was there for a sitting. It seems just as likely that she was there to examine proofs of pictures taken before. The defendant took the pictures of the two men, giving them several exposures, received pay, and the finished photographs were delivered a few days later.

Whether the taking of the pictures was a trade, manufacture or mechanical employment within the statute need not be discus-

sed. Clearly enough it was work within the statute. It was not menial work. It was skilled work or even artistic work or professional work, but it was work. It is entirely clear that it was not a work of necessity or charity within the definition of the statute.

The conviction cannot be sustained if it was necessary to show that the work done by the defendant was of a character interfering with the repose and religious liberty of the community. The taking of the pictures did not disturb the community. The conviction is sustained upon the ground that the prohibition was imposed in the legitimate exercise of the police power. It is a matter of common knowledge that photographic studios in times past and in times quite recent have been open on the whole or a part of each Sunday. In cities of considerable size studios, counting all grades of them, are numerous, and require the attendance of a considerable number of persons. To most of the proprietors their closing is not important if only competitors close. Competition tends to make each do as the others do. Some establishments catering to street patronage may suffer an actual loss if they are not open Sundays. A portion of the public may suffer some inconvenience. However, the suffering of either the public or proprietors is not great. It was within the province of the Legislature to determine that it was best that none should do business on Sundays. The language of the statute indicates such purpose. Unless given that effect a considerable number of persons, whose presence is necessary to the conduct of the business, will have for themselves no Sunday or but a part of a Sunday for rest or recreation or amusement or religious observances. There are kinds of work, not interfering with the repose and religious freedom of the community, not done in such a way that the public is annoyed, and not of such a character as to be subject to regulation under the police power, with which the law does not interfere though done on the Sabbath. And there are occasional technical or even substantial infractions of the statute which the good sense of a tolerant community chooses to let pass without serious notice. We uphold the conviction of the defendant upon the theory that he is one of a class so numerous that the police power of the state, for the common good of others in a like situation, may prohibit his working on the Sabbath day, though he does his work without interfering with the repose and religious liberty of the community.

Judgment and order affirmed.

GILLETTE v. McLAUGHLIN. (No. 4888.)*
(Supreme Court of South Dakota. Aug. 31,
1921.)

1. Wills §324(2)—Evidence held insufficient for submission of question of incompetency.

Evidence held insufficient for submission to jury of the question of mental incompetency.

2. Wills §324(3)—Evidence held insufficient for submission of undue influence.

In son's contest of father's will, in which it was claimed that the father had been unduly influenced by the beneficiary, who had befriended the father prior to his death, during the father's separation from his wife and children, and by a priest of the Catholic church to which the residue of the estate had been given, evidence held insufficient for submission of the question of undue influence.

3. Wills §166(7)—That beneficiary had opportunity to influence testator not legal proof of influence.

The mere fact that beneficiaries of a will had the opportunity to influence testator is not proof of undue influence.

4. Appeal and error §169—Question not raised by pleadings or evidence, or passed on by trial court, not considered.

A question not raised by the pleadings or presented by the evidence, nor passed on by the trial court, cannot be raised for the first time on appeal.

Appeal from Circuit Court, Moody County;
L. L. Fleeger, Judge.

Suit by Orrie Gillette against William J. McLaughlin, executor of the estate of James A. Gillette, deceased, to cancel the will. From judgment for plaintiff and from an order denying new trial, defendant appeals. Judgment and order reversed.

See, also, 180 N. W. 952.

Fredrick A. Warren, of Flandreau, and Bates, Johnson & Simons, of Sioux Falls, for appellant.

Rice & Rice, of Flandreau, and Brady, Robertson & Bonner, of Minneapolis, Minn., for respondent.

POLLEY, P. J. This appeal grows out of a controversy over a will. James A. Gillette, the decedent named herein, died testate on the 18th day of July, 1918. He left surviving him as heirs at law his widow, Maggie A. Gillette; a daughter, Elizabeth; and two sons, Orrie Gillette, the plaintiff in this action, and John A. Gillette. There had been an older son, Harry, who was killed by falling from a load of hay on the 1st day of September, 1910. Decedent and Maggie Gillette were married on the 1st day of January, 1890. They lived together on a farm in Moody county from the time of their mar-

riage until about the 1st of October, 1912, when Maggie Gillette, during the absence of decedent and without his knowledge or consent, took all of the children and moved into a house in Flandreau, and never after returned to the farm or lived with decedent. She remained in Flandreau about 2 years, when she took the children and moved to Minneapolis, where she has since resided. During the year 1914 she commenced an action against decedent for separate maintenance. In that action she prevailed, and judgment was entered, requiring her husband to pay her \$400 a year, and so far as the record shows this judgment was complied with. Not long after Maggie Gillette left the farm decedent had a sale and disposed of the personal property on the farm, and does not appear ever to have lived upon or made his home on the farm thereafter. At the time Maggie Gillette left the farm they owned two quarter sections of land, title to one quarter of which was in decedent's name and the other in his wife's name. About the year 1916, decedent commenced an action against Maggie Gillette to have title to both quarter sections quieted in his name. That action was still pending at the time of his death, but the final result of the suit was that title to one quarter was awarded to him, or rather to his estate, and the other to his wife. At the time of his death this land was worth about \$100 per acre. After decedent left his farm he worked about on different farms, also in a cream station in Flandreau, and finally had charge of a cream station at Elkton. In February, 1918, he entered the United States army. He enlisted as a single man, 34 years old, although at that time he was past 62 years of age and had a wife and grown family. He was sent to Jefferson Barracks, but in a short time his health broke down, and he was placed in a government hospital, where for a time he was very sick. He partly recovered, but was discharged from the army because of poor health, and returned to Flandreau about the last of June, 1918.

Some time during the year 1913 decedent made the acquaintance of the defendant, William McLaughlin, and a warm friendship sprang up between McLaughlin and his wife and decedent. Decedent worked for McLaughlin at different times, and McLaughlin transacted some business for decedent. When decedent was in the neighborhood he appears to have frequently visited the McLaughlins. He appears to have been welcome and to have been made to feel at home; in fact for the last 4 or 5 years of his lifetime the McLaughlin home came nearer to being a home for him than any other place. While he was sick in the hospital at Jefferson Barracks he telegraphed to McLaughlin to

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 22, 1921.

come to him. Upon receipt of this message McLaughlin and his wife both went to see him. They had a son in the government service stationed at East St. Louis, and they went to see him on the same trip; but after visiting their son they went back and visited decedent again before they returned to Flandreau. When decedent returned to Flandreau about the last day of June he went directly to the McLaughlin home, where he remained some three or four days, when he was taken to a hospital in Flandreau. From that time on he failed rapidly. On the 12th day of July he sent for a banker in Flandreau, with whom he had done business, to come and draw his will. By the terms of this will he disposed of his property as follows: To his three children he gave \$100 each. To his wife he gave a one-third interest in the two quarter sections of land above mentioned, provided the court should award it all to him, but in case any part of the land was awarded to his wife, then she was to have no interest in the part awarded to him. He directed his executor to expend \$500 for a monument to be placed on the family burial lot in the cemetery in Flandreau. To the Catholic Church in Flandreau he gave \$100 for masses; to defendant McLaughlin, \$5,000; the residue to the congregation of the Catholic Church in Flandreau; and the said McLaughlin was named as executor. Decedent was unable to leave his bed when the will was made. He continued to grow weaker until the 18th day of July, when he died in a hospital in Dell Rapids, to which place he had been taken on the 14th of July.

It is alleged in plaintiff's petition that the will is void and should be canceled, because, at the time the will was executed testator was not mentally competent to make a valid will, and because the said will was made as the result of the fraud and undue influence of the said McLaughlin and one George E. Kelly, a Catholic priest in charge of the Catholic Church in Flandreau.

Numerous questions are presented by the record, but under the view we take of the case it is necessary to consider only the questions of mental competency and undue influence.

It is claimed by plaintiff that at the time of the execution of the will testator was of unsound mind, was mentally weak, and laboring under mental delusions, and that he was unable to understand the nature of the instrument he executed, or his obligations to his wife and children.

Upon the question of decedent's mental condition it is claimed and fairly proved that testator was a man with a morose disposition; that he had a vicious temper; that he was unkind and sometimes brutally cruel to his wife and children; that the loss of his oldest son in 1910 caused him great grief;

and that for some time thereafter his mind seems to have been deranged. Upon the subject of his mental condition, his wife testified that—

At times he would sit "in a deep study and watched us and watched every move we made around the house, and I was terribly frightened. Sometimes he would just simply do that, and I would get up and go out of the house, and again he would fly in a rage and grab hold of anything he could, and looked like an insane man, watching you with that peculiar look. Sometimes he would go for weeks and be all right, and again he would take spells and wouldn't be all right. He seemed to be in a deep study over something. He would send the children to school with a horse that wasn't safe. It ran away a number of times, and a number of times it threw them out, and finally they quit driving the horse and walked. He wouldn't let them have anything else to drive. The horse ran away Decoration Day in 1911. It threw Elizabeth and I out and hurt us, and the man in the feed barn told us not to hitch it up for several days, and the next day Elizabeth wanted to drive to school, and Orrie was going to hitch up for her, and he forbid him, and she didn't have time to walk. It was seven miles. He had a very unbalanced mind. He was not of sound mind.

"When the tombstone came he wouldn't allow it to be put up. After the boy was buried there I had a curb put up around the lot, and had Harry's initials put in the corner of the curb, and when I went out a month later the corner with the initials was knocked out of the curb. I had planted some rose bushes, and they were torn out. There was a monument erected on the grave in 1911. It was afterwards removed from the lot. Yesterday I didn't mean to say he was insane because he enlisted. I meant to say when Mr. Gillette entered the service to swear his age the way he did, and that he was a single man, and take \$10,000 at the risk of the government put on it is what I meant. We came home from church one Sunday, and he came. I finished dinner before the others did, and I went in the living room and sat down and took a paper to read. Elizabeth was the last one to finish. She got up shortly, and came in where I was, and when he finished he took a chair and threw at her with such force that he broke the chair. There was not a word of disturbance. It was after the boy's death in 1911. When I saw my husband at Flandreau after leaving him and at Minneapolis our relations were friendly. The last 2 years he had sullen spells. He wouldn't speak to any one, and I can't describe the look on his face. It was a peculiar look, an insane look, as if he was watching every move you made and you were afraid he would spring at you."

Upon this same subject Lizzie, the daughter, testified as follows:

"Sometimes he would strike her [meaning his wife] with his hand or fists. Sometimes he would give her a kick, if that was more convenient. One time I saw him beat her with a buggy whip. I think she fainted and fell down, and he beat her after she lay on the ground. At one time I had gone to bed in the

evening and I woke up and heard my mother crying and talking and pounding on the door. I heard my father talking. I crawled to the door and he had the door locked, and the ax was leaning up against the door jamb. He had my mother locked out. I was afraid to say anything. My first recollection is of seeing him place the ax against the door jamb. He was standing by the door."

All of these acts, except possibly the removal of the monument from the son's grave, took place prior to the separation of decedent and his wife in 1912. Decedent tore the monument down, broke it to pieces, and hauled the pieces away and threw them in the Big Sioux river. It is not clear from the testimony set out in the printed record whether the monument was removed in 1911 or in 1917.

The deceased was the holder of a \$3,000 benefit certificate in the Modern Woodmen of America, which certificate named his wife as beneficiary. On the day of the execution of the will he undertook to change the beneficiary and make it payable to his sister, "Flora Sheffield" or "Clara Louise Sheffield, sister and niece." But in making out the direction to change the beneficiary the name is written as "Florence" Sheffield, instead of "Flora." This fact is urged as evidence of mental weakness at the time of the execution of the will. This, however, is of very slight consequence, because it is apparent from the handwriting on this certificate that it was not written by decedent, and the mistake may have been made by another party than him.

The above testimony touching the conduct of decedent is not disputed, and no doubt it is all true; but it falls far short of proving that decedent was insane or mentally incompetent on the 12th day of July, 1918. During all the period from October, 1912, until February, 1918, decedent was in and about Flandreau and Elkton. He worked on various farms and in the cream station at Flandreau; and at Elkton he had charge of a cream station. He attended to the business incident to the operation, renting and caring for his farm. Yet during all this time no act of his is shown that any one, including the members of his own family, considered indicative of a deranged mind or mental weakness. He appears to have managed his affairs as well as the average man. No doubt he was cursed with a mean, ugly, overbearing disposition, but this seems to have been exercised only toward members of his own family. What, if any, provocation he may have had does not appear, nor would any amount of provocation justify his conduct. But conceding all this, it does not prove nor tend to prove lack of mental capacity to manage and dispose of his property. He did not overlook any member of his family when he made his will. True, he virtually disinherited all

of his children, and in view of their relations with him this might have been expected. When his wife left him the children all went with their mother. When she sued him for separate maintenance they all took sides with their mother, and testified against him in court. While their loyalty to their mother is commendable, their father regarded them as unjust and unfair and ungrateful, and certain it is that so far as the record shows neither of the children ever showed him the slightest regard or respect, or showed the slightest concern for his welfare. On the other hand, the McLaughlin family was always kind to him, and afforded him an asylum when he seemed to be friendless and alone. He was made to feel at home at McLaughlin's, and was at liberty to come and go at will. When he was sick and among strangers at Jefferson Barracks it was to them he turned for friendship and consolation, and they responded. When he was discharged from the government hospital it was the McLaughlins who opened their home to him, and where he might have stayed indefinitely had it not been necessary that he be taken to the hospital. And it was the McLaughlins more than any one else who looked after his needs and comfort while he was in the hospital. What more natural thing was there to do than remember them in his will?

But in the face of all these circumstances decedent did not fail to make some provision in his will for his family. The evidence shows that he was claiming property valued at about \$30,000. Whether he owned it all or half of it belonged to his wife was a matter then pending in court. If the court awarded it all to him, then by the terms of the will one-third of it all was to go to his wife. If the court awarded her one-half the property, then he considered that she was provided for, and she was to have no part of the half that was awarded to him.

[1] After a careful consideration of this entire record, we fail to find any evidence sufficient to go to the jury on the issue of mental incompetency. Respondent cites and relies on *Johnson v. Shaver*, 41 S. D. 585, 172 N. W. 676, in support of the verdict in this case, but the circumstances under which the will in that case was made are so wholly unlike the circumstances surrounding the execution of the will in this case that that decision is not controlling in this case. As was said by this court in *Re Boll's Estate*, 178 N. W. 880:

"There is absolutely no proof of hallucinations nor proof of anything indicating continual mental incapacity on the part of deceased."

[2, 3] Upon the question of undue influence the evidence is even more meager than upon the other. It is claimed that the testator was unduly influenced in the making of the will by the said William McLaughlin and

seasons, flows from the plaintiff's land onto the defendant's land, except a small depression near the center of the west line of the plaintiff's land, and designated in the pleadings as pond D, which would overflow, if sufficient water were found therein, in a southwesterly direction, and not over the land of the defendant.

"(3) That the general contour of each of said farms is level, the general flow, however, being, with the exception of said pond D, from the north to the south on each of said farms; there being on plaintiff's land, however, depressions a few inches deep where surface water would accumulate in wet seasons.

"(4) That in order to more readily drain such depressions and cause the surface water to flow readily therefrom, the plaintiff has constructed a series of tile drains wholly upon his own land, between 5,000 and 6,000 feet, opening in a natural depression or swale, the water from which tile drain passes over the defendant's land through a natural depression.

"(5) That said tiling and draining done by the plaintiff is done in the most workmanlike manner and in accordance with good husbandry (except as to said pond D), and that the water flowing therefrom upon defendant's land does his farm as small, if any, damage as possible.

"(6) That the loss, if any, which the defendant suffers by reason of the flow of water from the plaintiff's land is trifling.

"(7) That said tiling and drainage done by the said plaintiff enters the said defendant's land (with the exception of pond D) in such a way as to do as little damage as possible, if any, to the said defendant.

"(8) That now the water from the said plaintiff's land immediately runs off after rains, leaving no permanent springs or permanent water.

"From the foregoing findings of fact the court derives and makes the following conclusions of law:

"1. That the defendant is entitled to judgment restraining the said plaintiff from draining said pond D in a southeasterly direction, so that the surface water therefrom will flow upon the land of the defendant.

"2. That the defendant is not entitled to restrain the said plaintiff from continuing the drainage of any of the remainder of his farm as the same is now constructed.

"3. That as the plaintiff offered to dismiss this proceeding prior to the incurring of the expense of the trial, and the defendant having insisted upon trial on the counterclaim, and the relief recovered by the defendant being of a trifling nature, neither party should have costs."

From the judgment, and an order denying new trial, defendant appeals.

We concur in the view of the trial court that the course of natural drainage from pond D is in a southwesterly direction, and therefore that plaintiff should not be permitted to drain that pond into depression A.

[1] We think, however, that the clear preponderance of the evidence shows that there is a well-defined ridge along the southwest side of pond B, and that the natural course of drainage from pond B is not along the line

of the tile drain from pond B to depression A, but that in time of high water the overflow from pond B ran along the line marked course 2. Rev. Code 1919, § 8479, permits drainage by landowners *along the natural course of drainage*, but the law does not permit it along *an artificial course*, except under the statutory drainage proceedings. In our opinion the determination of this case is governed by the decision of this court in Venner v. Olson, 40 S. D. 585, 168 N. W. 740.

[2] Nor can we agree with finding 6 that appellant's damage is trifling. The evidence clearly shows that prior to the construction of the drains appellant farmed the northwest 40 of his land as one tract; that by reason of the acts of respondent a deep cut has been made from depression A to the dry run, and that the portion of appellant's land north and east of the present branches of the dry run is isolated, and cannot be farmed in connection with the remainder of the northwest 40.

We are of the opinion that, under the evidence, the trial court should have enjoined the maintenance by respondent of the tile drain connecting pond B with depression A.

The judgment and order appealed from are reversed, and the cause is remanded for further proceedings in harmony with this opinion.

WHITING, J., not sitting.

SCHULER v. CITY OF MOBRIDGE. (No. 4650.)

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Municipal corporations $\S$ 817(3) — Pedestrian presumed to have been exercising ordinary care.

A pedestrian, who slipped on the sidewalk, will be presumed to have been exercising ordinary care, in the absence of evidence that she was walking in a careless or negligent manner.

2. Municipal corporations $\S$ 768(1) — Liable for improper construction of sidewalks, rendering them unsafe for use of pedestrians.

Where city constructed cement sidewalk with slippery surface, so that pedestrians exercising ordinary care slipped thereon, it was liable for the damages sustained; it being the city's duty, in the construction of the sidewalks, to make them reasonably safe for the use of pedestrians.

3. Municipal corporations $\S$ 791(1) — Knowledge of defective condition of sidewalk in business portion of city, which had existed since the construction of the walk, imputed to city authorities.

Where defective sidewalk was due to the construction thereof, and had existed from the time the sidewalk was built, and where the

sidewalk was located in the business portion of the city, and was used as much or more than any other piece of sidewalk in the city, knowledge of the defective condition of the walk will be imputed to the city authorities.

4. Municipal corporations ⇐822(5)—Evidence held insufficient for instruction on whether pedestrian, who slipped on defective sidewalk, had knowledge of defect.

In an action against a city for injuries to a pedestrian, who slipped on slippery sidewalk, the mere fact that the pedestrian had walked over the sidewalk on one other occasion two days before the accident did not warrant instruction submitting question of whether she knew that the sidewalk was dangerous.

5. Damages ⇐132(2)—\$1,950 verdict for permanent injury to knee held not excessive.

\$1,950 verdict to 56 year old woman, who had been confined to her bed for two weeks, had sustained a badly injured knee, had suffered a great deal of pain, and who was attended by a physician at the time of the trial, about a year and a half after the accident, with probability that injuries would be permanent, preventing her from taking care of her four children and doing her housework, held not so unreasonable and excessive as to warrant a new trial.

6. New trial ⇐77(2)—New trial awarded for excessive damages only when indicating passion or prejudice.

The damages awarded by the verdict, to warrant the granting of a new trial, must be so excessive as to strike mankind at first blush as being beyond all measure unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption.

Appeal from Circuit Court, Walworth County; J. H. Bottum, Judge.

Action by Mary M. Schuler against the City of Mobridge. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Judgment and order affirmed.

Harry A. Brenner, of Mobridge, for appellant.

Julius Skaug, of Mobridge, for respondent.

POLLEY, P. J. This is an action for damages for injuries alleged to have been sustained by plaintiff by reason of a defective sidewalk on one of the streets of defendant city. Verdict and judgment were for plaintiff, and defendant appeals.

[1, 2] The sidewalk in question is made of cement, and appears to have been constructed as cement walks usually are, except that the surface thereof had been troweled with a steel trowel, instead of a wooden trowel, such as is generally used for that purpose. The result is that the surface of the walk is very smooth and slippery. Plaintiff undertook to walk across it, but when she stepped

on it her foot slipped, and she fell and injured her leg, especially her knee, quite seriously. There was no snow or ice or other obstruction on the sidewalk at the time of this accident. There is no evidence that the plaintiff was walking in a careless or negligent manner; therefore she is presumed to have been exercising ordinary care. The negligence, if any, on the part of the city, consisted solely in the manner in which the sidewalk was constructed. The city proved by a number of witnesses, and their testimony was not disputed, that the sidewalk in question was well made and of good material; that it is one of the most substantial sidewalks in the city. But this does not disprove the fact that it was very slippery, and the undisputed evidence shows that numerous people, both before and after plaintiff's accident, slipped and fell on this same piece of sidewalk. The facts in the case bring it within the rule adopted by this court in *Smith v. Yankton*, 23 S. D. 352, 121 N. W. 848. In that case the following instruction was approved by this court:

"It is the duty of the city to so construct its sidewalks as that they may be reasonably safe for the use of pedestrians passing over them, under all ordinary climatic conditions which exist in this country. * * * If there was a faulty construction in this sidewalk at this point, and if the sidewalk was so constructed as that under ordinary and usual climatic conditions it was unsafe for persons traveling over it, then the city was negligent in so constructing it."

[3] It is contended by defendant that there is no evidence that the city had notice of the defective condition of this sidewalk. It was not necessary to prove this fact in this case. The evidence shows that the sidewalk in question had been built some time during the summer or fall of the year previous to the accident. It also shows that the condition complained of by plaintiff had existed from the time the walk was built. And the evidence shows that this particular piece of sidewalk was located in the business portion of the town, and was used as much or more than any other piece of sidewalk in the town. These facts and circumstances are sufficient to impute knowledge of the condition of the sidewalk to the officers of defendant.

It is contended by the city that the plaintiff knew of the dangerous condition before she went upon it, and therefore she herself was negligent, and for that reason is not entitled to recover, and upon that branch of the case defendant requested the following instruction:

"I instruct you that, if you find the plaintiff knew that the sidewalk was dangerous and that it was really doubtful whether she could travel upon it without accident, it was not consistent with ordinary care to attempt to pass over it,

especially if she could take another safe and convenient way to her destination. And if she did so proceed, and injury resulted, she was guilty of contributory negligence, which bars her right of recovery."

[4] This instruction was refused, and such refusal is assigned as error. There is no evidence to warrant this instruction, and no error was committed in refusing it. There is no evidence to show that plaintiff knew the sidewalk was dangerous. It is true that she had passed over it before, once only two days before the accident; but at that time the walk was covered with boards, and whether she had ever walked over it when it was not covered does not appear from the evidence, but this is not material. She may have walked over it without realizing how dangerous it really was. It is the duty of cities to so construct their sidewalks that they will be reasonably safe for people to walk over, and where they are constructed and maintained in the condition in which the evidence shows this sidewalk to have been from the time of its construction to the time of plaintiff's accident, and in the absence of negligence on the part of the plaintiff, the city is liable for damages resulting from such condition.

[5] It is next contended that the verdict should be set aside and a new trial granted because the verdict is so grossly excessive as to clearly indicate that it is the result of prejudice or passion on the part of the jury. The verdict (\$1,950) is liberal, to say the least; but under the evidence we do not feel that we would be warranted in setting it aside because excessive. The plaintiff at the time of the trial was 56 years old. Up to the time of the accident complained of she had always enjoyed good health. She had a husband and four children. She had always taken care of the children and done her own housework. As the result of the injury she was confined to her bed for two weeks. Her knee was badly injured by the fall. She suffered a great deal of pain, not only while she was so confined, but continuously thereafter until the time of the trial. She employed a physician at the time of the injury, and he was still treating her injury at the time of the trial—something like a year and a half after the accident. This physician testified that the injury probably was permanent. Plaintiff was not able to do her housework after the injury as she had done before. She was obliged to keep one of her daughters out of school to do the housework that she had been in the habit of doing before the injury. There was testimony on behalf of defendant to the effect that plaintiff was seen doing the work about the house about the same after the accident as before,

and one or two witnesses testified to seeing her working in the field after the injury; but this was denied by plaintiff. This, as well as other matters brought out by the testimony, presented questions of fact of which the jury was the sole judge.

[6] What we believe to be practically the universal rule, applied to the granting of a new trial on the ground that the verdict is excessive, is stated in *Coleman v. Southwick*, 9 Johns. 45, 6 Am. Dec. 253, as follows:

"The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption. In short, the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess."

"The jury and the trial judge have a much better opportunity than do the appellate judges to measure the actual damages suffered by the plaintiff and the amount which would compensate him for the injury. They have an opportunity of seeing the plaintiff and to discern his manner of testifying, his intelligence and capacity, to note his physical condition, and many other living evidences bearing upon the issue, including all the attending circumstances, of the larger part of which the appellate court is deprived. The jury, thus being in possession of all the facts and circumstances, is required to pass upon this issue as an issue of fact, under an appropriate charge of the court as to the law. Their solemn finding, returned into court and approved by the trial court, should not be disturbed by this court, unless it comes within the rule hereinbefore laid down. The trial judge has not only the opportunity afforded the jurors to gain knowledge of the conditions of the plaintiff's injury and the amount which will compensate him, together with all the facts and circumstances surrounding his injury, but also has the opportunity of observing the jurors in considering said cause and of any outward feeling evidencing passion or prejudice that may be exhibited during the proceedings before him; and if it is made reasonably to appear that the verdict of the jury is excessive by reason of any influence of passion or prejudice, it is his sworn and solemn duty, as a trial court to set aside the verdict" and grant a new trial. *Railroad Co. v. De Vore*, 43 Okl. 534, 143 Pac. 864, L. R. A. 1915F, 21.

And see note to *Padrick v. G. N. R. Co.*, L. R. A. 1915F, 30.

Tested by the above rule, we cannot say that the verdict is so unreasonable or excessive as to warrant a new trial on that account.

The judgment and order appealed from are affirmed.

WHITING, J., concurs in result.

HOLLEMAN v. TAYLOR. (No. 4914.) *

(Supreme Court of South Dakota. Sept. 16, 1921.)

Appeal and error ⇨ 1012(1)—Finding not contrary to clear preponderance of evidence not disturbed.

A finding which is not contrary to the clear preponderance of the evidence will not be disturbed.

Appeal from Circuit Court, Brown County; Frank Anderson, Judge.

Action by David Holleman against A. M. Taylor. From a judgment of dismissal, and from an order denying a new trial, plaintiff appeals. Affirmed.

Williamson, Williamson & Smith, of Aberdeen, for appellant.

Van Slyke & Agor, of Aberdeen, for respondent.

GATES, J. In October, 1919, defendant contracted in writing to sell and convey to plaintiff a half section of land at \$110 per acre. Plaintiff paid \$1,000 in cash and \$9,815 by deed of other land to defendant. The residue was to be paid in installments. On the same day plaintiff entered into an agreement in writing with defendant listing the land for sale with the A. M. Taylor Land Company at \$120 per acre, the portion of which agreement material to the present case was as follows:

"Said A. M. Taylor hereby agrees to buy said land himself at above-described price and terms, if I should want to sell said land after March 1 and before June 15, 1919. I hereby appoint and constitute the said A. M. Taylor Land Company as my true and lawful attorney and agent, and authorize them to enter into a written contract for me and in my name and place for the sale of above-described real estate upon the above-mentioned price and terms. When sale is made, I agree to furnish an abstract showing good and merchantable title in me. (Printed matter marked out.) This contract shall remain in full force and effect until June 15, 1920, and to continue in force thereafter until have served ten days' written notice of cancellation upon the said A. M. Taylor Land Company."

This action was brought to compel defendant to take back the land. The trial court found that the latter agreement was mutually abandoned and entered judgment dismissing the action. Plaintiff appeals therefrom and from the order denying new trial.

The plaintiff gave testimony tending to show that on May 21, 1920, he indicated his wish to sell the land back to defendant at \$120 per acre, and that on June 16, 1920, plaintiff wrote a letter to defendant, received in his absence on June 18, 1920, by the A. M. Taylor Land Company, asking defendant

to take the land back at that price. Defendant gave testimony, corroborated by another, tending to show that on May 21, 1920, plaintiff desired to sell, but at the price of \$135 per acre. A letter from plaintiff to defendant dated March 21, 1920, also indicated that plaintiff was holding the land at \$135 per acre.

It seems to us that the determination of the material issues before the trial court, and now before this court, depends on the credibility of the witnesses. We cannot say that the clear preponderance of the evidence was contrary to the findings of the trial court.

The judgment and order appealed from are therefore affirmed.

SMITH and McCOY, JJ., not sitting.

HALSTEAD v. MISSOURI SLOPE LAND & INVESTMENT CO. et al.

(Supreme Court of North Dakota. June 27, 1921. Rehearing Denied Sept. 10, 1921.)

(Syllabus by the Court.)

Damages ⇨ 78(1)—Contract construed as agreement for rental, contingent on determination of ownership, and not one for penalty.

In this action two parties, H. and M., were asserting conflicting claims of ownership to a certain tract of land. During the pendency of litigation involving such claims, H., the one in possession, surrendered possession to M., pursuant to a written agreement, signed by M. and two sureties, wherein it was agreed that "in case the court shall decree the return of said land" to H., "they will return the same to" him, "together with \$500 per year as damages for the use and occupancy of" the said premises. For reasons stated in the opinion, it is *held* that, under the evidence in this case, the agreement between the parties was one for the payment of a rental, fixed by them contingent upon the determination of the ownership of the premises, and not one for the payment of a penalty, or one whereby "the amount of damages to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof."

Appeal from District Court, Golden Valley County; Hanley, Judge.

Action by J. D. Halstead against the Missouri Slope Land & Investment Company and others. From a judgment in favor of the defendants, plaintiff appeals. Reversed and remanded.

H. L. Halliday, of Beach, for appellant.

W. H. Stutsman, of Mandan, for respondents.

PER CURIAM. This is an action to recover on a written agreement in the form of

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied October 19, 1921.

a bond, executed by the defendant Missouri Slope Land & Investment Company, as principal, and the defendants A. L. Martin and Mary J. McGillivray, as sureties. The written instrument upon which this action is brought was executed under the following circumstances:

About the year 1906 the defendant Missouri Slope Land & Investment Company, instituted an action against J. D. Halstead to quiet title to and recover possession of a quarter section of land situated in what is now Golden Valley county, in this state. Said Halstead defended said action, and claimed to have purchased the land under a contract from the Missouri Slope Land & Investment Company, and asserted that he was entitled to occupy said premises and to have the same conveyed to him upon payment of the sum due on the contract. The Missouri Slope Land & Investment Company denied the validity of the contract. Halstead was in possession of the land. A trial of the action resulted in a judgment in favor of the Missouri Slope Land & Investment Company and against Halstead; said judgment being entered February 3, 1909. 27 N. D. 596, 147 N. W. 643. Thereafter said Halstead proceeded to take proper steps to move for a new trial. Such motion was made and granted on January 14, 1911. 27 N. D. 597, 147 N. W. 643. An appeal to this court resulted in an affirmance of the order granting a new trial. 27 N. D. 591, 147 N. W. 643. On a retrial of the action, Halstead prevailed. The Missouri Slope Land & Investment Company appealed to this court, but it subsequently attempted to withdraw the appeal, with the result that this court ordered the appeal to be dismissed, and the judgment of the trial court then became final.

The written instrument which is involved in this controversy was executed during the time when Halstead was taking steps looking toward moving for a new trial, to wit, on June 6, 1910, and is in words and figures as follows:

"State of North Dakota, County of Billings.

"In District Court, Tenth Judicial District.

"Missouri Slope Land & Investment Company,
a Corporation, Plaintiff, v. J. D. Halstead, Defendant.

"Undertaking.

"Know all men by these presents, that the Missouri Slope Land & Investment Company, a corporation, as principal, and A. L. Martin and Mary J. McGillivray, as sureties, of Dickinson, N. D., are firmly bound unto J. D. Halstead in the sum of five thousand five hundred dollars (\$5,500.00), lawful money of the United States of America, to be paid to the said J. D. Halstead, his executors, administrators, or assigns, for the payment of which, well and truly to be made, we bind ourselves, our executors and administrators, successors and assignees, firmly by these presents. Sealed with our

seals, and dated this 6th day of June, A. D. 1910.

"The condition of the above obligation is such that whereas, the plaintiff is in possession of the northwest quarter (N. W. $\frac{1}{4}$) of section eleven (S. 11), in township one hundred thirty-nine (T. 139) north, of range one hundred six (R. 106) west of the 5th P. M., Billings county, North Dakota, under an execution issued in the above entitled case; and whereas, defendant above named, J. D. Halstead, has secured an order from the court above entitled to show cause why a stay of execution should not be granted in the above entitled action; and whereas, the defendant feels aggrieved and desires to take further action in the above-entitled case:

"Now, therefore, the above-named sureties hereby undertake and agree that the plaintiff, Missouri Slope Land & Investment Company, in case the court should decree the return of said land above described, they will return the same to the defendant herein named, together with five hundred dollars (\$500) per year as damages for the use and occupancy of the northwest quarter (N. W. $\frac{1}{4}$) of section eleven (S. 11) in township one hundred thirty-nine (T. 139) north, of range one hundred six (R. 106) west of the 5th P. M., Billings county, North Dakota, by the plaintiff herein.

"Now, if the plaintiff should do as hereinbefore set out, then this bond to be null and void; otherwise, to be in full force and effect. Missouri Slope Land & Investment Company, by H. A. Hunter, Its Secretary and Treasurer. [Cor. Seal.] A. L. Martin, Mary J. McGillivray.

"In Presence of: J. E. Davidson, E. O. Goodman."

It is undisputed that at, and prior to, the time this bond was executed and delivered, Halstead was in possession of the premises. It is also undisputed that upon the execution of such bond and in reliance thereon he delivered possession of the premises to the Missouri Slope Land & Investment Company, and that its agent entered into possession thereof and occupied the same from on or about June 6, 1910, until March, 1917, at which time Halstead was put in possession by virtue of an execution. Thereafter Halstead made demand for the payment to him of the amount stipulated in the written agreement. No payment was made, and he thereupon brought this action to enforce the bond. The three defendants answered separately, admitting the execution of the bond, and alleging that the same was without consideration. At the close of the trial both parties moved for directed verdicts. The trial court thereupon dismissed the jury, and rendered judgment in favor of the defendants.

The sole question presented on this appeal is whether the trial court was correct in ordering judgment in favor of the defendants. A determination of that question involves a consideration of, and is controlled by, a construction of the instrument in suit. Our statute provides:

"Every contract by which the amount of damages to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void." Section 5925, C. L. 1913.

"Parties to a contract may agree therein upon the amount which shall be presumed to be the amount of damages sustained by a breach thereof, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damages." Section 5926, C. L. 1913.

Questions similar to the one here presented have frequently been before the courts, and have given them much trouble. No good purpose would be subserved by analyzing the different adjudicated cases, for, as has been well said:

"No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule." *Streeper v. Williams*, 48 Pa. 450.

In the earlier cases the courts gave more weight to the language of the clause designating the sum to be paid. The modern authorities attach greater importance to the meaning and intention of the parties. *Sutherland on Damages* (4th Ed.) § 293, p. 907. No form of words has been regarded as controlling.

"But the fundamental rule, so often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties as evidenced by the entire agreement construed in the light of the circumstances under which it was made." *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45.

Thus, in *Streeper v. Williams*, supra, the Supreme Court of Pennsylvania held that the word "forfeit," in a certain instrument there in suit, was outweighed by the applicable rules of interpretation and meant "to pay." Our statute provides:

"All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code." Section 5895, C. L. 1913.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful." Section 5896, C. L. 1913.

"A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties." Section 5903, C. L. 1913.

"A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." Section 5907, C. L. 1913.

"Particular clauses of a contract are subordinate to its general intent." Section 5910, C. L. 1913.

From the evidence it appears that the bond in suit was drawn up as the result of a con-

ference had between the parties and their respective attorneys. It was first suggested that the bond provide that the land company pay a reasonable rental value of the land, in event it was defeated, without naming the sum of such rental. Halstead objected to this, and wanted "a stated sum" named. When, during the course of this trial, he was asked by his counsel if there was "any discussion at that time what would be the reasonable value of the use of the premises." Counsel for the defendants objected, on the ground that this "would tend to vary the terms of a written instrument," and this objection was sustained. There is not the slightest evidence tending to show that the sum stated, viz. \$500, was in excess of the reasonable rental value of the premises. There can be no question but that the owner of a tract of land has the right to contract with another with reference to the occupancy thereof, and to agree upon the rental to be paid for such occupancy. Nor is there any reason why two parties, asserting conflicting claims of ownership to a tract of land, may not contract, either with a third party or with one another, with regard to such occupancy and the rental to be paid, and leave the ownership of the rents contingent upon the adjudication of the right of ownership; that is, they may contract that a certain rental shall be paid to whoever is eventually determined to be the owner. And as we construe the contract, under the evidence before us in this case, that is precisely what the parties here did; that is, upon the record before us, we are of the opinion that the parties did not attempt to provide for a penalty, or for stipulated damages, but that they agreed upon the value of the "use and occupancy" of the premises—that is, upon what would be a fair rental to be paid to the owner of the premises, when the question of ownership was determined.

The judgment appealed from is reversed, and the cause remanded for further proceedings not inconsistent with this opinion. Appellant will recover costs on this appeal.

BIRDZELL, CHRISTIANSON, BRONSON, and GRACE, JJ., concur.

ROBINSON, O. J. (concurring in part). We all agree that the owner of land may lease it, and that it was competent for the plaintiff to lease his quarter section of land to the Missouri Company at an agreed price; but the bond in question is not a lease. There was no lease of the land for a month, a year, or for any time. The Missouri Company did not hold possession as a lessee, for a lessee is never subject to be dispossessed in a moment in the way the Missouri Company was dispossessed. When the bond was made, the parties were in court disputing the right to the title and possession of the land. The

Missouri Company had a right to hold possession on giving a bond to pay the value of the use and occupation. Comp. Laws, § 7828. The bond in question may well be sustained, if considered as an agreement to pay the value of the use and occupation, not exceeding \$500 a year. But if the bond is construed as an agreement to pay \$500 a year as damages for the withholding of the land not leased to it, then it is an agreement to pay a compensation for the breach of an obligation, and is to that extent void. Comp. Laws, § 5925.

The case should be remanded for a new trial, with directions to give judgment for the value of the use and occupation of the land, regardless of the amount named in the bond.

FILLMAN v. SHERWOOD. (No. 33625.)

(Supreme Court of Iowa. Sept. 27, 1921.)

Landlord and tenant — 291(7) — Action not barred by 30 days' peaceable possession after notice of forfeiture effective after such time.

Under Code, § 4217, barring actions of forcible entry and detainer after 30 days' peaceable possession with lessor's knowledge after the cause of action accrues, a lessor who, on lessee's failure to pay the last two installments of rent due September 1 and January 1, under a lease for a year ending March 1, notified him, on January 8th, of her election to cancel the lease, and demanded that he move before March 1st, on which date she served him with further notice to quit within 3 days, as required by Code, § 4210, as a condition precedent to an action of forcible entry and detainer, under section 4208, was not barred from bringing such an action more than 30 days after such notice of forfeiture, it being intended not to effect an instantaneous termination of the lease, but to declare a forfeiture effective March 1st; the rule being that the tenancy ends at the time fixed in the notice to quit, nor were the rights of the parties affected because lessor had obtained judgment in another action to recover the unpaid rent, and the amount of such judgment had been tendered or paid.

Appeal from Municipal Court of Des Moines; T. L. Sellers, Judge.

Action of forcible entry and detainer to recover possession of land. Judgment for defendant, and plaintiff appeals. Reversed.

Ralph L. Read and Paul Hewitt, both of Des Moines, for appellant.

Geo. F. Brooks and F. T. Van Liew, both of Des Moines, for appellee.

WEAVER, J. Plaintiff's intestate, G. W. Fillman, by contract in writing leased the land to Sherwood for one year from March 1, 1917, with an option for renewal of same

for an additional period of four years. The option was exercised, and defendant continued in possession during the succeeding years of 1919 and 1920. The agreed rate of rental was \$525 per year, payable each year, \$100 on March 1st, \$200 September 1st, and \$225 on the 1st of January following. The lease also contained a clause, as follows:

"And it is further agreed that if the lessee shall fail to pay his rent, as herein provided, and at the times herein stipulated, or shall make default in any of the covenants herein contained, he shall forfeit all his rights under this lease, and the lessor, by himself or his agents, may at his option take immediate possession of said premises, and may recover such possession by action of forcible entry and detainer; and that at the expiration of this lease, he will, without further notice of any kind, quit and surrender the occupancy and possession of said premises."

The lessor, G. W. Fillman, is now deceased, and the plaintiff herein in her own right, and as administrator of the estate of the deceased, has succeeded to his rights in the premises. The defendant failed to pay the installments of rent falling due September 1, 1919, and January 1, 1920. On January 8, 1920, said past-due rent being still unpaid, the plaintiff gave defendant written notice of her election to cancel the lease, and demanding that defendant remove from the property on or before the following March 1st. On or about March 1, 1920, plaintiff served defendant with further notice to quit within 3 days. This notice not being complied with, this action for possession was begun March 5, 1920.

The defendant admitted his possession, but denied the expiration or cancellation of his lease. He further pleads affirmatively that he was in peaceable possession of the leased property with plaintiff's knowledge for more than 30 days after the accrual of plaintiff's cause of action and before suit was brought, and that her right to maintain this action is therefore barred. He further answers argumentatively that if his lease was terminated or canceled because of his failure to pay rent, he thereby became a tenant at will, and such tenancy can be terminated only by 30 days' notice, which has not been given.

On trial to the court it found the facts substantially as hereinbefore stated, and held that by the plaintiff's service of notice of forfeiture in January, 1920, she became entitled at once to terminate the defendant's possession by an action of forcible entry and detainer, but, failing to do so, and permitting the defendant to remain in peaceable possession until on or about March 1st, he acquired the rights of a tenant at will, thereby barring the plaintiff's right to maintain this action until such tenancy at will

has been terminated. From this judgment the plaintiff appeals.

The statute provides that an action of this character will lie where the lessee holds over after the termination or contrary to the terms of his lease (Code, § 4208); but before the action can be brought 3 days' written notice to quit must be given the tenant (Code, § 4210). It is further provided (Code, § 4217) that—

"Thirty days peaceable possession with the knowledge of the plaintiff after the cause of action accrues is a bar to this proceeding."

The single question presented by this appeal is whether the fact that defendant was allowed to remain in possession after the notice of forfeiture in January until March 1st brings this action within the effect of the quoted statutory limitation. If the notice of forfeiture was calculated or intended to effect an instantaneous termination of the lease and of all defendant's rights under it, the question might fairly arise whether 30 days' delay, leaving the tenant in peaceable possession, would not bar the right to maintain a forcible entry proceeding. But the notice in this case was not of that character. It states plaintiff's election to declare a forfeiture, but it was in effect a forfeiture which was to become effective March 1st. That was the date when the yearly rental period would terminate; it was the date to which the January installment of rent, if paid, would entitle defendant to continue in possession, and it allowed him a reasonable period of grace in which to obtain other leasehold or other property for the succeeding year if he so desired. If plaintiff, moved by a sense of fairness or other sufficient reason, tempered her declaration of forfeiture by making it effective at the end of the rental year, it would be an abuse of both the letter and spirit of the statute to make the favor so shown a reason for keeping her out of possession at the expiration of the stated period. It was suggested by the trial court that it was open to the plaintiff, having given her notice of forfeiture to proceed at once or at any time within 30 days to begin forcible entry proceedings. We think such was not the case, and that had plaintiff acted on such theory appellee would have had a ready and sufficient defense by pleading the terms of the notice of forfeiture, which did not become effective until March.

Somewhat analogous in principle is the rule that a tenancy ends at the time fixed

in the notice to quit. *Smith v. Detroit L. & B. Ass'n*, 115 Mich. 340, 73 N. W. 395, 39 L. R. A. 410, 69 Am. St. Rep. 575; *Wray v. Flower*, 140 Mich. 452, 103 N. W. 876. There can be no doubt that under the terms of the lease plaintiff could rightfully terminate it and name the close of the current rental year as the point of time at which she would demand a surrender of the possession, and, such being the case, the statutory limitation upon suits of this character was not available to the defendant.

It was made to appear in evidence that plaintiff had brought another action to recover the unpaid rent, and had obtained judgment thereon, and that there was some tender of payment, or, perhaps, actual payment of the amount recovered. Whatever be the facts in that regard, we are unable to see how it affects the rights of the parties in this proceeding. The terms of the lease are not in dispute; it is not denied that defendant was in default for at least two installments of rent, or that a notice of forfeiture was given. In our opinion plaintiff was entitled to judgment for the possession of the property, and the court erred in holding otherwise. The judgment is reversed, and cause remanded, with directions to enter judgment for the plaintiff in accordance with the views expressed in this opinion.

Reversed.

EVANS, O. J., and PRESTON and DE GRAFF, JJ., concur.

STATE v. HAWKINS. (No. 34227.)

(Supreme Court of Iowa. Sept. 23, 1921.)

Appeal from District Court, Monroe County; C. W. Vermillion, Judge.

Proceeding by the State of Iowa against Frank Hawkins. Judgment for the State, and defendant appeals. Affirmed.

D. W. Bates, of Albia, and Geo. H. Woodson, of Des Moines, for appellant.

Ben. J. Gibson, Atty. Gen., and B. J. Flick, Asst. Atty. Gen., for the State.

PER CURIAM. The above case comes to us on the clerk's short transcript. We have examined the same, and, finding no error therein, the judgment is affirmed.

HERWEHE v. SCHULTZ et al. (No. 34024.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Vendor and purchaser **¶44**—Vendor claiming fraud must prove charge by evidence sufficient to convince impartial mind.

Vendor suing to cancel land contract, on ground of fraud, must show such fraud by evidence sufficient to reasonably convince an impartial mind, mere suspicion being insufficient, and fraud is not to be presumed from facts which are fairly consistent with honesty and good faith.

2. Vendor and purchaser **¶45**—Evidence held insufficient for submission of question of fraud.

In vendor's action to set aside, for fraud, contract to sell land at \$200 per acre, in which it was claimed that plaintiff had been fraudulently induced by administrator of her father's estate to sell the land which she had inherited from her father for an inadequate price, evidence that the land was worth \$250 an acre held insufficient to warrant submission of case to jury.

3. Evidence **¶18**—Uncertain condition of farm land market in 1919 a matter of common knowledge.

In vendor's action to set aside contract on ground that she was fraudulently induced to sell the land for an inadequate price, held that it was a matter of common knowledge that in March, 1919, the real estate market for farm lands in Iowa was in a fevered condition, and that prices demanded and prices offered fluctuated according to the individual confidence in the permanency of the then prevailing boom.

4. Vendor and purchaser **¶38**—When inadequacy of price is evidence of fraud.

Inadequacy of price, to be evidence of fraud, must be so great as to fairly suggest that vendor has been overreached or imposed upon.

Appeal from District Court, Jasper County; D. W. Hamilton, Judge.

Suit in equity to set aside and cancel contract for sale of land. Prayer of petition denied, and cross-petition of the defendant Carpenter for specific performance of the contract sustained. The plaintiff appeals. Affirmed.

Campbell & Campbell, of Newton, for appellant.

Hammer & Tripp, of Newton, for appellees.

WEAVER, J. In March, 1919, the plaintiff, as the only child and heir at law of Jacob Herwehe, deceased, acquired title to a farm of 75 acres in Jasper county, Iowa. In May of the same year plaintiff entered into a written contract to sell said land to the de-

pendant Frank Carpenter at the agreed price of \$200 per acre, payable \$100 down on the signing of the agreement, and the remainder in specified installments, beginning March 1, 1920. The writing was executed March 20, 1919 at which time Carpenter delivered to plaintiff his check for \$100. Shortly afterwards this suit was begun by the plaintiff to set aside the contract, on the ground that she had been imposed upon by the fraud and collusion of Carpenter and his codefendant Schultz, and thereby induced to make said contract of sale at much less than its actual market value. The nature of the alleged fraud may be stated, as follows: Jacob Herwehe died about March 20, 1919. Plaintiff, his daughter, was then about 48 years of age. She had always lived with her father, and was unaccustomed to business dealings.

Very soon after the death of Herwehe the defendant Schultz was appointed administrator of his estate, and plaintiff claims he suggested to her the advisability of selling the land, and volunteered to find her a purchaser. She testifies Schultz told her that the property was in some respects in bad condition, and was worth not to exceed \$200, and later reported to her that Carpenter would buy the property at that figure; and that, having confidence in Schultz as a friend, and as administrator of her father's estate, and believing and relying upon his representations, she consented to the sale and executed the contract. She avers that, in truth and in fact, the land, as Schultz well knew, was then fairly worth \$250 or more per acre; that Schultz had offers and opportunities to find purchasers other than Carpenter ready, able, and willing to buy the land at a price materially greater than \$200 per acre, but refused or avoided them in the interest of Carpenter, with whom he colluded to obtain the land at less than it was reasonably worth. She seems to say, though not in express terms, that she was led to believe by Schultz that the sale was being made by him as administrator, and that he alone was authorized to deal with the purchaser, and that, so believing, and having the utmost confidence in him that he would protect her interest and get the best obtainable price for the property, she followed his advice and counsel, and assented to the sale.

The defendants deny all plaintiff's allegations of collusion and fraud, and allege that the sale was made to Carpenter in good faith, and at a reasonable price. Schultz concedes that he took part in procuring the sale, but alleges that his participation therein was disinterested, without compensation or profit to himself, and with the sole purpose of rendering the plaintiff friendly assistance.

The trial court found that plaintiff's charges of fraud and imposition were not established by the evidence, dismissed her petition, and decreed specific performance of the contract.

[1] As will be seen, the issue is one of fact. That plaintiff did make and execute the contract to Carpenter is conceded. To be entitled to a vacation or annulment of such agreement, the burden is upon her to show that it was obtained by fraud, as alleged in her petition. Fraud is not to be inferred or presumed from facts which are fairly consistent with honesty and good faith. While the proof need not be beyond a reasonable doubt, it must be such as reasonably convinces the impartial mind of the truth of the charge. It must not be left to rest in a mere suspicion, but be found as an established fact.

[2-4] The trial court found that the case made by plaintiff did not measure up to this standard, and with that conclusion we are disposed to agree. Plaintiff does not claim that she was misled into a contract or sale which she did not intend to make. The gravamen of her complaint is not that she did not wish to sell or intend to sell, but rather that she was induced to sell, or for less than her land was worth. If it were clearly established that the price agreed to be paid was grossly inadequate, it would be a circumstance of material weight in support of the charge that she was defrauded, but the showing actually made falls short of this measure. The sale was made at \$200 per acre. Plaintiff's witnesses estimate the value of the land at the date of the contract at \$250 or more per acre, while the witnesses on behalf of the defendants unite in fixing such value at \$200 per acre. It is a matter of common knowledge that at the date in question the real estate market for farm lands in Iowa was in a fevered condition, and that prices demanded and prices offered fluctuated according to the individual confidence in the permanence of the then prevailing "boom," and variations of \$50 an acre within a very short time in successive sales of the same land were by no means unknown or uncommon. The mere fact that a purchaser buys land at less than its full market value is no evidence of fraud. The ordinary inducement to purchase is the belief of the purchaser that there is a margin of profit for him in the transaction, and this involves neither legal nor moral wrong. It is only when the inadequacy of the price is so great or so evident as to fairly suggest that the seller has been overreached or imposed upon, it may be treated as evidence of fraud.

But, even if we were to adopt the plaintiff's figures, and say that a purchaser might have been found at \$250 an acre, it would not follow therefrom that a contract to sell at \$200 an acre is tainted with fraud. It appears that, after obtaining this contract, Carpenter relisted the land with agents for sale at \$250 an acre, but there is no evidence that he found a buyer on such terms. Assuming then, as we must, that the price agreed to be paid is not so inadequate as to justify a finding of fraud, there is little left in the record to call for equitable interference by the court in plaintiff's behalf. The most which can be said is that there is room for the inference or suspicion that Schultz did favor Carpenter as against other possible buyers; but there is no evidence of any direct tangible offer of a better price from any purchaser ready, able, and willing to buy at a materially higher price. Certain witnesses do say that they would have welcomed the opportunity to bid on the property, or would have paid more than \$200 an acre, but the substance of the showing is not so much that Schultz rejected any definite offer of a better price, but rather that, with proper effort, he could have procured a price in excess of the one named in the contract.

There is no sufficient evidence that Schultz, as administrator, improperly assumed to control the plaintiff's land or the sale thereof, but it is not denied that he did offer and undertake to assist her making a sale without payment or charge for his services. In so doing, even though acting gratuitously, he was bound to deal with her and her property in good faith. He was not bound to go out and search for the highest and best bidder for the property, but he was bound to report to her the best bid obtained from any responsible buyer, and not make use of his position as her friend and advisor to induce a sale of the land for a price less than he knew it would reasonably command. If, however, as between purchasers proposing to buy on substantially like terms, he recommended and induced the sale to Carpenter, this would be a matter of which plaintiff could not justly complain.

Without extending this opinion for a statement or discussion of the testimony in detail, we hold that, under the rules above mentioned, the plaintiff failed to sustain the burden of proof of the fraud alleged to have been practiced upon her, and the decree as entered by the trial court must, and it is, affirmed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concur.

McDONALD v. YELLOW TAXICAB CO.
(No. 33643.)

(Supreme Court of Iowa. Sept. 27, 1921.)

1. Carriers $\Rightarrow$ 347(6)—**Passenger's contributory negligence held a jury question.**

In an action against a carrier for death of a passenger, in view of conflicting evidence, testimony of one eyewitness, an employee of defendant, as to contributory negligence of deceased, held not sufficient to sustain a directed verdict for defendant.

2. Witnesses $\Rightarrow$ 388(5) — **Exclusion of question on cross-examination, laying foundation for impeachment, held error.**

Cross-examination as to a conversation soon after and at the place of the accident, which was the subject of the trial, involving statements by witness at variance with his testimony, was erroneously excluded.

Appeal from District Court, Woodbury County; George Jepson, Judge.

Action at law to recover damages for the death of deceased. He was a passenger in one of defendant's taxicabs. The car was being driven by one Reed, one of defendant's employees. It is claimed by plaintiff that the cab was overturned, and that deceased was killed because of the negligence of defendant and its driver. The accident happened about 4 o'clock in the morning of October 3, 1919. Deceased and the driver were alone in the car, and both in the front seat. Deceased was instantly killed. No other eyewitness testified as to how the accident happened except the driver Reed. Reed testified that deceased, who was sitting by him in the car, became frightened and grabbed the steering wheel, causing the car to turn and tip over, and this was the cause of the injury. At the close of all the evidence the trial court sustained defendant's motion for a directed verdict in its favor, and stated in the record that the ruling was based upon the undisputed evidence of the driver, and that as a matter of law deceased was guilty of contributory negligence. Reversed and remanded.

A. C. Hatt, J. A. Berry, and Henderson, Fribourg & Hatfield, all of Sioux City, for appellant.

H. W. Brackney and Burgess, Gill, Sammis & Boylan, all of Sioux City, for appellee.

PRESTON, J. [1] It is alleged, and the evidence shows, that defendant is a corporation, and at the time in question was engaged in the business of transporting passengers for hire, as a common carrier; that on the date before stated, deceased employed defendant company to transport him from the main part of the city to Riverside Park, in said city, in one of its taxicab automobiles, which was used in transporting passengers;

that deceased entered one of defendant's taxicabs, and was accepted by defendant as a passenger therein, and that the taxicab was under the control and being operated by an employee of the defendant. It is further alleged that at a certain point on the route the automobile was overturned, and decedent killed, that deceased was without fault, and that his death was caused by the negligence of the defendant. A number of grounds of negligence are alleged, and they are substantially as follows: Failure to equip the taxicab with nonskid tires; failure to provide the wheels of the taxicab with proper and suitable chains; in driving the car, at and immediately before plaintiff's intestate was killed, at a dangerous and excessive rate of speed; that the driver failed to keep a proper lookout with reference to the condition of the road; that the driver took a dangerous route when there were other routes which could have been taken which were safe, the taking of which would have avoided the accident, which facts were known by defendant; that defendant's driver failed to properly operate the car or to have the same under proper control; that defendant caused deceased to be transported in an automobile which was unsafe, top-heavy, and unsuitable to be used in transporting deceased in the condition in which the roads were at the time. Defendant denies any negligence on its part, and says that the death of plaintiff's intestate was caused by his own negligence.

We assume that because defendant was a common carrier and deceased its passenger the trial court held there was no burden upon plaintiff to show specific negligence on the part of the defendant, or that negligence in the matters set up as such, or some of them, had been sufficiently shown, since the verdict was directed on the ground that deceased was guilty of contributory negligence. At any rate, that is the principal point argued, and will therefore be the point discussed. The evidence bearing upon that point will be referred to, as well as a brief reference to some other circumstances.

The part, the destination of deceased, was some five or six miles from the business part of Sioux City by one route, and a mile or a mile and a half, perhaps less, by the road taken by defendant's driver and his passenger. The longer, or military road, was level after leaving the end of the pavement, whereas the route taken was hilly. There is evidence tending to show that at one point on the longer road the street was torn up, but by a detour of a block or two one could get back into the same street or road; that it is a good road all the way; the place where the detour was made was through a regular street, with houses on both sides. The car was overturned while proceeding down the last hill before reaching the park, and when

the car was about halfway down. The road at that point was about 18 to 20 feet wide, with high banks 10 to 20 feet high on either side. As some of the witnesses put it, there were really no ditches at the side of the road, but the road was rounded up in the center. The taxicab was a Ford town car, covered top. The front where the driver sat was not inclosed. The rear part only is inclosed, but the stationary top extends over both the inclosed and the uninclosed portions. A number of witnesses testifying for plaintiff describe the condition of the road, the position of the car, and deceased under it, the description of the car, and so on. Defendant's witnesses also describe these matters. There is a conflict in regard to some of them. As we understand the record, the general direction of the road taken was northwesterly. From the testimony of plaintiff's witnesses, it appears that some of them went out to the place of the accident soon after it occurred. They testify that there had been much driving over the road in question during the fair, and the roads were beaten down hard; that it had rained during the night; that the rain on the clay had made it slippery and greasy; that the road was slippery; that they noticed the tracks of the car in question where it had slipped and skidded; that the road was crooked, winding, and steep; that the car tipped over at the point of a curve in the road; that the body under the car was found about at the turn, or perhaps a little before the car had made the turn; the turn was to the left; that this car was tipped over on its side, and was across, or diagonally across, the road and track, with the wheels uphill; that there were no chains on the tires, and that none of the tires were nonskid, but all smooth. Some of them say that there was no equipment for a Ford car, either chains or nonskid tires that would have prevented the car from skidding under the conditions as they existed, but that chains or nonskid tires would have been helpful in controlling the car. One witness puts it that it would make a difference whether you had smooth or nonskid tires, or whether you had chains; that a car with nonskid tires would skid or slip quicker than one with chains, and that it all depends on how a man handles a car; under conditions such as testified to, chains would be better than nonskid tires, and nonskid tires better than smooth. Would not say that it would skid anyhow under those conditions, even with chains, until he had tried.

Witnesses experienced with Ford and other cars testified that in going down this steep hill when the road is of clay and packed and wet and slippery, with smooth tires and no chains, it would cause the car to skid, and under such conditions the car would be likely to skid and upset; that the way in which the body of a Ford car is fastened to the

springs, and the manner of suspension, it would cause the body of the car to sway, and render it more likely to tip over. Some of the witnesses say that the road was so slippery that they slipped in walking down to the body from the top of the hill, and that they slipped so that their feet went out from under them, and that they could hardly keep their footing; that they had to put the body down to rest in carrying it up. Another witness for plaintiff says that the hill was about a quarter of a mile long or more; that it comes down through a ravine, trees, and steep banks on each side; noticed the tracks which led from the overturned car up the hill; the tracks were 4 or 5 feet from the north bank up to the time the car tipped over, and from the appearance of things there had been a little skidding to that point; the track he saw was near the right side of the road going west, and showed a little skidding, not very much; that the road was very slippery. Another witness testifies that in going down that hill with such a car, and under conditions as described by witnesses for plaintiff, one would lose control of the car, and it would slough around, and it would be hard to tell which way it would go; it probably would turn around. Another says that under such conditions one would lose control of the car, and if it started to slip it would be out of control, and would be apt to turn square around or turn over; it would be hard to tell what really would happen; that it would be more apt to turn clear around unless it hit some obstruction to turn it over; that it would make a difference whether the power was connected; as long as you have your wheels turning, you are that much better off; going down hill the possibilities of turning over would be greater than on the level road; if it started to swing around, and going down hill, it could happen very easily, and at that place it could happen easily; it could, if it just sloughed around there, if you turned the car very quickly; if you suddenly turned the steering apparatus, it would happen anyhow, whether that was done or not; it would be very easy for that car to turn over going down a hill. One witness described the position of deceased under the car by saying that the wheels were uphill and the body was in the automobile, just the head visible; the head was lying down hill the opposite from the wheels. Another witness states that a Ford town car differs from the ordinary Ford touring car only in that it is more top-heavy and has more weight on top, of heavier material; the adjustment has a tendency to make it sway, causing more swing to the body, because it had only the center point of suspension, whereas in other cars the springs in the rear have two points; the rear end of the body of the car is fastened by a single bolt in the Ford town car; such a car, if it set level, there would be no more

chance of its losing its balance, in moving down hill and skidding, than any other car if it was kept going straight ahead, but if it did skid or turn sideways while it was going it would be more apt to tip. This witness says further:

"And if such a car, going down hill, was equipped with smooth tires and had no chains on, if the car started skidding you could not hold it; that is all there is to it."

The widow of deceased testifies that her husband never owned an automobile, so far as she knew, and so far as she knew did not know how to run one; knew nothing about an automobile; in September and October they were living at Riverside Park; that her husband went to and from the city by the street cars, and so far as she knew had never ridden there in an auto.

Witnesses testifying for the defendant say that the tracks from the top of the hill to where the car was overturned showed no sliding or skidding; that it had sprinkled during the night; that there were nonskid Firestone tires on the rear wheels of the car in question, and smooth tires in front. The weather observer testifies that it was cloudy the morning of October 3, after midnight, and began raining shortly after 2; continued to rain until close to 4. The driver, Reed, says that the destination of deceased was his cottage at Riverside Park, which he, the driver could have reached, and avoided the hill by going by the military paved road and then on the level road; that he had driven both the roads before; that deceased said nothing as to the route that should be taken; that witness opened the rear door of the car for deceased, but he said he had been used to driving himself, and would rather ride in front, and he got in in front; that witness had driven both roads before. He says further that—

It had rained some before they started, and there was a very little sprinkle as they started out; that there was not very much rain; the car had nonskid tires on the rear wheels. "I do not know whether my car skidded or slid any time until it upset; I have never contended that the car ever did slide. Down the hill where the accident happened I was driving 3 or 4 feet from the right bank. Until the car was upset it wasn't sliding or skidding at all. Going down that road out there, just as you make a kind of a turn (I was keeping to the right-hand side of the road) the lights at the turn would be right square into the bank, and at that place deceased seemed to become excited or something—that must have caused him to be excited. I was driving and wasn't looking for anything of that kind to happen, as did happen, and he grabbed the steering gear and gave it a turn, a sharp turn, to the left, and the car upset and lay on its right side, the front end facing the left bank as you went down. After upsetting, the rear end of the car was 4 or 5 feet from the right bank. The road was a smooth one. He wasn't thrown, but the car

fell on him. I was not thrown out, was still hanging onto the steering gear. In a Ford car they will turn quick when you turn the steering wheel a little. When deceased grabbed hold of it, the car turned to the left, and I was busy trying to right it, and he must have let go. It was all done in very short order. Just the minute the car was turned, why it took long enough to travel across, not far enough to go into the left bank, she went over, I should say, slow. No part of the glass or any other part of the car was broken; there was mud on the right front fender and on the knob of the right front door, which remained closed; the car was in perfect condition; right after it turned over I shut the engine off and got out; the accident happened about 4:15, and the ambulance came at 5 o'clock. When I shut off my engine there was no light from the car; I lit matches and discovered deceased; tried to get him out. The last hill is not more dangerous than the first. I was going 20 miles an hour from Water street up to the end of the paving. When I struck the dirt road and had to go down the long hill, I went 10 miles an hour; I went down the second hill at 15 miles an hour. At the time of the accident I was only going 3 to 5 miles an hour, because it is more natural for a person, if you are driving anywhere near a curve, to go slow. That road with lots of traffic up and down during the fair week, or meeting cars at the turns, is more dangerous than the other road, but at 4 o'clock in the morning, I should say, with careful driving, it is not any more dangerous; at 4 o'clock in the morning it requires more careful driving on this last hill than on the first.

"Q. Did you have the power on on the second hill? A. You don't need it until you get pretty near the bottom.

"Q. Well, did you have your power on? A. I have forgot now. I had my power on on the third hill, because that is always the best way to travel down hill, where you are taking a curve in that road out there; then you have absolutely full control of your car. I never gave it a thought as to whether I could have gotten deceased out there as quickly the other road; it is further.

"Q. But you have pavement more of the way, haven't you? A. I don't know as it makes much difference."

It will be noticed that witness contradicts Mrs. McDonald as to the acquaintance of deceased with cars and their operation. Witness equivocated somewhat as to which was the better road and the most traveled. He was asked in chief whether the road he took is generally traveled from the city to the park, and his answer was:

"Well, it is the shortest route.

"Q. I didn't ask you if it is the shortest route. I asked you if this is the road that is generally and universally traveled in going from the city to the park. A. That is the one I always traveled; it is traveled by a large number of people, a large portion of the travel that goes out to the park."

He testifies, however, that he has been both ways. Witness on cross-examination equivocal

cated somewhat as to whether the road was wet. The record is:

"Q. But you haven't answered my question; was the road wet? A. I said it had rained a trifle after we started.

"Q. But it had rained that evening before you started out? Yes, sir.

"Q. Was the road wet down that hill; that is what I am asking you? A. Somewhat; yes.

"Q. Was the road slippery? A. The car didn't slip.

"Q. Was the road slippery? A. I didn't get out to test it.

"Q. You got out afterwards. Didn't you walk by where the automobile was turned over? Did you walk up the hill to where the ambulance was? A. Yes, sir.

"Q. Was it slippery then? A. I had no trouble getting up.

"Q. Was it slippery then? A. Not to cause me any trouble.

"Q. You wouldn't say it wasn't slippery? A. It didn't bother me any.

"Q. Will you say it was not slippery? A. Well, no, I would not say it wasn't slippery."

Witness also contradicts himself as to whether his car skidded. He testifies positively that there was not a particle of skidding shown on these tracks any place from the top of the hill down to where the car was overturned, but when asked if it slid when they were trying to right the car he says:

"In lifting the car and pulling at it I don't think it slid an inch.

"Q. It didn't slide a particle? A. I don't think it slid any.

"Q. What would you say about that? A. Well, now, I wouldn't say; I can't say."

He testifies further:

"Q. Do you say that the road which you took is the one most frequently traveled when the road is wet and slippery? A. I wouldn't say that.

"Q. You don't say that? A. No, sir.

"Q. You won't pretend that? A. No, sir. During the worst of the weather a person would naturally take the other road. If it was very slippery, the other road would be the best.

"Q. Why? A. On account of the hill.

"Q. On account of the danger of using the wet road with the hills, isn't that true? A. Yes, sir.

"Q. And you knew that, didn't you? A. Yes, sir.

"Q. You knew that last October? A. Yes, sir."

There is other evidence on these and other matters. Perhaps we have set out too much of the evidence, but we have attempted to set out enough, and only enough, to show the general situation and conditions. As said, the trial court stated that because Reed testified that deceased grabbed the wheel, and that this was not contradicted by any other eyewitness, that there was no dispute in the evidence, and that therefore deceased was, as a matter of law, guilty of contribu-

tory negligence. Appellee argues that plaintiff's case is based upon the supposition that the roadway was very slippery and muddy; that the road was dangerous, that the automobile was defective in design; was not equipped with nonskid tires or chains; and was going at a reckless rate of speed. Though there is a conflict in the evidence as to some of these matters, we are of opinion that the jury could have found as claimed by appellant. Appellee says that appellant ignores the sole cause of the accident, which was the negligence of deceased in grabbing the steering wheel and turning the car sharply to the left, which caused it to upset. But in such argument appellee assumes that there is no conflict on the question of the alleged contributory negligence of deceased. But, taking into consideration all the testimony and all the circumstances, and the contradictions in the testimony of Reed and his equivocation, at some points, we are of opinion that it was a question for the jury. Without again stating all the circumstances, the jury could have properly found that Reed was not going down the hill slowly, or with proper care, and that he did not have his car under control; that the grounds of negligence, or some of them at least, had been established. According to Reed's theory, there was no necessity for driving slowly, because he says at one point in his testimony that it was no more dangerous than the other hills, and that he had been traveling much faster down the other hills. The jury could have inferred properly that he did not have his power on. The evidence shows that would be the better way. Reed says he is not sure whether he had it on the other hills, and that it was not necessary to have it on until arriving at the foot of the hill. The jury could have found from the evidence that the road was very slippery and that this car did skid and slip, and could have found that under the conditions shown it was not only possible, but likely and probable, that the car would tip over, even though deceased had not grabbed the wheel. In short, the jury could have found, from all the circumstances, notwithstanding Reed's statement, that deceased did not grab the wheel. There are other inferences which might be drawn from all the evidence, but we shall not go into them further. It must be remembered that here was a tragedy in which a person lost his life. Reed was charged with being the cause of it. He might, perhaps, be liable, as well as defendant, for damages. There was a powerful incentive on Reed's part to shield himself. The mouth of the only other person present is closed. Under such circumstances, and under this record, neither the court nor the jury were compelled to blindly believe every word Reed said, and just as he said it. It may have occurred just as he says. We do not assume to say whether it

did or not, but it was a question for the jury.

Appellant cites *Bacus v. Railway*, 118 N. W. 751, as holding that, although there be but one eyewitness to a transaction, his testimony is not necessarily conclusive, and that a different condition may be satisfactorily established by the facts and circumstances appearing in evidence. We think this is especially so where the only other person or witness to the transaction is dead. We have so held in numerous cases. In *Markey v. Markey*, 108 Iowa, 373, 79 N. W. 258, a bastardy case, speaking of the question of recognition, the court said that such evidence cannot, in the nature of things, be controverted, and for that reason it should be carefully scrutinized and received with caution. It is also necessary to remember that in these cases, from the nature of the evidence given, it is not subject to any worldly sanction; it being obviously impossible of any witness being convicted of perjury for speaking of what he remembers to have been said in a conversation with a deceased person. In *Watson v. Richardson*, 110 Iowa, 673, 678, 80 N. W. 407, also a bastardy case, language similar to that in the *Markey* Case was used, and, further, that such testimony must necessarily be tested by its own inherent probability or improbability by comparison with other evidence in the case, and by ordinary rules of human conduct under similar circumstances. In *Holmes v. Connable*, 111 Iowa, 298, 301, 82 N. W. 780, 781, an action in equity to enforce specific performance of an oral promise of a person deceased, the court said:

"We wish * * * to say something as to the rules that should govern courts in passing upon cases of this kind. It will not do, as plaintiff's counsel seem to think proper [and as the court did in the instant case] to hold that because a certain number of witnesses have testified to the making of the contract, and none have been called to deny it, plaintiff's case is established. The lips of the only two witnesses who could deny it are forever closed. The only person who could controvert the admissions alleged to have been made is the dead man against whose estate this claim is produced. There is no defense that can be made, save as it may be found in the improbability of the stories of the plaintiff's witnesses, when tested by comparison with other evidence in the case, or the ordinary rules of human conduct under similar circumstances."

The same case quotes from *Wallace v. Rappleye*, 103 Ill. 229, to this effect:

"It is incumbent on the court to look upon such evidence with great jealousy, and to weigh it in the most scrupulous manner, to see what is the character and position of the witnesses generally, and whether they are corroborated to such extent as to secure confidence that they are telling the truth."

And from a Pennsylvania case:

"The temptation to set up claims against the estates of decedents—particularly such decedents as have left no lineal heirs—is very great. It cannot be doubted that many such claims have been asserted which would never have been known, had it been possible for the decedent to meet his alleged creditor in a court of justice. * * * Such claims are always dangerous, and when they rest upon parol they should be strictly scanned," and so on.

In other words, the court holds that such a claim cannot be considered as established as a matter of law, because witnesses have testified to the making of the contract and none have been called to deny it. The *Holmes* Case is cited and followed, in *Bremer v. Haag*, 151 Iowa, 449, 452, 131 N. W. 667, *Young v. McClannahan*, 187 Iowa, 1184, 1191, 175 N. W. 26, *Ross v. Ross*, 148 Iowa, 729, 733, 127 N. W. 1034, *Finger v. Anken*, 154 Iowa, 507, 511, 131 N. W. 657, and in *re Chismore's Estate*, 166 Iowa, 217, 223, 147 N. W. 297, 300. In the last case, at page 224, it is said:

"It has been frequently held, not only by this court, but by others, that uncontradicted evidence is not sufficient to command a directed verdict where the inferences to be drawn from all the facts and circumstances are open to different conclusions by reasonable men."

See, also, *McNeill v. McNeill*, 166 Iowa, 680, 701, 148 N. W. 643; *Bohen v. North American Life Insurance Co.*, 188 Iowa, 1349, 177 N. W. 706, 709. Some members of the court prefer to put their concurrence on the ground that defendant was a common carrier, and the burden was on it to explain the circumstances of the fatal accident consistent with its own freedom from negligence.

[2] 2. We think the trial court erred in excluding certain evidence tending to impeach Reed, and in plaintiff's attempt to lay a foundation for that purpose. After he had been asked, and he had answered as to his talking with Weisz, or Shinkle, on the hill at the time they came out with the ambulance, soon after the accident, he was asked:

"Q. I will ask you whether or not at that time you didn't state that you were going down the hill, and the rear end of the car started to skid, and you thought you would let it skid to the side of the bank? Did you say that to Mr. Shinkle or Mr. Weisz, or words to that effect at that time?"

Objected to as not proper cross-examination, incompetent. Sustained, as not proper cross-examination. Exception. The witness had stated in chief that his car did not skid at all. An affirmative answer to the question would have shown that it did skid, and thus contradicted his testimony in chief. Had he denied it, and the other witnesses testified that he did so say, it would have the same effect. Furthermore, if he so stated,

and did not then claim that deceased grabbed the wheel, the evidence sought to be elicited might tend to show that Reed's claim that deceased grabbed the wheel was an afterthought to shield himself. The inquiry was as to a conversation occurring at the place where the accident occurred, and very soon afterwards. It was cross-examination, and competent. Appellant cites at this point *Reynolds v. Smith*, 148 Iowa, 264, 127 N. W. 192. It seems needless to discuss this point further.

It is thought by appellant that, even though deceased did take hold of the wheel, he was acting in an emergency. Appellee contends otherwise. This, and one or two other questions are argued, but, having decided the point most argued and relied upon, we shall not extend the opinion to discuss the other questions. For the reasons given the judgment of the district court is reversed, and the cause remanded.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

FLEMING v. FLEMING et al. (No. 32408.)

(Supreme Court of Iowa. Sept. 28, 1921.)

1. Insurance ¶116(1), 138(1)—Partner has insurable interest in life of other partners; joint policy valid.

Each member of a partnership has an insurable interest in the life of every other member, and an undertaking of an insurance company to pay death loss upon any life to surviving members of firm is legitimate.

2. Dower ¶17—Proceeds of insurance policy held not assets of firm.

Where four partners carried insurance, undertaking of company being to pay the death loss upon any life to the other three members of the firm, expense of insurance being borne by beneficiaries, the proceeds of the policy on death was not an asset of the firm in which widow of deceased partner had an interest, in the absence of pleading and proof of facts aliunde which would equitably impress a trust upon such proceeds in the hands of the surviving partners.

3. Appeal and error ¶835(2)—Point that opinion overrules prior decision and hence denies due process not noticed on second rehearing.

The point that opinion of court overruled a prior decision, and hence was a violation of the Constitution of the United States in that it deprives a person of property without due process of law, made for the first time on second rehearing will not be considered.

Appeal from District Court, Polk County;
C. A. Dudley, Judge.

On second rehearing. Former opinions and decree in court below modified. For former opinions, see 174 N. W. 946; 180 N. W. 206.

A. B. Cummins, Parrish, Parker & Miller and W. E. Miller, all of Des Moines, for appellants.

Parsons & Mills, of Des Moines, for appellee.

EVANS, C. J. It is to be conceded that our former opinions (174 N. W. 946, 180 N. W. 206) are incomplete in their discussion, in that the item of "life insurance" is not considered therein. It is a matter of some doubt whether the pleadings make any issue as to such item. The only reference thereto in the petition of plaintiff is contained in paragraphs 6 and 11. Paragraph 6 was as follows:

"That plaintiff's deceased husband carried life insurance in the amount of \$58,000."

Paragraph 11 averred that the three defendants had collected such life insurance, and appropriated the same to their own use. It was not alleged that the plaintiff was the beneficiary of the policy; nor was any other fact pleaded as a basis for the claim that the insurance proceeds belonged to her either in whole or in part. The trial court filed a lengthy written opinion in the case, comprising apparently a complete discussion of all points presented for his consideration. No reference is made therein to the item of insurance. The opening argument of plaintiff as appellee purports to be a full discussion of the case, but no reference is contained therein to the insurance. However, the decree entered by the trial court did in terms declare the insurance proceeds to be a part of the partnership property. The implication from such finding would naturally be that the plaintiff was entitled to recover the one-eighth part thereof. The only disclosure of the detailed facts pertaining to such insurance is to be found in the answer of the defendants, appellants here, and in the evidence in their behalf. It is to be said also that the appellants made proper point in their opening argument here, calling in question that feature of the decree entered below. It is true that the basis of their claims of right to such proceeds which was put forth by them with greatest emphasis was the contract which we have already considered in our former opinions, and which we hold to be ineffective as a bar to the widow. But they did base their claims of right also upon other grounds which we here consider. If the item had not been specified in terms in the decree, we should be inclined to hold that it was not within any material issue tendered by the petition. Inasmuch as the decree did specifically purport to adjudicate it, the appellants are entitled to demand our consideration of it in a specific sense.

[1, 2] The undisputed facts as they appear from the pleadings and the evidence of the defendants are that the "life insurance" in question was payable to the three brothers, appellants herein. It appears that similar insurance was carried upon the life of each member of the firm in favor of the other three members thereof. The undertaking of the insuring company was to pay the death loss upon any life to the other three members of the firm. Such form of insurance was legitimate. Each member of the firm had an insurable interest in the life of every other. The expense of the insurance was borne by the beneficiaries. It appears also that the insuring company held all these policies as security for loans negotiated to the firm. The method of collection of these policies upon the life of decedent was that the insuring company applied the full proceeds as a credit upon the indebtedness owing to it by the firm and the members thereof. It is manifest therefore that upon the face of the insurance contract the three defendants had the legal right to the proceeds of the "death loss." They and they only could have maintained an action therefor against the insurance company. If there be facts aliunde which would equitably impress a trust nevertheless upon these proceeds in the hands of these defendants, it was incumbent upon the plaintiff to plead and to prove such facts. Nothing of that kind was attempted by her. The manifest objective of her petition was to obtain an adjudication that the contract under attack was ineffective to bar her right of distributive share. The emphasis of the litigation was concentrated upon that proposition. We have sustained the contention of the plaintiff in that regard. But, even so, such contract has no effect whatever upon the question of the defendants' right to the insurance proceeds. They do not take such proceeds under and by virtue of the contract under attack, neither are they forbidden to take the same thereby. They take such proceeds under and by virtue of the insurance contract and of that alone. Their right thereto is neither greater nor less by reason of the contract of alleged joint tenancy.

We reach the conclusion therefore that the item of "life insurance" proceeds should be eliminated from plaintiff's recovery, and that the decree entered below should be modified to that extent. In all other respects, the petition for rehearing is overruled.

[3] II. The appellants urge upon us very earnestly that the effect of our holding here is to overrule prior decisions, and therefore to deprive appellants of their property without due process of law in alleged violation of the Constitution of the United States. The premise upon which such plea of unconstitutionality is based is negated by the opinion complained of. It does not purport

to overrule prior decisions. Appellants' contention to such effect is argumentative only, and is not sustained by us. Moreover, if the premise were conceded, and if it were deemed correct to say that the overruling of a prior decision by an appellate court of a state is a violation of the Constitution of the United States, such point would have been just as available to the appellants in their original argument as in their petition for rehearing. No such point was therein made.

We are asked to recognize the point now made as presenting a federal question. If we could properly do so as a matter of sincere deference to the higher court or as a matter of courtesy to the distinguished counsel, we should not be reluctant to make such declaration as would enable a review of our decision by the higher court. But judicial candor compels us to say that we see no federal question involved. The decree below will be modified as above indicated, and otherwise affirmed.

KUTCHERA v. GRAFT et al. (No. 34022.)

(Supreme Court of Iowa. Sept. 20, 1921.)

1. Fraud $\S$ 58(1)—Evidence of lessor's admissions held insufficient to show knowledge of hog cholera on premises.

In an action against a lessor for death of a tenant's hogs from cholera, based on fraudulent concealment of fact that hogs of precedent tenant died of cholera, testimony as to statements by lessor that he told a former tenant whose hogs died of cholera to bury the carcasses, and that he did not bury them properly, held insufficient to show lessor's knowledge of hog cholera on the premises when he leased to plaintiff or that he knew carcasses of such hogs were not properly disposed of.

2. Fraud $\S$ 16—Failure to inform tenant that former tenant's hogs had cholera not necessarily fraudulent.

Though lessor knew former lessee's hogs had cholera, failure to inform subsequent lessee was not necessarily fraudulent, if proper precautionary orders as to disinfection and disposition of carcasses had been followed by the former tenant.

3. Fraud $\S$ 4—Intent necessary.

Fraud cannot be predicated on negligence, however gross, as there must have been an intention to deceive.

4. Fraud $\S$ 58(1)—Evidence held not to show source of infection of hog cholera.

A lessor held not guilty of fraudulent concealment as to hog cholera so as to be liable to lessee for the death of hogs from cholera alleged to have been contracted from improperly buried infected carcasses of hogs of a former tenant, who had been directed by a veterinarian and inspector how to bury them, without proof

that the hogs, the carcasses of which were found exposed more than six months afterward, died from cholera and that their carcasses infected plaintiff's hogs.

5. Evidence ¶60—Presumption against negligence of former tenant as to hog cholera on premises alleged fraudulently rented.

It is not to be presumed that a former tenant would violate the law or be guilty of negligence in the disposition of hogs dying on premises alleged to have been leased to plaintiff by fraudulently concealing facts concerning cholera, especially when under the supervision of a veterinarian and government inspector; criminality or negligence never being presumed.

6. Landlord and tenant ¶125(2)—Lessor not liable for unsafe condition of premises in absence of fraud or agreement.

A lessor is not liable to his lessee for the unsafe condition of premises for the purposes for which they are intended, in the absence of fraud, or an agreement to such effect.

Appeal from District Court, Linn County;
F. O. Ellison, Judge.

Action to recover damages against defendant landlord based on fraudulent concealment of hog cholera infection of the leased premises from which the tenant claims his hogs contracted cholera and died. There was a directed verdict for defendant and judgment thereon against plaintiff for costs. Plaintiff appeals. Facts appear in the opinion. Affirmed.

Ring & Hann, of Cedar Rapids, for appellant.

Voris & Haas, of Marion, for appellees.

ARTHUR, J. Defendant W. S. Graft owned a farm located about a mile southwest of Central City in Linn county, Iowa. On September 26, 1918, plaintiff leased the farm for the period beginning March 1, 1919, and ending March 1, 1921, and on or about March 1, 1919, moved from North English, where he had been living, on the farm, and took with him 11 brood sows and 28 shoats and pigs. The hogs were shipped in one car. After plaintiff moved on the Graft farm, the sows farrowed 66 pigs. On arrival at the farm the hogs were placed in a small lot near the barn and kept there three or four days, and then permitted to run in a field of 15 or 18 acres. The latter part of March many of plaintiff's hogs became sick and died. Plaintiff employed Clifford Moles, veterinarian, who treated and vaccinated the hogs. Moles says he was first called April 6th. A Mr. Rich had occupied the premises as tenant the year preceding March 1, 1919. Rich's hogs had cholera in August, 1918. Dr. Moles vaccinated 25 of the hogs by what is called the "double treatment." Some of them died. After that he was on the premises a few times in September. A government inspector visited the premises during the presence of

cholera in August. Moles posted a quarantine notice on the east side of the barn where it could be plainly seen from the road, or by any one coming on the premises. After treating the hogs, Moles turned them over to the government inspector and gave Rich directions as to disinfecting the premises, and told Rich that he had better burn the dead hogs; that if he buried them to bury them six feet deep and cover them with quicklime, and that that would be safe. On September 27, 1918, plaintiff was on the farm and about the buildings, and was again on the farm in December, 1918, and was not afterwards on the farm until he moved on March 1, 1919. When plaintiff's hogs took sick, the latter part of March, he employed Veterinarian Moles to treat them. Dr. Monger, a government veterinarian, went with Dr. Moles to the premises. Drs. Moles and Monger posted four or five of the Kutchera hogs and found they had cholera. On April 7th or 8th Moles and Monger were on the premises. They found portions of carcasses, not well covered up, in a ditch about 80 rods from the barn. The carcasses had been covered and the dirt washed away. The carcasses were decayed so they made no examination. They saw two carcasses and these were only partially exposed. Kutchera showed them the two carcasses, and did not point out any more. There was one carcass on top of the ground 3 or 4 rods from the barn. Moles vaccinated 44 head of the Kutchera hogs.

W. S. Graft died before the trial, and the administratrix of his estate was substituted defendant.

Plaintiff testified that the physical condition of his hogs when he took them to the Graft farm was good, was healthy.

Plaintiff's charge of fraudulent concealment consists of what he claims to be the facts that Rich's hogs had been diseased of cholera in the fall of 1918; that W. S. Graft had knowledge that some of Rich's hogs had died from cholera; that the hogs which died of cholera were not properly buried, and that W. S. Graft knew that they were not properly buried, and that W. S. Graft in no way informed the plaintiff of such facts; that the plaintiff was ignorant of such facts, and Graft, having knowledge of such facts and conditions, deliberately, willfully, and wrongfully concealed from plaintiff such facts.

Plaintiff further charges negligence on the part of Graft in failing to disinfect the premises.

In support of his charge that Graft knew that Rich's hogs had cholera in the fall of 1918, and knew how the dead hogs were disposed of, he offered the testimony of his 17 year old son, Robert Kutchera, who testified that Graft was on the farm several times after they moved there; that he heard a conversation between Graft and his father at

the dinner table at their house on the farm, wherein "Mr. Graft told my father that he had told Rich to bury the hogs up there; he pointed toward the direction of the west field at the time. At another time he told my father that the man on the farm before Rich did not have cholera among his hogs, but that Rich's hogs did."

Mrs. J. H. Lapham, who was employed as a domestic in the Kutchera home during the months of March and April, 1919, testified to a conversation that she heard between Kutchera and Graft at the dinner table wherein she reports Graft saying:

"Mr. Graft said he wanted Rich to bury the hogs. * * * He said he told Rich he ought to bury them."

Bertha Kutchera, wife of plaintiff, testified that she heard a conversation between Graft and her husband in April, 1919, at the dinner table, wherein Graft said:

"Rich's hogs had died with cholera, and he told him to bury them up there. He pointed west of the house. I heard my husband tell Mr. Graft that he thought he ought to pay him for the loss, that he knew there was cholera on the place, and he answered: 'I will not pay for them. Go to Rich; he is responsible for them.'"

Robert Hass, brother-in-law of Kutchera, who was working for Kutchera, testified that about April 25th Mr. Graft came out to the farm, and in a conversation with him Graft spoke about the Rich hogs that had died, and that it was cholera, and that he had told Rich that it was a poor place to bury them where he had buried them.

R. C. Hatch, a township trustee, testified that in the latter part of April, 1919, Graft notified him that Rich had buried hogs in a ditch, and that Rich should look after them; that he went and saw Rich, but Rich did not bury them, and later on Mr. Graft buried the hogs himself. Hatch said:

"Graft wanted me to see Rich and have him attend to burying the hogs; that Rich should have burned them or buried them out on the hill where they would not wash."

There was testimony bearing on damages, which need not be discussed.

At the close of plaintiff's testimony, defendant moved for a directed verdict in his favor, which was sustained; the motion being:

"1. There is no evidence of fraud or deceit or concealment on the part of the deceased, W. S. Graft, and in the absence of such evidence there is no liability on the part of deceased, or the representatives of his estate.

"2. There is no evidence that the deceased, W. S. Graft, knew there had been cholera on the premises, and no evidence that he knew the hogs had been left in the ditch uncovered; no evidence to show that he had any knowledge, or that knowledge could be imputed to him.

"3. It appears the deceased was not in the

occupancy of the premises preceding the occupancy of the plaintiff, but that the premises had been occupied by a tenant, a one Fred Rich. It does not appear that the premises were under the control of the deceased in the fall of 1918, down to the first of March, 1919, and no knowledge of the conditions can be imputed to him because of his relations and landlord.

"4. It does not appear that the dead hogs found on the premises in April ever had the disease known as cholera.

"5. It does not appear that the plaintiff's hogs contracted the disease directly or indirectly from the dead hogs found on the premises in April, or from any other infection on the premises.

"6. There is no evidence that plaintiff's hogs contracted the disease from any conditions existing on the premises. The most that can be claimed is that conditions existed which might have caused the disease, but whether such disease was caused by the conditions is but mere surmise, speculation, and conjecture. The relation of cause and effect is not shown.

"7. On the whole record plaintiff is not entitled to recover, or if a verdict were returned for him against the defendant, it would be the duty of the court to set it aside."

It was established by the evidence that there was cholera in Rich's herd of hogs during the season of 1918 when he was a tenant on the Graft farm, and that the ravages of the disease began in August and continued into and ended in September, perhaps ended early in September, for late in September, at the time Kutchera entered into his lease with Graft, he and Graft were on the farm and went over it and about the buildings, and evidently discovered no trace of hog cholera on the premises. Again in December Kutchera was on the premises and discovered nothing wrong. Veterinarian Moles treated and vaccinated the hogs, a government inspector assisting him. Some of the hogs died, but the record does not disclose to what extent the herd died. The veterinarian instructed Rich how to dispose of the carcasses. The record does not disclose anything more about cholera on the farm or concerning the disposition of the hogs that died, until along in April when cholera broke out in the herd of Kutchera. Then it was that Mr. Graft was out on the farm and took dinner with the Kutchera family, and conversation arose at the dinner table about Kutchera's misfortune, and about the disposition of some hogs that Rich had lost the season before. Members of the Kutchera family testify to statements then made by Graft. This, and the testimony of Hass and Hatch, is the only testimony tending to show that Graft knew of cholera in the Rich herd.

[1] The record does not disclose when the knowledge that Rich's hogs had the cholera came to Graft. At the time of the dinner table conversation, all in any way interested, and likely everybody in the neighborhood, had come to know that there had been cholera in the Rich herd. The record does

not disclose that Graft was on his farm after the latter part of September, when he was there with Kutchera to show him the farm, until in April, more than six months after disease had been in Rich's herd. It does not appear that Graft was on the farm while Rich's hogs were sick, or that he had any personal knowledge of the situation. After Graft was informed of Kutchera's loss of hogs, and Kutchera wanted him to pay the loss, Graft then, upon learning from Kutchera that some hogs had not been properly buried, cast blame upon Rich for not properly burying the hogs. It does not appear that Graft knew that the hogs were not properly buried until told so by Kutchera. We find no evidence in the record that Mr. Graft knew of hog cholera on the farm at the time of the execution of the lease. Robert Kutchera, witness, reports Graft as saying that "he told Rich he ought to bury them." Testimony of admissions of Graft, who was dead at the time of the trial, should be scrutinized carefully. The claimed admissions of decedent Graft we think do not go to the broad extent claimed by counsel for plaintiff. It is true that there is testimony tending to prove that some time in April Graft made the statement to Robert Hass a brother-in-law of Kutchera, to the effect that he knew where the hogs were buried that had died with cholera, and that he told Rich that "it was a poor place to bury them where he buried them." But this was in a conversation in which Graft was intimating that Rich was blamable. But against this Robert Kutchera, son of plaintiff, says that at a conversation the latter part of March, Graft told his father that he told Rich to bury the hogs up there, pointing to the west. Mrs. Lapham, probably at the same time, heard Graft say that he wanted Rich to bury the hogs. Mrs. Kutchera, wife of plaintiff, says that she heard, what was probably at the same conversation, Mr. Graft say that Rich's hogs had died with cholera, and he told him "to bury them up there," pointing to the west. These statements were made in a general conversation. The parties who testified to them were of the Kutchera household, and swayed by motives of bias or self-interest, and are subject to infirmities of memory. The statements purport to have been made a year before the trial, and the memories of the witnesses might be so imperfect as to leave them with only an impression of the substance, which may have been at variance with the meaning intended to have been conveyed. Testimony of admissions is ordinarily received with caution. 1 Greenleaf on Evidence (14th Ed.) § 200; *Holmes v. Connable*, 111 Iowa, 268, 82 N. W. 780. Outside of these admissions, there is no evidence tending to show that the deceased, Mr. Graft, had knowledge that there had been hog cholera on the farm while Rich was a tenant. These statements were made in April, 1919. We

think this evidence does not prove that Graft knew that Rich's hogs had cholera at the time the lease was made on September 27, 1918. Nor does it prove that Graft concealed the facts, if he knew them. Nor does it prove that he designed to mislead the plaintiff, or that he deceived him in any way.

[2] Even if Mr. Graft knew that Rich's hogs had had cholera, it cannot be said that he was guilty of fraud in failing to inform Kutchera at the time the lease was made. If the premises were disinfected and the dead hogs buried or burned as Rich was directed by Dr. Moles and the government inspector, there would have been no danger in March, five months afterwards.

Then it must follow that Graft actually knew, at the time the dead hogs were buried, that they were not properly buried. But his claimed admissions do not go so far. The only thing his admissions—giving to them their utmost probative force—tend to prove is that he told Rich to "bury them over there," at the time pointing to the west. Moles had told Rich to burn the carcasses or bury them six feet deep and cover them with quicklime. Even if Mr. Graft had suggested to Rich a place to bury the hogs, there is no evidence that he knew, or had reason to believe, that they would not be properly and safely buried. In fact, according to the witness Hass, it appears that Graft was complaining because Rich had buried the hogs at an improper place. This is not inconsistent with his statement at the dinner table that he "told Rich to bury them up there," for to Robert Hass he criticized Rich for attempting to bury them in a ditch or ravine, saying that that was not a proper place. Kutchera's claim is that his hogs contracted cholera by coming into contact with the hogs of Rich which had died of cholera and had been improperly buried. The evidence will permit plaintiff no other theory, for there is no evidence that the farm carried the infection otherwise. Plaintiff is reduced to the claim that his damage resulted from the improper burial of the deceased animals. If there is actionable fraud in the instant case, it must be because of the knowledge of Graft and concealment by him of the fact that the animals had not been safely buried, and this knowledge and concealment must have been at the time of the execution of the lease. Assuming that the animals found by Kutchera died from cholera, when did Graft acquire such knowledge? He did not live on the farm. Rich was in possession and control of the farm. It does not appear that Graft was at the place where the hogs were buried until after Kutchera went on the place. So far as appears from the evidence, Mr. Graft never knew of the improper burial of the hogs until he was informed of the fact by Kutchera the last of March or the 1st of April, 1919.

[3] It may be urged that he should have known of the facts. But he was not in the occupancy of the farm himself, and is not shown to have been upon the farm until he helped Kutchera move on March 1st. In any event, fraud cannot be predicated on negligence, however gross. There must have been an intention to deceive.

[4] Moreover, it was not shown by any evidence that the carcasses found by Kutchera in April were those of hogs that had died from cholera. Perhaps it may be inferred that the hogs found by Kutchera in the ditch, partially exposed, were victims of cholera. It was not to be presumed that Rich would violate the law, or even be guilty of negligence in the disposition of the dead hogs, especially when he was under the supervision of a veterinarian and a government inspector who told him what to do. Rich's hogs did not die from cholera after September, 1918, nor did they all die. More than six months intervened before it was discovered that some hogs had not been properly buried. Rich may have lost other hogs after September. It is not shown that the hogs found partially exposed in the ditch died from cholera. It may be that these hogs, the bodies of which were found, did not die of hog cholera, and for that reason Rich did not burn the bodies or bury them under a coating of quicklime. Criminality or negligence is never presumed, but must be established by proof. The record does not speak as to the cause of the death of these particular hogs which were found partially exposed, not properly buried, in a ditch. A strong inference may be conceded that the source of infection of the Kutchera hogs was the carcasses of the Rich hogs. Prevalence of hog cholera and how it is transmitted are often difficult to account for and baffle experts. Will the germs, if it is a germ disease, survive the sunlight and cold of an Iowa winter? Will they retain their vitality in a body exposed to sunlight and the freezing and thawing of winter, so that after six months they will transmit the disease? The record is silent about these matters. The veterinarians did not examine the bodies which were found exposed to ascertain the disease which attacked them. Without proof that the carcasses found had been infected with cholera, without proof that there were cholera germs, and that the germs would retain vitality for six months, through fall, winter, and spring, it is sought to make the estate of W. S. Graft, deceased, liable for Kutchera's loss. The period of incubation does not appear in the record, and it is not to be presumed that because the disease manifested itself in about three weeks after Kutchera moved to the Graft farm that his hogs could not have acquired the germs of the disease before coming to the Graft farm. The record leaves us in a field of inference, speculation, and conjecture with reference

to these matters, where the law requires reasonable certainty; at least, more than a mere possibility.

Counsel for plaintiff sought to have the inference drawn that the Kutchera hogs contracted cholera by coming in contact with the bodies of diseased hogs improperly buried. But we think the proof is lacking here. True, Rich's hogs had cholera in August and September, 1918, but Dr. Moles, the veterinarian, and a government inspector, gave Rich directions to burn the dead animals or to bury them six feet deep and cover with quicklime. It is not shown that Rich did not bury the body of every hog dying from cholera, or that he did not bury them as directed. This was in August and September. Rich had other hogs that did not die at that time. How many died does not appear. The fact that some carcasses were found on the premises some six months later does not prove that they were the carcasses of hogs that had died from cholera. Farmers lose hogs from various causes. It is only fair to presume that Rich would comply with the law relative to the disposition of bodies of hogs dying from cholera, or, at least, that he would dispose of them according to directions of the veterinarian and government inspector. At least, criminality or negligence is never presumed. As to hogs dying from other causes, he may have been careless. It is not established that the carcasses found were those of cholera hogs. The carcasses were not examined to ascertain the disease which attacked them.

[5, 6] The basis of the alleged liability of defendant's decedent is founded and rests upon a fraudulent concealment of a known danger. As we interpret it, this was the theory upon which the petition was drawn. The relation of Kutchera and Graft was created by the lease. As we understand the general rule, it is that the lessor, in the absence of fraud or any agreement to that effect, is not liable to the lessee for the condition of the premises, and that the premises may be safely used for the purposes for which they are intended. Plaintiff's claim, therefore, must be bottomed on fraud inducing the contract. *Jaffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Cate v. Blodgett*, 70 N. H. 316, 48 Atl. 281; *Boyer v. Commercial Bldg. Inv. Co.*, 110 Iowa, 491, 81 N. W. 720; *Starr v. Sperry*, 184 Iowa, 540, 167 N. W. 531; *Willis v. Snyder*, 180 N. W. 290.

Authorities cited by counsel for plaintiff do not hold to the contrary, except *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823, and the later opinion in the same case, *Willcox v. Hines*, 100 Tenn. 538, 46 S. W. 297, 41 L. R. A. 278, 66 Am. St. Rep. 770. It is held in the *Hines* Case that recovery may be had for mere negligence. But this case seems to stand quite alone. It is contrary to the weight of authority, and is not authority in

this jurisdiction. *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 68 Ohio St. 328, 67 N. E. 715. In *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, the court said:

"That no action lies by a tenant against a landlord on account of the condition of the premises hired, in the absence of an express warranty or of active deceit."

With the exception of the Tennessee cases, so far as we discover, the courts hold to the doctrine that the liability of the landlord must be grounded on deceit.

We think the court did not err in sustaining defendant's motion for a directed verdict. The judgment of the court below is affirmed.

Affirmed.

EVANS, C. J., and STEVENS and FAVILLE, JJ., concur.

YOUNG v. MANDIS. (No. 33777.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Pleading $\S$ 237(1) — Petition may be amended.

Petition may be amended to meet the proof in a proper case.

2. Damages $\S$ 208(3)—Evidence held insufficient for submission of permanency of injuries.

In action for damages for bruised and lacerated leg and sprained ankle and knee, evidence held insufficient for submission of question of permanency of injuries.

3. Damages $\S$ 6—For future pain and loss of time must be reasonably certain.

Damages cannot be recovered for future pain and suffering or loss of time unless reasonably certain.

4. Damages $\S$ 185(2)—Permanency of injuries may be inferred from their nature.

Permanency of injuries may in some cases be inferred from their nature.

Appeal from District Court, Woodbury County; John W. Anderson, Judge.

Action at law to recover \$3,000 damages alleged to have been suffered by plaintiff by being run over by the driver of defendant's automobile. Trial to a jury, which returned a verdict for plaintiff for \$656.35, which the court thought was not in harmony with, and in obedience to, the instructions of the court, in that the verdict included items not submitted to the jury and in excess of the amount authorized by the instructions. The court, upon its own motion, reduced the verdict to \$156.35, and rendered judgment for the latter amount. Thereafter plaintiff filed a motion asking the court to vacate the judgment

so rendered and to render a judgment in the sum of \$656.35 on the verdict as returned, also filed a motion for new trial, both of which were overruled. Plaintiff appeals. Affirmed.

C. R. Metcalfe and F. H. Rice, both of Sioux City, for appellant.

Jepson & Struble, of Sioux City, for appellee.

PRESTON, J. 1. Four items claimed for in the petition were: Lost time, three weeks, \$75; damage to bicycle, \$25; hospital bill, \$31.35; physician's bill, \$25—total, \$156.35. Plaintiff's testimony sustained the verdict of the jury as to these items, and this is the amount of the verdict as finally fixed by the court. No evidence was introduced on behalf of the defendant, except that of the defendant himself, who testified as to his employment of the driver of the car and his duties, and so on.

The court instructed the jury:

"If under the evidence and these instructions you find for the plaintiff, and that he is entitled to recover, it will then be your duty to ascertain and determine from the evidence the amount of such recovery. And in doing this you should take into consideration the damage of plaintiff's bicycle, his loss of time, hospital and medical attendance, and assess such an amount as you find from the evidence will fairly compensate him for the damages sustained by him, if any, not, however, exceeding the sum of \$156.35."

The instructions seem to clearly limit plaintiff's recovery to the items mentioned and that it shall not exceed \$156.35, although counsel for plaintiff argue that, properly construed, the instruction authorizes a recovery for other items, and in a larger amount. We shall see in a moment that there was no pleading or evidence authorizing a larger recovery. When the jury returned a verdict for the larger amount, the court made this record:

"It appearing to the court that said verdict is not in accordance with the instruction of the court, in which instruction said jury is instructed that they shall not find for the plaintiff in any amount in excess of \$156.35. It is ordered by the court, upon its own motion that said verdict be amended and reduced, so that the amount therein shall read \$156.35, instead of \$656.35," etc.

Judgment was thereupon rendered. The petition alleged that he was bruised, his leg lacerated, and his ankle and knee sprained, and that he was still sore and lame, and because thereof he had lost time, etc., but there is no claim in the petition for pain and suffering. However, some two or three days after the trial, and after the judgment had been entered, the plaintiff filed an amendment to the petition, as it says, to conform to the

(184 N.W.)

proof, and to make his claim for damages more specific, and says that he suffered severe physical pain and anguish during the time he was in the hospital, and after he was out, for two weeks, and since then has suffered constant pain, but not so severe, which pain prevents him from enjoying comfort, and disturbs his sleep at night. It appears that plaintiff was in the hospital seven days, and that those who called to see him testify, as he and his wife do, that he appeared to suffer pain while he was in the hospital and for a short time thereafter. He was at home two weeks after he left the hospital, and then returned to his work.

[1] In a proper case amendments to meet the proof are permissible, but it would not be expected that the court would instruct the jury or that the jury would make any allowance, for such pain and suffering, which was not in issue until after the trial was over and judgment rendered. The original petition further alleged:

"Plaintiff further says that his injuries are of a permanent character, and that he has not been able to perform efficient service since, on account of his said injuries."

[2] We take it that the more important point in the case is whether the evidence was sufficient to require the submission to the jury, of the question as to whether plaintiff's injuries were permanent. No medical witnesses testified. Plaintiff testified that before the accident he had nothing wrong with him so far as he knew; that since then he has had pains in his back and neck, sprains on his ankles, and they are weak; several nights had to sit up; the pain in his legs was so severe, he had to sit up and rub them, and his wife put a hot water bag with ice in it on his leg; that he was away from work two weeks and returned to the same employment at \$25 per week.

"Q. To go back, just exactly what is the effect of the injury upon your arm; you say you suffered a sprain? A. Of the leg; it strained the back of my neck and back.

"Q. What is the effect of it now? A. I have a catch in the back now in the center of the back, and am not able to do the same kind of work I did before; at this time I suffer pain in my right leg and ankle and back.

"Q. Do you know whether that pain is liable to be permanent?"

[3] This was objected to as calling for a conclusion, and that the witness had not shown himself competent to testify with regard thereto. The objection was sustained. The accident happened August 14, 1919, and the trial occurred something less than four months thereafter, or in December. Plaintiff does not state, either in his petition or evidence, what his business is or was. It appears that in three weeks he returned to his business at the same wage or salary claimed

for in his petition. The petition does not allege that plaintiff would suffer pain in the future, and there is no basis in the evidence for an allowance of loss of time in the future, and any recovery for such loss of time would be speculative. The damages recoverable, if at all, for future pain and suffering, or loss of time, must be such only as are reasonably certain, and, had the court submitted that question, it would have been required to so say. *Westercamp v. Brooks*, 115 Iowa, 159-163, 88 N. W. 372; *Woodworth v. Railway*, 170 Iowa, 697-718, 149 N. W. 522. In the last case it should be noted, however, that the plaintiff had lost both his legs, so that there could be no question as to permanent injury and future damage.

[4] It is doubtless true, as contended by appellant, that the permanency of injuries may in some cases, be inferred from their nature. The only case cited by appellant on this point is a Texas case. None are cited by appellee. In *Shultz v. Griffith*, 108 Iowa, 151, 72 N. W. 445, 40 L. R. A. 117, the allegation was that plaintiff had become sick, sore, and lame, and suffered great bodily pain and loss of time. We said that these allegations are all in the past tense, and do not, even inferentially, allege or claim damages for future pain or anguish. There were no allegations of permanent injury, future incapacity, etc. In *Meler v. Shrunk*, 79 Iowa, 18, 44 N. W. 209, it was alleged that plaintiff became sick, sore, and lame, and so continued for a long time and is not yet fully recovered therefrom, and that during all of which, the plaintiff suffered great pain and was thereby prevented from performing his lawful business, and it was held that, so far as the allegations of the petition were concerned, this was sufficient to sustain an allowance of damages for loss of time, and the charge that he had not yet recovered was a sufficient claim for future disability, warranting the court in submitting the question. But we assume that there was evidence to sustain the allegation as to loss of time in the future. We think such is not the case here, since as said, plaintiff for more than three months had gone back to work, at whatever his business was, and at the same pay he claims for in his petition. In the instant case there is no such claim as that plaintiff was prevented from performing his lawful business. True, he does say in one sentence that he had not been able to do the same kind of work, but in another place he says that he returned to the same employment at \$25 per week. The appellant asserts, but cites no authority, to the proposition that the question propounded to plaintiff as to what he thought about whether the pain is liable to be permanent was competent. No foundation was laid.

2. Appellee cites *Stevens v. Campbell*, 6 Iowa, 538, *Chamberlain v. Des Moines*, 172

Iowa, 500, 154 N. W. 766, *Robyn v. Van Der Weide*, 178 Iowa, 608, 614, 159 N. W. 1034, *Jacobson v. Gypsum Co.*, 150 Iowa, 333, 337, 130 N. W. 122, *Federspiel v. Johnstone*, 87 Mich. 303, 49 N. W. 581, *Archer v. Milwaukee Co.*, 144 Wis. 476, 129 N. W. 598, and *Lowenstein v. Lombard*, 2 App. Div. 610, 38 N. Y. Supp. 33, to the point that the court is not bound by the verdict returned by the jury if the same is not in conformity with the instructions, but may correct the verdict. We do not understand appellant to controvert the proposition, for he cites *Hensley v. Davidson*, 135 Iowa, 109, 112 N. W. 227, 14 Ann. Cas. 62, as holding that the right of the court on its own motion to set aside the verdict should rarely be exercised. Appellant's real complaint of the action of the court, as we understand it, is, as before stated, that the jury had the right to construe the instruction to allow other damages. Whether the defendant could complain of the action of the court we do not determine, but we are unable to see that appellant has any complaint, since the jury allowed, and the court sustained, a finding as to the full amount claimed by plaintiff for the items covered by the instruction of the court, and of which there was pleading or proof. Appellee raises some questions as to whether appellant is entitled to be heard on these matters, but we shall not prolong the opinion.

We reach the conclusion that the judgment of the trial court ought to be, and it is, affirmed.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

DOUGHERTY v. RECKLER. (No. 33653.)

(Supreme Court of Iowa. Sept. 20, 1921.)

1. Animals §74(8)—Proximate cause of personal injury by team frightened by dog held question for jury.

One who knowingly harbors a vicious dog which, while running at large, frightens a team of horses lawfully on the highway, causing it to run away and injure the owner, who departs from a place of safety to stop it, is liable to such owner, if his injuries resulted proximately from the dog's act, which is for the jury; the owner in such circumstances not being necessarily guilty of contributory negligence.

2. Animals §74(6)—Exemplary damages for personal injury not recoverable without proof of malice.

Though exemplary damages are not recoverable under Code, § 2340, imposing liability for all damages done by a dog except when the party injured is doing an unlawful act, the statute does not limit the right of one injured to proceed under the common law, but

plaintiff in such case cannot recover exemplary damages in the absence of evidence of malice.

3. Animals §74(5)—Evidence held to warrant recovery for personal injury by team frightened.

In an action for injuries to the owner of a runaway team while attempting to stop it, evidence as to whether it was defendant's dog that frightened the team and as to the habits of the dog held to warrant recovery.

4. Appeal and error §843(1)—Errors not likely to occur on retrial not considered.

Errors not likely to occur on a retrial will not be considered.

Appeal from District Court, Jasper County; D. W. Hamilton, Judge.

Action for damages alleged to have resulted from the acts of a vicious dog owned or harbored by the defendant. The material facts are referred to in the opinion. There was a verdict and judgment for plaintiff, and defendant appeals. Reversed.

O. P. Myers, of Newton, and C. O. Holly, of Des Moines, for appellant.

Hammer & Tripp, of Newton, for appellee.

ARTHUR, J. This is an action in tort to recover damages on account of injuries received by plaintiff while attempting to intercept and control a team of horses owned by him, which while being driven upon the public highway by Willis Kono, a boy about 14 years of age employed by plaintiff, became frightened by a dog which ran into the highway and snapped at or bit one of the horses. The team was hitched to a riding cultivator, and was proceeding along the highway three or four rods in the rear of a team of mules, hitched to a surface plow, which was being driven by plaintiff. The horses driven by the boy jumped when the dog ran into the highway and threw him from the plow to the ground, but he clung to the lines, and, at the time plaintiff caught hold of the horse's bridle, was being dragged in the road behind the plow.

The petition contained all the essential averments of action under the common law. The answer was composed of a general denial and the plea of an alibi for the dog.

The questions presented for review involve principally alleged errors in the rulings of the court upon objections to certain questions propounded by counsel for defendant to a witness for plaintiff upon cross-examination in several paragraphs of the court's charge to the jury, and the overruling of defendant's motion for a new trial.

I. The court in the sixth paragraph of its charge instructed the jury that under section 2340 of the Code "the owner of a dog shall be liable to the party injured for all damages done by his dog, except when the party is doing an unlawful act," and that

if plaintiff had made out a case by the evidence he would be entitled to recover such actual damages as it was shown he had sustained. The court further and in paragraph 7 instructed the jury that exemplary damages might be allowed if it found, by a preponderance of the evidence, that defendant's dog was vicious; that such fact was known to him, and he permitted the same to run at large without any attempt to restrain him.

The exceptions noted to instruction 6 were that there was no causal connection between the act of the dog and the injuries received by plaintiff, and that the alleged frightening by the dog of the team driven by the boy was not the proximate cause of plaintiff's injury.

Paragraph 7 of the charge was excepted to on the ground that under the statute plaintiff could recover only compensatory damages, and that the allowance of exemplary damages was not permissible even though the petition recited a good cause of action at common law.

It is further contended by appellant that the injuries received by plaintiff were due to his own voluntary act in taking hold of the horse's bridle and trying to stop the frightened team, and that if he had not thus voluntarily put himself in the way of danger he would not have been injured, and that therefore the injuries complained of were not the proximate result of any wrongful act on the part of defendant.

[1] It is tacitly conceded, however, by counsel for appellant, in this connection, that a person who seeks to rescue another from imminent peril at the risk of his own life, or under circumstances likely to result in serious injury or damages to himself or property, is not necessarily guilty of contributory negligence, or prevented from recovering damages from the negligent party; but they contend that this is true only when actionable negligence on the part of the defendant toward the person rescued, or the party making the rescue after the attempt has been initiated is shown. This is substantially the general rule, the reasons for which are obvious. *Saylor v. Parsons*, 122 Iowa, 679, 98 N. W. 500, 64 L. R. A. 542, 101 Am. St. Rep. 283; *Liming v. Illinois Central Ry. Co.*, 81 Iowa, 246, 47 N. W. 68. We said in the case last cited that where "one who, acting with reasonable prudence, voluntarily exposes himself to danger for the purpose of protecting the person of another, may recover for the consequent injuries he received from the person whose wrong caused the injury to himself, and the danger to the person he sought to aid." To the same effect, see *Beckler v. Merringer*, 131 Iowa, 614, 109 N. W. 185; *Tyler v. Barrick*, 178 Iowa, 989, 160 N. W. 273.

We perceive no just or valid legal reason for holding that one who negligently sets a

dangerous instrumentality in operation, which results in injury to a person who voluntarily seeks to rescue another from existing or impending peril, must respond in damages to the person voluntarily attempting to rescue who is injured while in the act, and that one who owns or harbors a vicious dog, contrary to the statute or his common-law duty, which, while running at large, frightens a team of horses while lawfully upon the highway, causing it to run away and seriously injure the owner who departs from a place of apparent safety to stop the team and prevent it from running away and perhaps from being severely injured, or from inflicting damages upon some other person or property, shall be relieved from liability. The liability in both cases, if any exists, rests upon the breach of a legal duty which the defendant owed to the injured party. In the one case the gist of the action is the negligence of the defendant, it is statutory; and, in the other, the unlawful harboring of a vicious dog with knowledge of its vicious character. The specified unlawful act of the defendant in the later case takes the place of negligence in the former. If the injuries received by the plaintiff resulted proximately from the act of the dog snapping at or biting one of the horses, then it seems to us the defendant must be held to a liability. This was a question for the jury. *Liming v. Illinois Central Ry. Co.*, 81 Iowa, 246, 47 N. W. 68; *Beckler v. Merringer*, 131 Iowa, 614, 109 N. W. 185; *Mellicker v. Sedlacek*, 179 N. W. 197, 11 A. L. R. 259.

[2] II. Complaint is also made by appellant of the submission to the jury of the question of exemplary damages. Exemplary damages are not recoverable in actions based upon section 2340 of the Code. This statute does not, however, limit or affect the right of one claiming damages on account of injuries received from the attack of a vicious dog to proceed under the common law. *Sanders v. O'Callaghan*, 111 Iowa, 574, 82 N. W. 969; *Mellicker v. Sedlacek*, supra.

We held in *Cameron v. Bryan*, 89 Iowa, 214, 56 N. W. 434, that where it was alleged in the petition and established by the evidence that the defendant "willfully, unlawfully, and maliciously" harbored a vicious dog with full knowledge of his vicious propensities, exemplary damages might be recovered by one injured thereby. While it is alleged in plaintiff's petition that the defendant "willfully and maliciously" harbored and kept a dangerous and vicious dog upon his premises, the evidence wholly failed to establish malice. The most the evidence tended to show was that the defendant knew the character of the dog in question and that it had vicious inclinations. To allow plaintiff to recover exemplary damages in this case would be to establish a rule that would permit the recovery of exemplary damages

in every action under the common law for injuries caused by vicious dogs. It is unnecessary to go further into this question. The record clearly did not justify the submission of the question of exemplary damages to the jury.

[3] III. It is further insisted by counsel for appellant that the verdict of the jury is not sustained by the evidence. No motion was made for a directed verdict after both parties had rested in the court below.

It was alleged in plaintiff's petition that the defendant willfully and maliciously harbored a vicious and dangerous dog, and the evidence tended to show that the dog in question was in the habit of running into the highway and barking and chasing teams and automobiles, and one or two witnesses testified to having made complaint to the defendant of his behavior in this respect, either offering to kill the dog for defendant or advising him to do so. Another witness testified that the dog bit his horses and his daughter eleven years of age. The defendant sought to show that his dog was at home at the time the trouble occurred. But the plaintiff testified that the dog that frightened the team was defendant's. Other corroborating testimony was offered. There was a fair dispute in the evidence upon all material points, and the issues were fairly submitted to the jury.

It would serve no useful purpose to set out or review the evidence at length, and we refrain from doing so.

[4] Other alleged errors discussed by counsel are not likely to occur upon a retrial of this case, and we give no further consideration thereto.

For the error pointed out, the judgment of the court below must be, and is, reversed and remanded.

EVANS, C. J., and STEVENS and FAVILLE, JJ., concur.

VAN SCOY v. NATIONAL FIRE INS. CO. OF HARTFORD, CONN. (No. 34009.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Insurance $\S$ 232—Letter held not to constitute request or demand for cancellation of policy.

A letter by insured to insurer in policy of insurance of live stock against loss by lightning held not a request or demand for a cancellation, but no more than an expression of a wish to have the policy canceled and a desire to be informed of the terms on which it could be accomplished, and there was no cancellation of the policy under Code, $\S$ 1745, and Code Supp. 1913, $\S$ 1758b, and paragraph 11 of the standard form of policy.

2. Insurance $\S$ 640(1)—Cancellation of policy affirmative defense to be specially pleaded.

An alleged cancellation of a policy of insurance on which suit is brought is an affirmative defense, and must be specially pleaded and proved, and the answer must allege the facts upon which the pleader relies as constituting cancellation.

3. Insurance $\S$ 235—Evidence held insufficient to sustain finding of cancellation.

In an action upon a policy of insurance of live stock against loss by lightning, evidence held not to warrant a finding that policy was canceled.

Appeal from District Court, Monona County; J. W. Anderson, Judge.

Action at law to recover upon a policy of insurance of live stock against loss by lightning. There was a directed verdict for the defendant, and plaintiff appeals. Reversed.

Prichard & Prichard, of Onawa, for appellant.

Miles W. Newby, of Onawa, and Kindig, McGill, Stewart & Hatfield, of Sioux City, for appellee.

WEAVER, J. The plaintiff alleges that under date of May 1, 1919, the defendant insurance company made and delivered to him a policy of insurance indemnifying him for the full term of three years against loss by lightning of certain live stock, including 16 head of horses, mules, and colts; that thereafter, in June of the same year, one of the mules so insured and of the value of \$150 was struck and killed by lightning. He further alleges that soon after said loss he reported it to the defendant's local agent, who directed him to call in three neighbors to view the dead animal and estimate the loss so occasioned, and that he, the agent, would notify the defendant. Plaintiff further alleges that he complied with the directions of the local agent and reported the result to him; that thereafter the defendant's adjuster appeared and after alleged investigation refused to recognize the loss or advise its payment because, as he alleged, plaintiff's policy had been canceled before the killing of the mule, and plaintiff had no right of action thereon against the insurer. Upon the case so stated judgment is asked against defendant for \$150, interest and costs.

Answering this claim, the defendant admits the issuance of the policy sued upon, but alleges in general terms that the same had been canceled before the loss of the mule and was not of any force or effect. It also denies that the animal was killed by lightning.

For the trial of these issues a jury was impaneled, and, when plaintiff had offered his evidence and rested, defendant moved for a directed verdict in its favor because

of an alleged failure of proof to sustain the claim sued upon and because the evidence showed that plaintiff's policy had been canceled before the alleged loss. This motion was sustained, a verdict returned as directed, and judgment rendered against plaintiff for costs.

Assuming, as we must, the truth of the testimony offered by the plaintiff, the jury could properly have found therefrom that the policy was issued and delivered to him by the defendant, and at the same time and in consideration thereof he made and delivered to the defendant his promissory note for the premium upon said policy. Later, and before said loss, plaintiff wrote a letter to the defendant as follows:

"Blencoe, Iowa, June 1, 1919.

"Dear Sirs: I want to get my policy No. 467741 canceled that has just recently been taken out for three years. There has been some misunderstanding between your local agent and myself. Kindly inform me what is the best you can do. Yours truly,

"[Signed] W. H. Van Scoy."

This letter was not answered nor its receipt acknowledged by the defendant until June 30th, a considerable time after the loss occurred, and plaintiff had claimed the indemnity, when an attorney representing the company wrote plaintiff as follows:

"W. H. Van Scoy, Blencoe, Iowa—Dear Sir: The writer has before him all matters pertaining to the writing of policy No. 467741 by the Columbia Fire Writers' Agency of Omaha, Nebraska, the entire matter being turned over to me for action such as the case justifies. No particular explanation is necessary and none will be made for you are very familiar with all circumstances from the inception of this policy. It has never been placed in force and you were fully advised. There has been no liability on the part of the company and none will ever attach by reason of this policy. You have been instructed to return it so that your note might be delivered to you. In behalf of the company, we demand that the policy come forward or that you deliver same to A. O. Gray, the company's agent at Blencoe, and receive your note.

"Our advice would be that you attend to it at once, and we thank you in advance for so doing. Yours very truly, Business Men's Protective Association, [Signed] by S. P. Jones."

The plaintiff has never returned or surrendered possession of the policy to the defendant, and the defendant has never surrendered or returned to plaintiff his premium note. This is the substance of the entire record as to the alleged cancellation of the policy.

[1] The evidence as to the death of the mule by lightning is largely circumstantial, but it was sufficient to take that question to the jury, unless we are required to say as a matter of law that the policy was in fact canceled. Such holding is not justified by the record. It may be conceded that under

the law of this state it was the right or privilege of the plaintiff to request or demand a cancellation of his policy at any time on "equitable terms, and the return to the insured of any premium paid in excess of the customary short rates," etc. See Code, § 1745, and Code Supplement 1913, § 1758b, and paragraph 11 of the standard form of policy for Iowa. But plaintiff's letter addressed to the company on June 1, 1919, is obviously neither a request or demand for a cancellation. It does no more than express a wish to have the policy canceled and asks to be informed of the terms on which it could be accomplished. This was a natural and proper inquiry as preliminary or preparatory to a cancellation in fact, for the statute provides that it shall be done upon "equitable terms" and gives to the company the right to exact from plaintiff the customary short rates of premium from the date of the policy to the date of cancellation. In the regular course of business it was then incumbent on the defendant to respond to such inquiry stating the amount of its claim for premium carried, payment of which would entitle plaintiff to surrender his policy and have the return of his note. The most that can be said from the undisputed showing is that a cancellation was in contemplation, but was never in fact made. In many respects the case presented is quite similar to *Conway v. Insurance Association*, 181 N. W. 768, and is governed by the principles there approved.

[2] We there held that alleged cancellation of a policy on which suit is brought is an affirmative defense, and that—

"unless some special matter is pleaded that did discharge the instrument and the legal liability thereon the trial court could properly have directed a verdict in favor of the plaintiff. The cancellation of a contract must be specially pleaded as a defense. * * * Petition or answer must allege facts upon which the pleader relies, and not legal conclusions which he draws from facts not stated."

[3] Now in the case before us the answer does allege that the policy had been canceled, but it is so stated as a purely legal conclusion without statement of any fact or facts from which such conclusion is drawn. Applying this rule as stated in the cited case, there was no affirmative issuable plea of cancellation, but, even if that objection be waived, and assuming that the issue was sufficiently presented, that proof in support of the plea is clearly not such as will sustain a ruling that the defense was established as a matter of law.

Indeed, it is significant that as late as June 30, 1919, and after plaintiff had demanded payment under his policy, the plea that the policy had been canceled does not seem to have occurred to the mind of the defendant, for on that date it was denying liability on the assertion that the policy "had

never been placed in force," and that no liability had ever attached to the company under it. This is in effect saying that no policy had ever been issued, and yet, when required to plead, it expressly concedes that it did issue such policy.

Further discussion is unnecessary.

For the error in directing a verdict, the judgment below is reversed, and cause remanded for a new trial.

Reversed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concur.

HECHTMAN v. CHICAGO GREAT WESTERN RY. CO. (No. 32931.)

(Supreme Court of Iowa. Sept. 28, 1921.)

1. Master and servant ¶286(30) — Verdict held properly directed on evidence of negligence in moving train without warning.

In an action for injuries to a railway employé while alighting from a train which started from the station before he had finished icing the coolers in a passenger coach, evidence on the issue of negligence in failing to give warning of the moving of the train held to warrant a directed verdict for defendant.

2. Master and servant ¶285(3) — Verdict held properly directed on evidence as to cause of injury while alighting from train.

In an action for injuries to a railway employé by a fall from a moving train alleged to have been caused by his trousers catching on a nail or other obstruction on the step as he was alighting, where he admitted he did not know what the leg of his trousers caught on, a verdict for defendant was properly directed; the *res ipsa* doctrine being inapplicable.

Appeal from District Court, Fayette County; W. J. Springer, Judge.

Action at law to recover damages for personal injury. There was a directed verdict for defendant, and plaintiff appeals. Affirmed.

Jas. Cooney and E. H. Estey, both of West Union, for appellant.

E. R. O'Brien, of Oelwein, and Carr, Carr & Evans, of Des Moines, for appellee.

WEAVER, J. Plaintiff was an employé of the defendant railway company at Oelwein. In such employment he was required, among other things, to supply ice to the water coolers on passenger coaches calling at the Oelwein station. On the day in question it became his duty to ice the cooler in a car which had arrived from Chicago, Ill., bound for Omaha, Neb. When he was emptying the ice in the cooler the train started, and while it was in motion plaintiff went to the

car platform and undertook to pass down the steps, and in so doing he fell or was thrown to the ground, receiving personal injury. In this action he seeks to recover damages on account of such injury on the theory that defendant by its employes was negligent in failing to give him any warning of the starting of the train or to allow him sufficient time to perform the work assigned to him before putting the other car in motion.

He also charges that defendant negligently permitted the existence of a protruding "nail or screw or other obstruction" upon one of the steps over which he was leaving the car, and that in making his exit his trousers caught upon such obstruction, causing him to fall, and thus sustain the injury of which he complains.

Issue was taken upon these allegations and tried to a jury. At the close of plaintiff's testimony, the court sustained defendant's motion for a directed verdict in its favor because of the insufficiency of the evidence to sustain a recovery of damages. A reading of the record leads us to the conclusion that there was no error in the ruling complained of.

The only witness testifying of the accident and the attending circumstances is the plaintiff himself, and for the purposes of this appeal we may concede the entire truthfulness of his story. He says, in substance, that after the arrival of the Chicago train more or less switching was done, some of the cars being attached to trains there being made up for the several branches of the railway radiating from Oelwein. At some time during the wait at this station plaintiff, in pursuit of his employment took a pail of ice into the Omaha car and emptied it in the cooler. While so engaged he noticed the car was in motion, but says he did not know it was pulling out, but felt sure it was not, believing it was a mere switching movement. He says:

"I went out on the platform and started to get off. * * * When I got on the platform the train had gone about a couple of hundred yards. Was going about 10 to 12 miles an hour. I had on my left arm the empty pail. Took hold of the grabiron with my left hand. Went down the steps. There were three steps. Tried to get off, but something caught on my left foot by the pants. Something caught me, and I didn't notice. When I got down on the lower step and before I tried to get off I was standing with both feet on the lower step. Then I swung hanging down holding the grab handle. I took my right foot off that lower step and my left foot still on the lower step. * * * Then I tried to reach the ground with my right foot and take off the other and I would be down. When I started to put my right foot down and take my left foot off the step it throwed me down. The lower step was made of wood covered by a piece of rubber matting fastened

with screws or nails. Don't know what threw me down. Something caught on my pants, and I could not get my foot off the platform to get down, and that is what held me."

On cross-examination he says:

"When I went back with the ice the train was made up, but I didn't notice. I figured on another coupling and didn't notice it was made up. It was made up, but I expected them to make another move, another coupling. * * * While I was doing that (filling the cooler) I felt the train start. I kept on filling the cooler, and the train was moving at that time. After I got that done, went back to where the porter was to see if he didn't want some ice. The train was moving all that time. Don't remember whether he wanted any ice. After the train started it was only about two minutes till I decided to get off. * * * I did not know whether the inspector was through with his work or whether the conductor had signaled 'all right' for the train to start. After I got on the train and found it was in motion I was still waiting for another stop."

Plaintiff explains that he was misled into believing the train had not started from the station because the order in which the several cars were attached or coupled together was not such as was usually observed by the defendant in making up that train, and because it is "usual" for the car inspector when a train is ready to start to pull a cord that "gives lots of noise over all the train." That signal, he says, means that the inspector notifies the engineer that the air hose is all connected and in good order. This signal is answered by the engineer with the air, making a blowing noise. The conductor "gives some kind of a sign with his hand, and the train starts." He says the air test and signal to the engineer are given after the train has been fully made up, and adds:

"When I went back with that pail of ice I didn't know, I didn't know whether the air had been tested or whether the inspector had signalled all right for the train to start."

[1] Without further quotation from the record it appears to us very clear that plaintiff's allegations of negligence on part of defendant are without any substantial support. There is no showing whatever of any rule or custom of the defendant at this station entitling plaintiff to warning before allowing its train to start. It was a regular train accustomed to stop at Oelwein but a few minutes after its arrival from Chicago. The nature of the service being performed by plain-

tiff was not such as exposed him to peculiar danger against which it can fairly be found he was entitled to other notice or warning than such as was afforded him in the conduct of defendant's employes in coupling up the cars and in the familiar preparation of the train for its journey. Even if we were to assume that plaintiff could rightfully place some degree of reliance upon the inspector's signal to the engineer or the engineer's response thereto, or upon the conductor's call, there is no evidence that all these were not given in the usual manner. Indeed, plaintiff's story fairly indicates that these preliminaries were or might have been attended to before he entered the car. He admits he did not enter the car with his ice until after the train had been fully made up, and he did not know and could not say but what the signals between inspector and engineer had already been given, and his only explanation of his heedlessness is, not that he was depending upon a signal, but that he in some way took it for granted that there would be another stop and another coupling made. Under such circumstances it must be said there is no evidence of any neglect of duty by defendant in failing to give warning of the moving of the train.

[2] On the charge of negligence with respect to the condition of the step or steps from the car platform the failure of evidence is equally apparent. Plaintiff was not a passenger, and the res ipsa doctrine which might under some circumstances be invoked in favor of a passenger has no application here. The allegation that there was a protruding "nail or screw or other obstruction" in the step finds no substantial support in plaintiff's testimony. Neither he nor any other witness appears to have examined the step either before or after the accident. He admits he does not know what the leg of his trousers caught upon when he undertook to drop from the step to the ground, but says it was "something," the character of which he does not and cannot describe. This is entirely too vague and indefinite to justify the conclusion that the unknown and undefined cause of his misfortune was the failure of the defendant to exercise reasonable care for his safety.

The court did not err in directing a verdict for the defendant.

Affirmed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concur.

DICKSON v. YATES et al. (No. 33895.)

(Supreme Court of Iowa. Sept. 27, 1921.)

1. Appeal and error $\S$ 907(2)—Presumed in absence of evidence that there was evidence as to question of facts submitted to jury.

In the absence of the evidence it will be assumed on appeal that there was evidence on a question of fact submitted to the jury.

2. Conspiracy $\S$ 6, 43(12)—Plaintiff, alleging conspiracy, without proof thereof, may recover for assault committed.

In action for an assault upon plaintiff's person and trespass upon his property, in which conspiracy was alleged, plaintiff might recover against defendants, who committed trespass or assault, notwithstanding failure to prove conspiracy; the gravamen of the action being the trespass or assault, and not the conspiracy.

3. Assault and battery $\S$ 18—Trespass $\S$ 31—Persons who have united in wrongful act jointly and severally liable.

All persons uniting in or aiding or abetting an assault or trespass or other wrongful act are alike jointly and severally liable to the injured person.

4. Torts $\S$ 22 — Plaintiff, suing defendants jointly, may recover against one or more, though he fails as to others.

Where two or more persons are sued jointly for a tort alleged to have been committed, plaintiff, if the evidence justifies it, may recover against one or more, though he fails to sustain his claim as to the others.

5. Witnesses $\S$ 345(4)—Verdict of guilty upon which no judgment has been entered not a "conviction" within statute.

A verdict of guilty upon which no judgment has been entered is not a "conviction" within Code, $\S$ 4613, providing that a witness may be interrogated as to his previous "conviction" for a felony, but that no other proof is competent except the record thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Convicted—Conviction.]

6. Witnesses $\S$ 345(1)—Cross-examination of witness as to whether federal officer had investigated charges against him improper.

In action for assault and trespass, cross-examination of plaintiff as to whether some federal officer or marshal had not been in the neighborhood investigating charges against him held improper.

Appeal from District Court, Davis County; C. W. Vermillion, Judge.

Action at law to recover damages for an assault upon the plaintiff's person and trespass upon his property by the defendants. There was a jury trial and verdict for the defendants. Plaintiff appeals. Reversed.

Jaques, Tisdale & Jaques, of Ottumwa, R. M. Haines, of Des Moines, and T. P. Bence, of Bloomfield, for appellant.

Payne & Goodson, Ellsworth Rominger, J. F. Scarborough, H. C. Taylor, and Buell McCash, all of Bloomfield, for appellees.

WEAVER, J. The petition alleges that in May, 1918, the defendants, some 30 or more in number, conspired and associated themselves together as a mob for the purpose of threatening, assaulting, and coercing the plaintiff and injuring and damaging his property, and in pursuance of such conspiracy and combination did maliciously assault him, by cursing him, shaking fists in his face, and threatening him with battery of his person, and did on the same day trespass upon and injure and deface his property. Because of such alleged wrongs, he asks a recovery of substantial damages.

The defendants deny the charges of conspiracy and wrong on their part, and make other averments of an affirmative character to which we shall later allude in discussing the charge to the jury.

There was a trial to a jury, and verdict and judgment for the defendants.

[1] The plaintiff's abstract makes no attempt to set out the evidence produced on the trial, except to state that the evidence offered tended to establish the truth of the charge made in the petition. That there was evidence to that effect must be taken for granted from the fact that the trial court submitted the issue to the jury.

I. The alleged errors mainly relied upon by the appellant are to be found in the charge of the court to the jury to the effect that, if plaintiff failed to establish the alleged conspiracy between the defendants or some of them to do the wrongs complained of, proof of the alleged assault or trespass by defendants or some of them would not be sufficient to support a recovery of damages, or, stated in other words, that there could be no recovery of damages for the assault, if any, or for the trespass, if any, unless it be proved also that the wrong was done in pursuance of a conspiracy to do it. That such was the court's conception of the law and of the issues presented is demonstrated by reference to the language of the charge. In stating the case to the jury the court, after giving the substance of the petition and defendant's denial thereof, proceeded to set out the special matter pleaded in defense as follows:

"The defendants, further answering, deny that they committed any acts against the plaintiff which tended to injure plaintiff's feelings or by which he was humiliated and caused grief and annoyance, and they say that plaintiff's feelings were not outraged, nor did he suffer public disgrace; that plaintiff was at said time a bachelor, and was not associated with any class of people who had become prejudiced against the plaintiff by reason of any acts and conduct charged against the defendant; that at and

prior to the transaction involved plaintiff had maintained an attitude of unconcern and apathy towards the people in general, and had acquired a character and reputation which would not suffer in estimation of his acquaintances by reason of the acts and conduct charged against these defendants; that plaintiff had lived a selfish life and had cultivated and acquired a disposition of unconcern as to the esteem in which he was held by his neighbors and acquaintances; that plaintiff was a strong, robust man, possessed of sufficient strength to defend himself, and was of a combative disposition, accustomed to fighting, and had prior thereto engaged in physical combat with his enemies, and was of a disposition and make-up to not suffer any feeling of outrage, humiliation, or grief by the acts charged in his position, and he did not suffer any damage on account thereof.

"And defendants further say that certain individual defendants were at the time members of the county council of defense in and for West Grove township, and charged with the duty of aiding the government in the raising of such funds as were necessary to carry on the war; that other defendants were duly appointed officers and solicitors of the American Red Cross to solicit and raise subscriptions and collect money for said American Red Cross; that the transaction between plaintiff and the defendants at said time was in substance and to the effect that certain of the defendants solicited the plaintiff for a donation to said organization and informed him in a gentlemanly manner that it was necessary for every one to contribute to said organization; that plaintiff was not abused, neither was he assaulted, and if his feelings were injured and outraged it was not because of any wrongful conduct on the part of the defendants, and defendants deny that plaintiff was, in fact, insulted, assaulted, or his feelings outraged, or that he was brought into public disrepute by reason of the acts or conduct of the defendants on said occasion."

After stating the issues, the court further charged (paragraph 4) that to entitle plaintiff to a verdict he must establish:

"First, that some two or more of the defendants entered into a conspiracy to injure him by assaulting his person or trespassing upon or injuring his property; and, second, that in pursuance of such conspiracy some one or more of the defendants did make an unlawful assault upon plaintiff or did wrongfully trespass upon or injure his property by injuring or destroying his shrubbery or putting paint on his house."

By paragraphs 13 and 15 of the charge the court further told the jury:

"(13) If you find by the greater weight or preponderance of the evidence that two or more of the defendants conspired and confederated together to injure the plaintiff by assaulting him or trespassing upon or injuring his property, this fact alone would not warrant a recovery, but in order for the plaintiff to recover he must further establish by the greater weight and preponderance of the evidence that in pursuance of such conspiracy one or more of the defendants wrongfully made assault upon the plaintiff or wrongfully trespassed upon or injured plaintiff's property. * * *

"(15) If you find by the greater weight or

preponderance of the evidence that two or more of the defendants entered into an agreement or combination to unlawfully assault plaintiff or to secure plaintiff's subscription to the Red Cross by so unlawfully assaulting him, or to unlawfully trespass upon or injure his property, then such combination or agreement would constitute a conspiracy, and, if you so find that in pursuance of such conspiracy the defendants, or any one or more of them, did commit an assault upon the plaintiff, or did unlawfully trespass upon or injure his property in any respect as alleged, then all of the defendants shown by the greater weight or preponderance of the evidence to have been engaged in or parties to such conspiracy would be liable for whatever may have been done in carrying out the object of such conspiracy, whether they were personally present or actively participated in such alleged assault or trespass upon or injury to plaintiff's property or not, and in such case your verdict should be for the plaintiff and against such of the defendants as you so find were members of or parties to such conspiracy."

After the jury had retired and had been in consultation for some time it appears to have been recalled to the courtroom at its own request for further instruction which was given in the following words:

"Gentlemen of the jury, in response to your question as to whether it is necessary for a conspiracy to be established as alleged before there can be a recovery for the alleged trespass upon plaintiff's property, you are instructed that before plaintiff can recover in this case for or on account of any alleged trespass upon or injury to his property you must find by the greater weight or preponderance of the evidence that some two or more of the defendants conspired to injure the plaintiff by so trespassing upon or injuring his property, and that in pursuance of such conspiracy one or more of the defendants did trespass upon or injure the plaintiff's property by trampling and injuring his shrubbery or putting paint on his house."

It will thus be seen that under the court's instruction, in order to justify the jury in returning a verdict for the plaintiff, it was not enough for him to prove that the alleged assault or trespass was in fact committed, or that the defendants or some of them actively participated in such wrong, but before he could recover damages for the wrong so proved he must further establish that such assault or trespass was committed in pursuance of a conspiracy or combination entered into for that purpose. If this theory of the law is correct, it leaves little in the record as presented for us to consider, but, if wrong, the error is of such vital character as to make necessary a reversal without other inquiry into the merits.

[2-4] That the charge to the jury mistakes the law in this respect and that the appellants challenge thereof must be sustained is easily demonstrable. Appellees' citation of the familiar rules that, where torts by sev-

eral parties are independent of each other, there is no joint liability, and that separate torts committed by different persons may not be joined in the same action, and other precedents of the same general class may all be accepted as sound law in cases calling for their application, but they are in no way here in point. There is nothing better settled in the elementary law of torts than that all persons uniting in or aiding or abetting an assault or trespass or other wrongful act are alike jointly and severally liable therefor to the injured person. It would be a waste of time to pause in this discussion to cite authorities which are as familiar as the alphabet to every lawyer. It is no less well settled in this and most other jurisdictions that, where two or more defendants are sued jointly for a tort alleged to have been committed, the plaintiff, if the evidence justifies it, may have a recovery against any one or more of the defendants, even though he fails to sustain his claim as to others joined in the same action. There was a time when some courts held to the notion that, where a joint tort is charged against two or more, and the proof falls as to one defendant, there can be no recovery against either.

In the case of *Barnes & Son v. Ennenga*, 53 Iowa, 497, 5 N. W. 597, that rule is inferentially approved; but this court took early opportunity in *Boswell v. Gates*, 56 Iowa, 143, 8 N. W. 809, to repudiate it with the declaration that "in no view can it be regarded as authority." The rule of the *Barnes* Case may possibly be applied where the wrong charged to have been jointly committed is of a nature or character to render it incapable of commission by a single individual, but not otherwise. The rule of joint and several liability of all uniting in or aiding or abetting a wrong upon another is practically without exception. *Carothers v. Van Hagan*, 2 G. Greene, 481; *Brown v. Webster City*, 115 Iowa, 511, 88 N. W. 1070; *Cooley on Torts*, pp. 145-149.

The error of appellees at this point appears to be in starting with the assumption that the defendants are being sued for conspiring to do plaintiff a wrong, and not for the commission of the wrong. To use the language of counsel, it is assumed that the alleged conspiracy "is the gravamen of the right to recover," and that unless the conspiracy be proven "no verdict can be returned against any of the defendants." In support of this defense, counsel cite us to a single decision by this court, *Hines v. Whitehead*, 124 Iowa, 262, 99 N. W. 1064, where the writer of that opinion by way of manifest dictum said with reference to the case then under consideration that "the gravamen of the action is the conspiracy charged." That such is not the case where the tort charged is one for which one or more

individually is established by all our cases beyond recall.

In *Young v. Gormley*, 119 Iowa, 546, 93 N. W. 565, the plaintiff charged a conspiracy to trespass upon and injure his property, and in the opinion of this court, prepared by Ladd, J., we said:

"Appellants insist that, as conspiracy was alleged, no recovery could be had unless this were proven. Were the wrong alleged actionable only because of an unlawful combination of several persons, the position would probably be sound. *Jenner v. Carson*, 111 Ind. 522, 13 N. E. 44; *Collins v. Cronin*, 117 Pa. 85, 11 Atl. 869. But where the tort may have been committed by one or more, independent of any conspiracy, that allegation is of no consequence, so far as the cause of action is concerned. Damage is then the gist of the action, and not conspiracy. In order to recover against all defendants, it is necessary to prove a combination or joint act of all. For this purpose proof of conspiracy may become essential. But, if it turn out that but one was concerned, recovery may be had against that one the same as though he had been sued alone. If more than one jointly do the wrong, like recovery may be had, though conspiracy had not been established. In other words, the allegation of conspiracy in such cases is mere matter of inducement and evidence; the injury and damages being the gravamen of the action. *Van Horn v. Van Horn*, 56 N. J. Law, 318, 28 Atl. 669; *Laverty v. Vanarsdale*, 65 Pa. 507; *Austin v. Barrows*, 41 Conn. 287; *Jones v. Baker*, 7 Cow. 445; *Parker v. Huntington*, 2 Gray, 124; 4 Enc. Pl. & Prac. 739."

That opinion has been expressly approved and followed in *McCann v. Clark*, 166 Iowa, 714, 148 N. W. 1025; *Dunshee v. Standard Oil Co.*, 165 Iowa, 625, 146 N. W. 830; *Aughey v. Windrem*, 137 Iowa, 319, 114 N. W. 1047; *Moore v. Fryman*, 154 Iowa, 537, 134 N. W. 534; *Hobbs v. Railway Co.*, 171 Iowa, 629, 152 N. W. 40, L. R. A. 1017E, 1023; *Jahr v. Steffen*, 187 Iowa, 168, 174 N. W. 109. The principle was also applied in *Lull v. Bank*, 110 Iowa, 537, 81 N. W. 784; *Waltz v. Etnier*, 137 Iowa, 604, 115 N. W. 209; *Reizenstein v. Clark*, 104 Iowa, 287, 73 N. W. 588; *Boswell v. Gates*, 56 Iowa, 143, 8 N. W. 809; *Heisler v. Heisler*, 151 Iowa, 503, 131 N. W. 676; Among the multitude of cases from other jurisdictions supporting the same rule we may cite *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 480; *Verplanck v. Van Buren*, 76 N. Y. 247; *Page v. Parker*, 40 N. H. 47; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376. In this last-cited case it is said:

"The allegation that there was a conspiracy to commit the fraud does not affect the substantial ground of action. * * * The means by which a fraud is accomplished are immaterial except so far as they tend, in connection with the damage suffered, to show an actionable injury. The allegation and proof of a conspiracy in an action of this character is only important to connect a defendant with the transaction and charge him with the acts and declara-

tions of his coconspirators where otherwise he could not have been implicated. * * * An allegation of conspiracy may be wholly disregarded and a recovery had, irrespective of such allegation, in case the plaintiff is able otherwise, to show the guilty participation of the defendant."

See, also, *White v. White*, 132 Wis. 121, 111 N. W. 1116.

For a collection of decisions upon the "Gist of Civil Actions for Conspiracy," see Ann. Cas. 1914C, 763. There is, of course, a distinction to be observed between criminal prosecutions for conspiracy and charges of conspiracy in civil actions for damages. Criminal liability is established by proof of the conspiracy or unlawful combination, but civil liability can be found only on proof of recoverable damages, and, the actual participation of a defendant in the alleged assault or trespass being shown to the satisfaction of the jury, it becomes wholly immaterial so far as he is concerned whether a conspiracy to which he was a party is or is not proven.

It follows of necessity that the exceptions to the court's charge must be sustained.

[5] II. The conclusion reached in the foregoing paragraph makes it necessary that the judgment below be reversed, and cause remanded for a new trial. The only other errors assigned have reference to the ruling of the court in permitting defendants' counsel on cross-examination of the plaintiff, after obtaining from him a denial that he had ever been convicted of a felony, to interrogate him as to a trial in the federal court on a charge of violating the Espionage Act and require him to answer that he had been indicted on several counts of such charge, had been acquitted upon six of them, and found guilty upon one, but that judgment on the verdict had never been entered; the matter still being under advisement in that court on a motion in arrest. It was doubtless competent in cross-examination for counsel to ask the witness whether he had ever been convicted of felony, but, that question having been asked and answered in the negative, "no other proof was competent except the record" of such conviction. Code, § 4613. A verdict of guilty upon which no judgment has been entered is not a conviction within the meaning of this statute. *Hackett v. Freeman & Graves*, 103 Iowa, 296, 72 N. W. 528. In our judgment the objections to this line of examination should have been sustained.

[6] In other respects the cross-examination appears to have been pursued very far afield, as, for example, whether at some time some federal officer or marshal had not been in the neighborhood investigating charges against the witness. Whether we should regard these rulings in evidence sufficient in

themselves to call for a reversal we do not now decide, but mention them in a cautionary way to avoid their repetition on a new trial.

For the reasons hereinbefore stated, the judgment below is reversed, and a new trial ordered.

Reversed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concur.

DES MOINES NAT. BANK v. FAIRWEATHER, Mayor, et al.
(No. 33525.)

(Supreme Court of Iowa. Sept. 28, 1921.)

1. Taxation ~~§~~ 386(2)—United States securities not deductible from assessable value of shares of bank stock held by shareholders.

Code Supp. 1913, § 1322, requiring incorporated banks to furnish the assessor a statement showing separately, in addition to all the matters required of private bankers, under section 1321, the amount of capital stock, surplus, and undivided earnings, and that the assessor, from such statement, fix the value of the shares of stock to be assessed to the stockholders, is mandatory on the assessor, and does not permit the elimination of "exempt assets," such as United States securities, though, by section 1321, a private banker must include in the description of his assets a specific description of those "exempt from taxation," their elimination from consideration in fixing the assessable value of the shares of stock held by the shareholders not being required because of their nonassessability in the hands of the owner under federal law.

2. Taxation ~~§~~ 12—Statute exempting federal securities held by private bankers held not discriminatory against national bank shareholders.

Though, under Code Supp. 1913, § 1321, requiring private bankers to include in their statement of assets for the assessor a description of those "exempt from taxation," a private banker may claim exemption of his United States securities, whereas, under section 1322, no such exemption is available to a national bank stockholder for the purpose of fixing the taxation value of his shares, such statutes do not discriminate in favor of the private banker as against the holder of national bank stock, in violation of Rev. St. U. S. § 5219 (U. S. Comp. St. § 9784), section 1321 creating no exemption, but merely recognizing that created by federal law.

3. Taxation ~~§~~ 12—Act denying to national bank shareholders exemption of federal securities held by corporation as assets held not discriminatory in favor of private bankers; "discrimination."

The taxation of bank shares of stock to the shareholder not being a tax on exempt securi-

ties held by the corporation as part of its assets, the practical operation of Code Supp. 1913, § 1322, under which exempt federal securities are not deductible from the assessable value of the shares of national bank stock held by the shareholders, does not work a discrimination, within Rev. St. U. S. § 5219 (U. S. Comp. St. 9784), in favor of private bankers, whose exempt securities, under section 1321, are so deductible, and the shareholder, not being the owner of such securities, cannot claim exemption thereof, whether or not the state, under the federal statute, can tax both the shareholder on his stock and the bank on its corporate assets, the power of "one taxation," under the federal statute being plenary, subject only to the qualification that there be no discrimination against national banks in favor of competitors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discrimination.]

Appeal from District Court, Polk County;
Thomas Guthrie, Judge.

Supplemental opinion on rehearing. Petition overruled.

H. W. Byers, Reson S. Jones, C. A. Weaver, and Paul Hewitt, City Legal Department of Des Moines, all of Des Moines, for appellant.

Sargent, Gamble & Reed, of Des Moines, for appellees.

EVANS, C. J. Original opinion was filed herein on February 12, 1921, and is reported in 181 N. W. 459. Certain points are made in the petition for rehearing which merit further discussion. In our original opinion we disposed of plaintiff's first six grounds of complaint on the theory that each and all presented federal questions, and were disposed of by federal authority. This assumption on our part was too broad, in that ground 4 of the complaint did challenge the validity of the assessment made by the board of review as being in violation of our own statute, section 1322. All the grounds of complaint are specifically set out in the original opinion and we will not repeat them here. The challenge of ground 4 now under consideration was and is that by the express provisions of section 1322 of our Code Supplement 1913, the assessor was required to deduct from the assets all securities exempt from taxation in order to arrive at a basis of valuation of the shares of stock. The point is now pressed in the petition for rehearing. The point thus made involves a consideration of both sections 1321 and 1322, which are as follows:

"Sec. 1321. Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such

bank or banker on January first of the current year, as follows:

"1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers, brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

"2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;

"3. The amount of all deposits made with them by others, and also the amount of bills payable;

"4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

"5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof; the aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits, and the aggregate actual value of bonds and stocks, after deducting the portion thereof otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five of this chapter, not including real estate, which shall be listed and assessed as other real estate.

"Sec. 1322. Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings bank and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section thirteen hundred twenty-one of the supplement to the Code, 1907, which shall also show separately the amount of the capital stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. A refusal to furnish the assessor with the list of stockholders and the information required under this section shall be deemed a misdemeanor and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars."

It will be noted that by the provisions of section 1321 the private banker is required to aid the assessor by furnishing to him certain enumerated data as a description of his assets, including specific description of such assets as are "exempt from taxation." Section 1322, by its reference to section 1321, in effect calls for the same data. The argument now is that the same data which fixes the assessable value of the assets of a private banker must also fix the assessable value of the shares of stock of an incorporated bank.

[1] Manifestly United States securities are exempt from state taxation. To assess them for taxation in the hands of the owner, whether private banker or other person, would be an interference with federal prerogative. Clearly therefore a private banker as owner of United States securities could, under federal law, insist upon their exemption from taxation. Does it follow that, under section 1322, they must be eliminated from consideration of the assessor in fixing upon the assessable value of the shares of stock held by the shareholders? Section 1322 answers this question in the negative in that it expressly directs the assessor to "fix the value of such stock" by basing such valuation "upon the capital, surplus, and undivided earnings." Such was the course pursued by the assessor in this case. Whereas another provision of this section provides for the elimination of real estate from such basis of valuation, there is no provision in such section for eliminating "exempt" assets from such basis. We are not considering at this point whether any discrimination is presented in the operation of these two sections. If yea, a federal question would be presented which we consider in the next division hereof. We hold here only that section 1322 is mandatory upon the assessor as presenting a specific enumeration as a basis for the valuation of stock for the purpose of taxation, and that such enumeration does not permit the elimination of "exempt assets" for the purpose of such valuation. It follows that the valuation fixed by the assessor was not in violation of our own statute.

[2] II. Turning now to the federal question, the point is made by petitioner that under section 1321 a private banker could claim exemption of his United States securities from taxation, and that the assessed valuation of his assets would be accordingly reduced proportionately, whereas no such exemption is available to a shareholder of bank stock for the purpose of fixing the taxation value of his share; that therefore our statutes work a discrimination in favor of the private banker as against the shareholder of national bank stock in violation of section 5219 of the Revised Statutes of the United States (U. S. Comp. St. § 9784). Our one concern in this field of discussion is to follow federal authority, and we might well rest our

holding upon the recent case of *Hannan v. First National Bank* (O. C. A.) 269 Fed. 527, wherein the question now raised is fully considered by the United States Circuit Court of Appeals for this circuit.

Section 1321 creates no exemption. It merely recognizes such exemption as shall have been created by higher authority. On that question it is not legislative in an affirmative sense. It simply renders obedience to federal sovereignty. The private banker claims his exemption, if at all, under the federal statute, and not under our statute. If section 1321 should purport to accomplish uniformity by denying exemption to the private banker, it would be a vain effort. The exemption would still remain. It cannot be said, therefore, that any discrimination is created by the two sections of our statute.

[3] But it is contended, nevertheless, that the practical operation of the law works a discrimination which entitles the plaintiff to the protection of section 5219, U. S. Revised Statutes. This contention rests upon the argument that the taxation of shares of stock to the shareholders is the practical equivalent of the taxation of corporate assets to the corporation; that two formal methods of taxation are possible, and that the doing of one is only an indirect method of doing the other. Whichever method of taxation be adopted, the burden of the tax must ultimately fall upon the shareholders. It is to be conceded that the two methods are ordinarily equivalent in practical ultimate result. It is to be conceded also that, if a direct tax were levied against the corporation itself upon its assets, it could not be levied upon securities exempt under federal statute. Does it follow that taxation may not be levied against the shareholder upon his shares of stock upon the basis of market value, regardless of the character of the assets which give such market value? A corporation at most is but an artificial entity. Under sanction of law, it may be created or dissolved by the voluntary action of its shareholders. It can have no assets except such as are permitted by its shareholders. It is theirs to give or to take away. The value of the corporate assets and the value of the shares of stock are necessarily responsive. One flows into the other. They are not necessarily equal either in a legal or in a practical sense. Ordinarily, however, they are in a practical sense approximately equal. The fact remains that the legal title to the assets is in the corporation. The property of the shareholders is in the stock. Under the law, this stock is clothed with all the attributes of property, and may be bought and sold as such. Its owner is subject to taxation thereon. There is no limitation upon the power of the state both to tax the shareholder upon his stock and also to tax the corporation upon its corporate assets. This double power of taxation is

not always—perhaps not often—exercised. It may fairly be said that the policy of this state has been not to tax both the corporation upon its assets and the shareholder upon his stock. Such is the policy followed in the taxing of corporate banking. If the state were exercising herein its double power of taxation and were to tax the corporation upon its assets, the right of exemption would be available to the corporation. This fact however could not avail the shareholder to claim the exemption in the taxation of his stock.

In a legal sense, a share of stock is an item of property separate and distinct from any asset of the corporation, although the extent of its value may be materially dependent upon such assets. The character of this item of property and its liability to taxation remains precisely the same, whatever the liability of the corporation itself may be for taxes upon its corporate assets. We use this argument only to illustrate the separate identity of a stock share as property. We neither hold nor suggest that the state has this double power of taxation as to national banks under the permission of section 5219. The holding in *Bank of California v. Richardson*, 248 U. S. 476, 39 Sup. Ct. 165, 63 L. Ed. 372, would indicate otherwise. The power of "one taxation," however, is quite plenary under section 5219, and is subject only to the qualification that there be no discrimination against national banks in favor of a corporate or individual competitor. The taxation of bank shares of stock to the shareholder is not, in a legal sense, the taxation of the corporate assets. Such tax is therefore not a tax upon exempt securities held by the corporation as a part of its assets. Such was the holding of the United States Supreme Court in *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229, and in *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850. Such, also, was the holding of the Hannan Case, *supra*, which we purported to follow in the original opinion upon the federal question presented. We hold therefore:

(1) That our statute creates no discrimination against national banks in favor of any competition whether corporate or individual; nor is it made to appear that any discrimination results from the practical operation of the law as applied.

(2) That the shareholder is not, in a legal sense, the owner of the exempt securities held

by the corporation, and that he is not therefore entitled to claim exemption thereunder.

III. Petitioner brings to our attention a recent opinion of the Supreme Court of the United States handed down July 15, 1921, since the submission of the petition herein, in the case of *Merchants' Nat. Bank v. Richmond*, 256 U. S. —, 41 Sup. Ct. 619, 65 L. Ed.—. It is earnestly urged upon us that this opinion supports the contention of the petitioner, and that it is quite decisive thereof. It appears from the opinion in that case that, pursuant to certain legislation by the state and certain ordinances by the city of Richmond, Ind., a certain rate of taxation of \$1.75 per \$100 was imposed upon all banking corporations, state and national; whereas a rate of only 95 cents per \$100 was imposed upon moneyed capital in the hands of individuals who were competitors with the national banks in the loan market. This competition extended into millions of dollars, and was therefore relatively material. It was held that—

"The ordinance and statute under which the stock of plaintiff in error was assessed as construed and applied exceeded the limitation prescribed by section 5219, Revised Statutes, and hence that the tax is invalid."

We are unable to see wherein such opinion runs counter to our present holding.

It is earnestly urged that the Hannan Case, *supra*, should not be deemed controlling of the case at bar. The emphasis of the argument in support of the contention is that the exempt securities involved in the case at bar consisted of Federal Reserve stock and of recent bond issues, none of which were involved in the Hannan Case, and none of which were even in existence at the time the decision was rendered. The form or character of the exempt securities is not material to the decision. The ultimate question for solution, both in the Hannan Case and in this, was and is, whether, where a bank's corporate assets includes United States securities exempt from taxation under federal statute, such right of exemption attaches to the shares of stock in the hands of the shareholder. If yea, then the rule or principle applies to all such exempt securities; if nay, it can apply to none.

We are confirmed in our conclusion that our former opinion must be adhered to, and the petition for rehearing is accordingly overruled.

ROCHE v. AMERICAN SURETY CO.
(No. 33821.)

(Supreme Court of Iowa. Sept. 27, 1921.)

1. Garnishment $\Leftrightarrow$ 247—Evidence in action on delivery bond held to show fund attached did not belong to defendant.

In an action against a surety on a delivery bond given to release money held under attachment served on a garnishee in an action to recover commissions for sale of realty, evidence held to show that garnishee was not indebted to defendant land company and that funds attached were held by him as attorney to pay balance due on lands purchased by his clients, and securing release of vendor's liens, so that, under Code, § 3911, the surety could show as a defense that the property attached did not, at time of levy, belong to defendant against whom attachment was issued.

2. Judgment $\Leftrightarrow$ 675(1) — Surety on delivery bond held not estopped by judgment against attachment defendant from setting up defense, that attached funds did not belong to defendant.

Though a surety company, which reinsured the liability of another such company on a delivery bond given to release a sum of money held under attachment served on a garnishee in an action by an agent to recover commissions from a land company for sale of real estate, guaranteed payment of attorney fees to insure a defense by the land company, the principal surety was not estopped by a judgment recovered by plaintiff in such action from setting up in an action on the bond the defense that the fund in the hands of the garnishee did not belong to the land company.

Appeal from District Court, Johnson County: R. G. Popham, Judge.

Action against the surety upon a delivery bond. Verdict and judgment for the defendant by direction of the court. The material facts are stated in the opinion. Affirmed.

W. J. Baldwin and Remley & Russell, all of Iowa City, for appellant.

Messer, Clearman & Olsen, of Iowa City, for appellee.

ARTHUR, J. This is an action against the American Surety Company as surety upon a delivery bond. The bond was given to release a sum of money held under attachment in an action brought in the district court of Johnson county in 1912 by Thomas F. Roche, who is also the plaintiff in this action, against the Star Land Company (a corporation located at Des Moines, Iowa, and having an office at Kansas City), to recover \$2,583.05, which plaintiff alleged was due him as commissions for the sale of real estate, under a written contract of agency with the Star Land Company. A writ of attachment was

issued and served by garnishing W. J. McDonald, an attorney at Iowa City, individually as a supposed debtor of the Star Land Company. A trial of the main action followed resulting in a verdict for the plaintiff, which, upon appeal to this court, was reversed. *Roche v. Star Land Co.*, 176 Iowa, 84, 157 N. W. 212. Upon a retrial, plaintiff was again successful, recovering a judgment for \$1,724.84, with costs amounting to \$402.30. Upon motion of plaintiff, judgment was entered against the surety on the delivery bond for the amount of the judgment obtained by plaintiff against the Star Land Company. The judgment against the surety company, in an action brought by it for that purpose, was later canceled and set aside. Thereupon, Thomas F. Roche, appellant herein, commenced this action against the American Surety Company as surety upon the delivery bond.

At the conclusion of all the testimony, the court directed the jury to return a verdict in favor of the defendant. A verdict was returned accordingly and judgment entered against the plaintiff for costs.

The petition of plaintiff in the original action against the Star Land Company was later amended by plaintiff in several material respects.

The amended petition contained three counts, whereas the original petition contained but one. In count 1, plaintiff alleged that the Star Land Company was indebted to him for commissions earned under a verbal contract therewith, entered into on or about September 15, 1911, in the sum of \$837. In count 2 he sought to recover for commissions earned under the written contract of agency entered into February 1, 1912, and in count 3 for expenses incurred on behalf of the Star Land Company in the sum of \$125.50. It was further alleged in the amendment to the petition that the defendant was entitled to credits upon the several items referred to therein in the sum of \$3,053.70, and judgment was asked for \$3,018.80 instead of \$2,583.05, the amount demanded in the original petition. Two subsequent amendments amplifying the allegations of the amendment here referred to were filed. They did not, however, change the causes of action set up in the amendment. The defenses pleaded by the American Surety Company in the case at bar are: First, that the judgment entered in favor of plaintiff and against the Star Land Company December 9, 1916, is void because entered in vacation; second, that W. J. McDonald, garnishee, was not, at the time notice of garnishment was served upon him, a debtor of the Star Land Company, but that the money in his possession, which plaintiff sought to tie up, was held by him as attorney for Frank G. and Charles C. Myers, who had purchased some Texas land of the Star Land Company under

a written contract, the material terms of which will be referred to later; third, that the funds garnished, in the hands of W. J. McDonald, did not, at the time of the service of the notice of attachment, belong to the Star Land Company; and, fourth, that by reason of the several amendments setting up new and different causes of action filed by plaintiff to the petition in the original action to recover commissions, he waived and abandoned the attachment and thereby estopped himself from maintaining this action against the surety upon the delivery bond. Counsel for appellant moved the court to strike the defendant's plea of abandonment and estoppel from the answer upon the ground that same did not constitute a defense. The motion was overruled. Whereupon the plaintiff, appellant herein, by way of reply, set up that the Star Land Company abandoned the defense of the original action commenced by Thomas F. Roche to recover commissions, in which is set up a counterclaim for damages on account of the alleged wrongful and malicious suing out of the attachment, and that F. F. Messer, one of the attorneys for the Star Land Company in the first trial and in the appeal to the Supreme Court, was employed and paid by the Southern Surety Company to present the defense of the Star Land Company upon the second trial of the case, and that said defense was made by the Southern and American Surety Companies for themselves and for their own benefit, and not for and on behalf of the Star Land Company; that such was concealed from plaintiff, who did not know thereof; that it was the duty of appellee to present all defenses it had in said action; and that, having failed to do so, he is bound absolutely by the judgment entered and estopped from now making defense to the action on the delivery bond. Upon motion of counsel for defendant, this plea was stricken from the reply. Later, however, an amendment thereto, setting up substantially the same matters, was filed. This amendment was not challenged by defendant.

The errors assigned by counsel for appellant, and relied upon for reversal, are in substance, that the court erred in overruling his motion to strike the defendant's plea of abandonment of the attachment and estoppel from the answer; in striking plaintiff's plea of estoppel from his reply; in admitting certain documentary evidence offered by defendant and in excluding certain other documentary evidence offered by plaintiff upon the grounds that same were privileged communications between Messer, attorney for the Star Land Company, or his co-counsel; also in refusing to withdraw certain defenses tendered by the American Surety Company from the consideration of the jury; and finally in directing a verdict for the defendant.

In view of the state of the record before us, which includes all documentary evidence admitted over the objection of counsel for plaintiff and also that excluded by the court upon the objection of counsel for defendant, we are enabled to review the ruling of the court upon defendant's motion for a directed verdict, the same as though all of the testimony offered by plaintiff had been received in evidence.

The one vital and controlling question upon this appeal, as we view it, is: Was the fund garnished in the hands of W. J. McDonald, attorney for the Myers Bros., the property of the Star Land Company? The material facts bearing upon this question, which are not disputed in the evidence, are, in substance, as follows: On September 29, 1911, Frank G. and Charles C. Myers, brothers, entered into a written contract with the Star Land Company for the purchase of a tract of land situated in Hidalgo county, Tex. The agreed purchase price of the land was \$7,000, to be paid, \$300 cash upon the execution of the contract, the remainder in three payments, as follows: \$3,000 March 1, 1912; \$2,000 March 1, 1913; \$1,500 March 1, 1914. Each of the deferred payments was evidenced by a promissory note payable to the Star Land Company. Later, a controversy arose between the Star Land Company and Myers Bros., which resulted in the employment by the latter of W. J. McDonald to represent them in the adjustment thereof and to make settlement of the purchase of the Texas land. Myers Bros., for the purpose of carrying out its contract, turned \$3,602.50 over to McDonald to be remitted to the Star Land Company at Kansas City, Mo., as soon as a satisfactory settlement of the dispute between them was reached. Before the money was remitted, but, as we understand the record, after a settlement had been agreed upon, notice of garnishment was served upon McDonald as a supposed debtor of the land company. After the execution of the delivery bond, which followed shortly, McDonald forwarded the money received from Myers Bros. to the Southwest National Bank of Commerce at Kansas City, Mo., with directions that same be applied upon the indebtedness represented by the two notes above referred to and last maturing. The reason for sending the money to the bank at Kansas City was to insure the proper application thereof upon two vendor's lien notes for \$972.80, and \$1,459.20 respectively, which were liens upon the land, and the release of these liens. The correspondence reveals that the Star Land Company desired Myers Bros. to assume the vendor's liens and to take up the notes by paying the difference between the amount thereof and the vendor's lien notes. Myers Bros., however, preferred to pay the whole sum due and obtain a release of the vendor's liens. An agreement between

the Star Land Company and McDonald resulted in this arrangement being made.

It appears without dispute in the evidence that the Star Land Company did not hold the vendor's liens, but that they were held by a bank in New Orleans as collateral security to a loan made by one John J. Conway. These notes were, however, upon request, forwarded by the New Orleans bank, together with appropriate releases executed by Conway, to the Kansas City bank, which forwarded the same to McDonald to be turned over to Myers Bros. The evidence is not quite so clear as to who was entitled to the balance due on the purchase price, which amounted approximately to \$1,017.63. So far, however, as the record discloses any facts on this point, it is to the effect that the notes were not held by the Star Land Company. This is shown in part by a letter from one of its officers, in which it is stated that the notes, which had been turned over to some other person by the land Company, had been located and would be forwarded in a few days for payment. The notes, when received by McDonald, in fact, bore the cancellation stamp of the Star Land Company.

[1] From the foregoing statement, it is manifest that McDonald, who was garnished as an individual and not in his representative capacity, was in no wise indebted to the Star Land Company, and that the funds in his hands were held by him solely in his capacity as attorney for Myers Bros. for the purpose of paying the balance due on the purchase price of the Texas land and securing the release of the vendor's liens. This question aside, is it not equally manifest that the funds in the hands of the garnishee were not the property of the Star Land Company?

Section 3911 of the Code, which is as follows:

"In an action brought upon such bond, it shall be sufficient defense that the property for the delivery of which the bond was given did not, at the time of the levy, belong to the defendant against whom the attachment was issued, or was exempt from seizure under such attachment."

—permits the surety, in an action against it upon a delivery bond, to show as a complete defense that the property attached did not, at the time of the levy, belong to the defendant against whom the attachment was issued. If McDonald caused the vendor's lien notes to be paid and obtained a release of the liens, payment must be made either to the holder or the New Orleans bank, and not to the Star Land Company. If, on the other hand, the Texas land was conveyed to Myers Bros., subject to the vendor's lien notes, \$2,432 of the money held by McDonald belonged absolutely to his clients. The only possible question as to the ownership of any part of the money in the hands of the gar-

nishee is that represented by the difference between the amount of the vendor's lien notes and the balance due on the purchase price of the land, which was approximately \$1,000. The record as to the ownership of the two notes for \$2,000 and \$1,500, respectively, is not very clear; but as the evidence upon this point is undisputed, a finding by the jury that it was the property of the Star Land Company could not stand. In what we have said thus far, we have given no consideration to the interest of Myers Bros. in the fund held by the garnishee for the protection of their rights under the adjustment of the controversy between them and the Star Land Company as affecting the susceptibility of the fund to garnishment. We conclude, however, upon this point that the undisputed evidence shows that the money garnished was not the property of the land company.

[2] II. It follows, from this conclusion, that the ruling of the court upon defendant's motion to direct a verdict in its favor must be sustained unless appellee is bound by the judgment entered in the original action and estopped thereby and the other matters pleaded by plaintiff in his reply to set up this defense. In discussing this question, we shall ignore the ruling of the court upon the motion to strike this plea from the original reply, and treat the amendment thereto the same as though it in fact embodied all of the allegations stricken from the reply.

One W. F. Zumbrunn, an attorney at Kansas City, Mo., appeared with Frank F. Messer, an attorney at Iowa City, for the Star Land Company in the defense of the original action brought against it by Roche for commissions. After the judgment obtained from the first trial was reversed by this court and the case sent back for retrial, Messer refused to proceed with the second trial until a satisfactory arrangement was made by the Star Land Company for the payment of his fees. On November 14th, he advised Zumbrunn that the case was assigned for trial November 27th and that it would be reached promptly on that date and suggested that he make arrangement for the trial. No reply appears to have been received to this letter from Zumbrunn; but it is shown that Ethel King, his stenographer, replied to a second similar letter from Messer bearing date November 20th, informing him that Mr. Zumbrunn was in Louisiana and was expected back the following Thursday, which would be after the date set for trial. Messer obtained a short delay of the trial, and on November 29th forwarded two telegrams to the Southern Surety Company at St. Louis, stating in effect that unless his fees were guaranteed by some responsible party he would withdraw his appearance and let the plaintiff take judgment. On December 1st, the Southern Surety Company wired Messer

guaranteeing payment of his fee for the trial of the case, whereupon the trial began on December 4th and was concluded on the 9th. No officer or representative of either the Southern Surety Company or the American Surety Company was present at the trial or participated therein. No other or further arrangement was made with Messer by either of the surety companies. Later, however, he became the attorney of the American Surety Company, for which he appeared in the action brought by it in equity to set aside and cancel the judgment rendered against it upon motion of plaintiff's attorney as previously stated. The conduct of the defense made by Messer and the other members of his firm was for the Star Land Company. Messer had been employed by the land company and had not withdrawn as its attorney. The surety companies had no control thereover, or authority to direct the proceedings. Of course, they were, as Messer knew, interested in the result of the trial, as their liability depended upon whether or not a judgment was obtained by Roche against the Star Land Company. The American Surety Company was not a party of record, did not employ or pay Messer, and is not by the mere act of the Southern Surety Company, with whom it had reinsured its liability upon the delivery bond, guaranteeing the payment of attorney fees to insure a defense by the Star Land Company, estopped from setting up the defenses above discussed. The authorities relied upon by counsel for appellant do not go to the extent of holding that one not a party to the record who guarantees the payment of attorney fees for the defendant, and who assumes and has no control of the proceedings and does not direct the same, is bound by the judgment entered, as will appear from a careful reading thereof. *McNamee v. Moreland*, 26 Iowa, 96; *Stoddard v. Thompson*, 81 Iowa, 80; *Conger v. Chilcote*, 42 Iowa, 18; *Marsh v. Smith*, 73 Iowa, 295, 84 N. W. 866; *Montgomery v. Alden*, 133 Iowa, 675, 108 N. W. 234, 119 Am. St. Rep. 648. Indeed, *McConnell v. Poor*, 113 Iowa, 133, 84 N. W. 968, 52 L. R. A. 312 and *Goodnow v. Litchfield*, 63 Iowa, 275, 19 N. W. 226, lend support to the contrary view.

In our opinion, the evidence offered by the plaintiff, as well as the record as a whole, fails to establish his plea of estoppel. He was not therefore prejudiced by any of the rulings complained of. Having arrived at this conclusion, none of the remaining questions discussed by counsel require consideration.

It follows, therefore, that the judgment of the court below must be, and is, affirmed.

EVANS, C. J., and STEVENS and FAVILLE, JJ., concur.

BOROUGH v. MINNEAPOLIS & ST. L. RY. CO. (No. 33553.)

(Supreme Court of Iowa. Sept. 27, 1921.)

1. Witnesses $\S$ 389—Court erred in not admitting impeaching testimony, when witness denied making inconsistent statement.

Where a material witness for plaintiff denied on the stand that he had in a conversation with defendant's witness stated that a certain written paper signed by him was true, held, that the court erred in not permitting defendant's witness to testify that he did make such statement, being material as impeaching testimony.

2. Appeal and error $\S$ 1031(1)—Error presumed prejudicial.

When error appears, prejudice is presumed to result therefrom, and it cannot be disregarded, unless from the record it appears that the error has worked no prejudice to the objecting party.

3. Witnesses $\S$ 388(10)—Proper foundation held laid for impeaching witness.

Where witness, sought to be impeached, recalled in cross-examination conversation referred to by impeaching witness, there was no merit in an objection that no proper foundation was laid as to time and place.

4. Witnesses $\S$ 390—Impeaching evidence held admissible.

Where witness denied that he made statements as shown in a written statement signed by him, which was introduced in evidence, testimony as to a conversation wherein such witness stated that the written statement was true was relevant and competent impeaching testimony.

5. Witnesses $\S$ 379(1), 383—May be impeached by proof of former inconsistent statements material to issue.

A witness may be impeached by proof of former statements inconsistent with his present testimony; but, of course, to impeach a witness by proof of contradictory statements, they must be material to the issue.

6. Appeal and error $\S$ 1066—Prejudicial error to submit grounds of negligence not supported by evidence.

It was prejudicial error to submit to jury issues of negligence that were without support in the evidence, by permitting recovery if the defendant was negligent "in some one or more of the particulars claimed, and substantially as alleged by plaintiff in his petition."

7. Damages $\S$ 216(5)—Instruction as to life expectancy held erroneous.

In action for personal injuries, the court erred in charging that, in determining life expectancy, "You must take into consideration the condition of his health at the time of his injury, and all facts and circumstances bearing thereon, as shown by the evidence, if any, and as bearing upon the question of how long the plaintiff would be likely to live;" the jury not being told that they should take into consider-

ation plaintiff's expectancy in his injured condition.

Appeal from District Court, Keokuk County; Charles A. Dewey, Judge.

Action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in operating one of its trains over a public crossing. The case was tried to a jury, which resulted in a verdict for the plaintiff, and judgment was entered on the verdict. The case was here on appeal once before (*Borough v. Minneapolis & St. Louis Ry. Co.*, 184 Iowa, 210, 167 N. W. 177), and the facts there set out are substantially the same in this record. We need not repeat the facts, except as necessary in discussing the errors complained of. Defendant appeals. Reversed and remanded.

James A. Devitt, of Oskaloosa, and Stockman & Baker, of Sigourney, for appellant.

C. C. Orvis, of Oskaloosa, and F. M. Beaty and Talley & Snakenberg, all of Sigourney, for appellee.

ARTHUR, J. Defendant assigns as error the refusal of the court to admit the testimony of the defendant's witness Marq Barr, offered to impeach plaintiff's witness L. C. Northup. The record sufficient for the consideration of this claimed error is as follows:

A coroner's inquest was held on the night of the accident, August 14, 1914. L. C. Northup was a witness at the inquest, and testified:

"We could see the freight train standing there by the headlight of the passenger train. The freight train was coupled together as far as I know. I told them we had better hold up a little, but they thought we could make it and get between the two trains. I jumped out of the buggy to the right."

Three days later, on August 17th, Northup, at the request of Marq Barr, an employé of defendant, made a signed statement of what occurred at the time of the accident:

"I and Borough were in the seat, and Smithart was on our knees. When we came to the M. & St. L. crossing east of the depot, we saw a freight train standing on the railroad track with the train cut for the crossing. I heard the passenger train coming, and said, 'I don't believe we can make it,' and Smithart and Borough both said they thought they could. I did not realize the train was so close. About the time the mare was going on the track, I then realized we were in great danger. I then jumped out, and saved myself. The freight train was standing still when I called the attention of the others about the train coming. Could not tell how far away it was. Could see the headlight on the engine. * * * When I first heard the train coming, I think we were about 15 or 20 feet from the freight train. The driver did not halt the horse as I remember it. I could not tell anything about the speed of the train. I don't think Smithart said he was

going to drive between the cars, but simply said he thought he could make it."

On this trial Northup testified:

"Smithart was driving. I was sitting on the right side, Borough on the left side, Smithart sitting in our laps. The horse was traveling at an ordinary gait. I noticed a train of cars on the right of way. It was cut for the crossing. I judge it was 30 feet between the cars. We drove up onto the track, and as the passenger train came it jammed together. I didn't observe the passenger train. I didn't hear any train on the right of way that night. The first I saw the passenger train was before we got on the M. & St. L. tracks. I didn't see the passenger train until it was within 20 feet of the crossing. I think it was about 140 feet from the crossing down to the head of the freight engine. There was some smoke from the freight engine. It obstructed the view some to the east. I didn't read over the statement I made to Barr, and it was not read over to me. I made the statement to Barr that I made as a witness."

On cross-examination Northup was asked:

"Q. Didn't you say to Mr. Barr: 'I heard the passenger train coming, and I said I didn't believe we could make it, and Smithart and Borough both said they thought we could. I didn't realize that the train was so close. About the time the mare was going on the track I then realized we were in danger. I then jumped out and saved myself.' A. I do not know.

"Q. Didn't he read that over to you from the paper? A. I don't remember."

"Q. Didn't you make that statement to Barr in the presence of the deputy sheriff? A. No, sir."

Concerning the written statement made by Northup, Barr testified:

"I met Northup at the sheriff's office. The deputy sheriff, Mr. Rathbun, was present. The statement was made to me in the sheriff's office at Sigourney. I told Mr. Northup at the time that I represented the railroad company. He signed the statement in my presence, and in the presence of Mr. Rathbun. I read it over to him, and went over it with him. I read it to him exactly as it is written."

J. J. Rathbun, deputy sheriff, testified:

"I was present in the sheriff's office when Northup came there and talked this matter over with Barr. I heard the conversation between them. I heard the statement contained in the signed statement. I saw Mr. Northup sign it. The statement was read over by Mr. Barr to Mr. Northup just as it appears in the written statement. It was read over to Mr. Barr, and Mr. Northup followed the reading with Mr. Barr. After it was read over in my presence, Northup signed it."

On the trial, Northup, as a witness on cross-examination, admitted that after the former trial he had a conversation with Mr. Barr, but specifically denied that in that conversation he had reiterated to Barr the truth of the statements contained in the

written statement, the record on this point being:

"Q. You had a talk with Mr. Barr recently about this transaction, did you not? A. Not very much; no, sir.

"Q. You said to him in that conversation that the statement that you had signed was a true account of the transaction? A. No, sir.

"Q. You did not say that to him? A. No, sir.

"Q. Did you not tell him that it was all true that you had said to him? A. No, sir."

The defendant called Barr as a witness, the record of his examination being as follows:

"I had a talk with Northup in Sigourney some time after the first trial. Q. And what, if anything, did he (Northup) state in that conversation in relation to this statement (the written statement signed by Northup)?" Objection: Plaintiff objects as incompetent, irrelevant, and immaterial, witness not being a party to the suit, a mere witness in this case, and calling for hearsay testimony. Objection sustained. Defendant excepts.

Offer: "The defendant offers to show by this witness that in a conversation with the witness Northup, after this statement was taken, and after the first trial of this case, that the witness Northup said to this witness (Barr) that the statement that he had given him in the sheriff's office at Sigourney was the truth about what had occurred and the manner in which the accident had occurred, and that every statement contained in said written statement was the truth as to how the accident had occurred at Martinsburg, at the time the plaintiff in this case was injured." Plaintiff makes the same objection to the offer of defendant. Sustained. Defendant excepts.

[1, 2] In brief the record discloses: That Northup was a material witness for the plaintiff; that Northup had testified on the original trial of this case, and that, as a witness on this trial, he was asked if, after the first trial, and after he had testified contradicting his written statement given to Barr, he did not have a talk with Barr; that he admitted having a talk with Barr after the first trial, but specifically denied that in such conversation he had told Barr that the written statement he had given him was true. Barr was placed on the stand, and by him defendant offered to prove that after the first trial he had a conversation with Northup in which Northup stated to Barr, in substance, that the written statement which he had given was the truth about the transaction. Certainly this evidence was admissible, and the ruling of the trial court was clearly erroneous. The testimony offered was competent and material as impeaching testimony, and it was error to reject it. *State v. Gray*, 43 Or. 446, 74 Pac. 927; *State v. Cary*, 159 Ind. 504, 65 N. E. 527; *State v. Rudd*, 97 Iowa, 389, 66 N. W. 748. In substance we have often said, and in *McNamara v. Corporation of New Mel-laray*, 88 Iowa, 502, 55 N. W. 322, we say:

"When errors appear, prejudice is presumed to result therefrom, and it cannot be disregarded, unless from the record it appears that the error has worked no prejudice to the objecting party."

[3] Counsel for appellee urges that the proper foundation was not laid in cross-examination of Northup for the introduction of Barr as an impeaching witness, because the place and time of the claimed conversation were not definitely fixed. Witness Northup recalled the conversation referred to, and admitted having it, making it unnecessary to further identify the conversation. *State v. Gray*, 43 Or. 446, 74 Pac. 927.

[4] It is urged by counsel for appellee that the written statement made by Northup to Barr was in evidence for comparison with the oral testimony of the witness, and that it would add nothing in ascertaining the truth to receive the offered testimony of Barr, and thereby attempt to prove that Northup had afterwards confirmed the facts recited in the written statement. Perhaps this contention would be logical if Northup had not, in his oral testimony, said that he never made the statements as they appeared in the written statement, and conveyed the idea that he gave to Barr the same facts that he related as a witness, but that Barr did not correctly record him. In other words, the witness Northup disputed the facts in the written statement. Under that state of the record the testimony offered was relevant and competent impeaching testimony.

[5] There is hardly any more familiar practice than of impeaching a witness by proof of his former statements which are inconsistent with his present testimony. Such attempted impeachment is a direct attack upon the testimony of the witness. In general it may be said that the credibility of the witness may be attacked by the testimony of other witnesses that the facts which he has testified are other than he had stated. One of the most frequent methods of discrediting the testimony of a witness is to show that he has made prior statements which are inconsistent with, or which contradict, his testimony at the trial. Of course, to impeach a witness by proof of contradictory statements, they must be material to the issue. There can be no question, we think, as to the materiality of the proof offered in the instant case.

Northup first testified at the coroner's inquest, and a few days later made the written statement to Barr. His testimony at the inquest and his written statement are in substantial accord. There is a wide difference between the facts related by the witness before the coroner and in the signed statement, and the testimony of the witness on this trial. Northup was the only living witness to the accident except the plaintiff. When the case was before us on the former appeal, concerning Northup, we said:

"Northup, who escaped by jumping from the buggy, was a witness, and gave a strangely different account of the conditions there [at the coroner's inquest] from that given by him on this trial."

We further said:

"Both statements of this witness cannot be true. If he has deliberately falsified in one instance, it is quite impossible to tell from his testimony what the fact really is."

Rules governing the introduction of impeaching or discrediting testimony cannot be stretched for the purpose of meeting exigencies, but we think, under the approved rules of practice, that the testimony of Barr offered was admissible. The "strangely different account of the conditions" related by Northup as a witness, from those given by him before the coroner and in the signed statement, seems to call for the admission of all competent testimony tending to discredit him as a witness.

[6] Defendant assigns error in the giving of instruction No. 2, that the court, instead of submitting the specific grounds of negligence, referred the jury to the negligence alleged in plaintiff's petition, and this submitted to the jury issues of negligence that were without support in the evidence. The instruction stated that the plaintiff must establish, in order to recover, that the defendant company was negligent "in some one or more of the particulars claimed, and substantially as alleged by plaintiff in his petition." Five grounds of negligence were alleged. One ground was that the defendant was operating the passenger train without having a headlight on the engine; another that the freight train was backed over the crossing with negligent speed. The complaint is that this permitted the jury to find that the defendant was guilty of negligence as to charges of negligence set out in the statement of the issues, which were copies from the petition, of which there was no evidence, and which were therefore not properly submitted to the jury. Among the grounds of negligence alleged in plaintiff's petition, and copied into the statement of issues, were the above-mentioned grounds as to the headlight, and the speed with which the freight train was closed up over the crossing. We have been unable to discover any evidence in the record bearing on these two specifications of negligence, and because of its absence we are of the opinion that these two issues of negligence ought not to have been submitted to the jury, and that it was prejudicial error to submit them.

The issues, substantially a copy of the pleading, were stated in instruction No. 1. By instruction No. 2, as applying to instruction No. 1, the court instructed the jury that they could find the defendant guilty of negligence, if they found that the freight train was backed over the crossing

at an excessive rate of speed, when there was no evidence to support this allegation; and the court said in instruction No. 2 that the jury could find the defendant negligent in not having a headlight on the passenger engine, which was contrary to the evidence.

In instruction No. 4, which is assailed by defendant, the jury was told, "There can be no recovery, unless you find from a preponderance of the evidence that defendant was negligent in some one or more of the particulars alleged in the plaintiff's petition," and it did not state specifically the grounds of negligence charged which the jury should consider. It was error to thus submit to the jury all of the five grounds of negligence alleged, when there was no issue made in evidence, and no evidence offered to support at least two of the grounds—those above mentioned. Unquestionably, it is the duty of the court to confine the jury to a consideration of the grounds of negligence which had sufficient support in the evidence to warrant submission, instead of presenting and permitting the jury to consider all the grounds of negligence alleged, regardless of whether or not they had support in the evidence. It is reversible error to submit to a jury issues that are without support in the evidence. *McDivitt v. Ry. Co.*, 141 Iowa, 689, 118 N. W. 459; *City Nat. Bank v. Mason*, 181 Iowa, 824, 165 N. W. 103; *Rawleigh Medical Co. v. Bane*, 181 Iowa, 734, 165 N. W. 42; *Packers' National Bank v. Michener*, 183 Iowa, 122, 164 N. W. 206.

[7] Error is assigned as to instruction 15 in relation to determining the expectancy of plaintiff. The jury was told that, in determining the expectancy—

"You must take into consideration the condition of his health at the time of his injury, and all facts and circumstances bearing thereon, as shown by the evidence, if any, and as bearing upon the question of how long the plaintiff would be likely to live."

It is the claim of defendant that in this instruction the jury was told to determine the plaintiff's expectancy from the condition of his health at the time of his injury; but were not told that in determining his expectancy they should take into consideration his expectancy in his injured condition, thus ignoring a most material matter upon the determination of the question of how long the plaintiff would be likely to live.

It is true that the question was, How long would plaintiff probably live injured as he was? *Scott v. Ry. Co.*, 160 Iowa, 306, 141 N. W. 1065; *Hughes v. Ry. Co.*, 150 Iowa, 232, 129 N. W. 956. In the *Scott Case* we said:

"The question here is, How long will he probably live injured as he is? It is proper to consider the physical condition, habits, and the like prior to the injury as bearing on the questions as to whether a strong, rugged person

would not be likely to live longer than a delicate person, with the same injuries. This matter should be considered, with his condition after being injured, in determining how long he would be likely to live in the condition he is in with his injuries."

Under the rule announced in the Scott Case and the Hughes Case, the instruction in the instant case cannot be sustained.

Defendant complains that the verdict is grossly excessive, and for that reason a new trial should have been granted. We have carefully examined the testimony bearing on damages. We think the damages awarded are excessive, but would not reverse on that account if reduction would be accepted by plaintiff.

The other assignments of error we deem without merit, and not necessary to discuss, and not helpful on another trial of the case. Because of the errors pointed out, the case is reversed and remanded.

Reversed and remanded.

DE GRAFF, STEVENS, and FAVILLE,
JJ., concur.

THORSON v. CITY OF DES MOINES.

REIMER v. SAME.

(Nos. 33950, 33951.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Eminent domain $\Rightarrow$ 238(4)—Notice of appeal from award of sheriff's jury need not be filed in district court within 30 days.

Notice of an appeal from an award of a sheriff's jury under Code Supp. 1913, § 2009, need not be filed in the district court within 30 days from the date of the award in order to give such court jurisdiction, especially in view of Code, § 3660, authorizing appeal to be docketed by appellee.

2. Eminent domain $\Rightarrow$ 238(4)—If sheriff fails to file copy of notice of appeal, court may require him to perform duty.

The provision in Code Supp. 1913, § 2009, that sheriff shall file in district court a certified copy of notice of appeal from award of sheriff's jury served upon him, simply prescribes a duty imposed upon sheriff, and if he fails or neglects to so act he does not thereby deprive the court of jurisdiction of the appeal, and the court may, upon application of either party, enter a rule or order requiring him to perform his duty.

3. Eminent domain $\Rightarrow$ 238(4)—Mere informalities in notice of appeal immaterial.

Mere informalities in a notice of appeal from an award of sheriff's jury under Code Supp. 1913, § 2009, do not vitiate it so long as they do not mislead, and the notice gives the necessary information to the proper party.

Appeal from District Court, Polk County; Joseph E. Meyer, Judge.

The defendant appeals from an order of the district court dismissing its appeal from an award of damages in condemnation proceedings. The two entitled cases involve the same question, and will be disposed of in a single opinion. Reversed.

Chas. W. Lyon, El. J. Frisk, Chauncey A. Weaver, and Russel Jordan, all of Des Moines, for appellant.

Miller, Kelly, Shuttleworth & Seeburger, of Des Moines, for appellees.

WEAVER, J. On May 31, 1919, the city of Des Moines made written application to John F. Griffin, sheriff of Polk county, for appointment of 6 persons to act as a jury for appraisal of damages to the owners of property to be condemned for the construction of a storm sewer. Acting upon this application, the sheriff summoned a jury of 6, who, after notice to the property owners, met and acted upon such appointment June 28, 1919. Included in the property intersected by the course of the proposed sewer were a lot owned by the plaintiff Thorson, and another by the plaintiff Reimer. In its return of its appraisal, the jury awarded damages to Thorson in the sum of \$1,200, and to Reimer in the sum of \$900. On July 22, 1919, the city presented a notice to the plaintiff Thorson in the following form, upon which he signed an acceptance of service:

"In the District Court of the State of Iowa, Polk County, Iowa. September Term, A. D. 1919. Oscar Thorson, Plaintiff, v. City of Des Moines, Defendant. 28963 Law. Notice of Appeal. To Oscar Thorson: You are hereby notified that the city of Des Moines appeals from the action of the sheriff's jury in awarding you the sum of twelve hundred dollars (\$1,200) for a strip of ground in lot 2, Union Place, to be used as an easement for the construction of a storm sewer, and that this appeal will be heard at the September term of the Polk county district court which convenes on Tuesday, September 2, 1919. [Signed by attorneys for defendant city.] Service accepted this 22d day of July, 1919. [Signed] O. Thorson."

On July 24, 1919, service of a written notice of such appeal directed to the sheriff, and service as of that date was accepted by him. On the same day a written notice of appeal by the city directed to the plaintiff Reimer and the sheriff Griffin was served upon Reimer and accepted by Griffin. The last-mentioned notice, with return of service, was filed in the office of the clerk of the district court on July 29, 1919. The return or certificate of appraisal of damages to the property of plaintiffs was not filed in the district court until March 5, 1920, when such certification was made by the then acting sheriff. On March 10, 1920, each of the named plaintiffs

filed in the district court a motion to dismiss the city's appeal on the following grounds:

"(1) Because the notice of appeal given in this cause by the city of Des Moines was not filed with this court within 30 days after the award made by the sheriff's jury in this cause; (2) because on said notice it does not affirmatively appear that it was ever served on both Oscar Thorson and the sheriff of Polk county, Iowa, as required by the statutes of Iowa; (3) because said notice fails to affirmatively show that service thereof was made within 30 days from the date of the award of the sheriff's jury on the parties as required by the statutes of Iowa, to wit, Jesse Reimer and the sheriff of Polk county, Iowa."

This motion was sustained by the trial court, the appeals were ordered dismissed, and the defendant appeals.

The statute providing for an appeal from the award of a sheriff's jury is found in Code, Supplement of 1913, § 2009, and is in language as follows:

"Either party may appeal from such assessment to the district court, within 30 days after the assessment is made, by giving the adverse party, or, if such party is a corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisal as applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The landowner shall be plaintiff, and the corporation defendant."

The motion to dismiss challenges the sufficiency of the appeal from the award of damages on three grounds: First, because the notice of appeal was not filed in the district court within 30 days from the date of the award; second, because it does not affirmatively appear that service of notice of defendants was ever served on both sheriff and Thorson; and, third, because the notice does not affirmatively show that service thereof was made on the parties Reimer and the sheriff within 30 days from the date of the award. These objections, as will be seen, raise the single question whether the district court acquired jurisdiction to try the appeal upon its merits.

[1, 2] I. Jurisdiction is first challenged because of failure to file the notice of the city's appeal in the district court within 30 days from the date of the award. As the award is shown to have been made on June 28, 1919, and the first date of filing a notice of appeal therefrom in the court below appears to have been July 29, 1919, it follows that, if the filing is required to be made within the 30-day period as contended by the appellee in order to perfect an appeal, the motion to dismiss was rightly sustained. Is this requirement to be found in the statute providing for such appeals? This inquiry, we think, must be answered in the negative. The statutory provision, as we have seen, is that either party

may appeal by "giving the adverse party * * * and the sheriff notice in writing." To add thereto a requirement that to perfect an appeal the notice must be filed in the district court within 30 days would be in the nature of a judicial amendment to the statute. The provision that "the sheriff shall thereupon file a certified copy" of the appraisements simply prescribes the duty imposed upon the sheriff when the notice of appeal has been duly served. No stated period is named in which that duty shall be performed, but the provision that he shall "thereupon" make the certification means, of course, that he shall act with reasonable promptness. If he fails or neglects to so act, he does not thereby deprive the court of jurisdiction of the appeal, and the court may, upon application of either party, enter a rule or order requiring that officer to perform his duty. This authority is inherent in all courts exercising appellate jurisdiction.

Nor were the plaintiffs without a remedy, for, under an express provision of our statute (Code, § 3060), the defendant not having had its appeal docketed, or sheriff's certificate filed in time for the next succeeding term of the district court, they were themselves authorized to have the appeal docketed and the award affirmed, or to demand that the case be set down for trial on its merits. This it did not elect to do, thus leaving it still open for the appellant to procure the filing of the sheriff's certificate and the docketing of the case for trial. This was so ruled in express terms in *Simons v. Ry. Co.*, 128 Iowa, 189, 103 N. W. 129. Speaking to the same point we there said:

"It will be observed that the appeal is taken and perfected by the service of notice on the adverse party and the sheriff. From that time down until the final disposition of the case it is in the court to which the appeal is taken. * * * There is no statute which expressly requires the filing of a transcript in order to give the district court jurisdiction. * * * A transcript is not really required until the case is reached for trial."

If it be argued in this connection that in the instant case the plaintiff's objection is not to the omission to file the transcript or certification of the award, but to the omission to file the notice within the 30-day period, we still have to answer that the statute neither in terms or by necessary implication makes such filing necessary to an appeal in such proceedings. The objection to the jurisdiction of the district court, that the notice of appeal was not filed within 30 days from the date of the award, is therefore not well taken.

[3] II. The other objections go more to the substance and form of the notice of the appeal. In the first place, if we understand counsel, it is contended that the notice should be addressed to the property owner and sheriff jointly, and that separate and distinct no-

tices addressed to them severally is not a compliance with the statute. If this be the point made, we hold it not well taken. While we think the record fairly shows that the notice of appeal was in fact addressed to the sheriff and to the property owner by name, and that service thereof was made or accepted within the 30-day period, we would not be disposed to hold that notices directed to them severally would not answer the literal requirement of the statute. Mere informalities in a notice of appeal do not vitiate it so long as they do not mislead, and the notice gives the necessary information to the proper parties. See 3 C. J. 1229. There is some confusion and dispute in the abstracts over the exact language and terms of the several notices alleged to have been given, but the appellees nowhere undertake to deny that notices of appeal were in fact served upon each of them and upon the sheriff, but confine their argument to the propositions (1) that, at the time their motion to dismiss was made, there was nothing on file in the district court to show either the award of damages or the taking of an appeal therefrom; and (2) that the notices on which the appellant relies were defective in form, and do not show sufficient service.

It is enough at this point to repeat that neither the filing of the notices or of the sheriff's certification is essential to the taking or perfecting of the appeal. It is the service of the notice which gives jurisdiction, and, as said by us in *Simons' Case*, supra, the notice being served "the case is in the court to which appeal is taken from that time" until its final disposition. If the court records do not show such appeal, or the proper filings have not been made to give it a status of readiness for trial, it does not present a case for dismissal on motion of the appellee, for the court, having acquired jurisdiction, may enter such rule or order as may be needed to supply the omitted records. See *Robertson v. Ry. Co.*, 27 Iowa, 245; *Bank v. City*, 118 Iowa, 84, 91 N. W. 829; *City v. Loan Co.*, 122 Iowa, 629, 98 N. W. 488; *Marion v. Ry. Co.*, 120 Iowa, 259, 94 N. W. 501; Code, § 3660.

As to the form and substance of the notice of appeal, we may also repeat that it is clear, and indeed is not denied, that within the prescribed 30-day period notices were served. For the purposes of the argument it may be conceded (though we do not so decide) that those notices were informal or defective, or that the service was irregular. It does not follow that the court acquired no jurisdiction. A merely defective notice is not the equivalent of no notice.

The notices in this case were served upon or service was accepted by the proper parties; they were so served in due time; they pointed out in intelligible manner the award from which the appeal was taken; they designated the court to which defendant was appealing;

and they accomplished their designed purpose to bring the appellants into court. No more is needed to give the court jurisdiction to proceed with the case to final judgment in the manner provided for the trial of such appeals.

The court erred in dismissing the appeals, and the order and judgment so entered are reversed, and cause remanded, for further proceedings not inconsistent with the views herein expressed.

Reversed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concur.

STATE ex rel. COON et al. v. ORR et al. COON et al. v. HART, County Superintendent, et al. CONSOL. INDEPENDENT SCHOOL DIST. OF HOPEVILLE et al. v. INDEPENDENT SCHOOL DIST. NO. 6, CENTER DOYLE TP., CLARKE COUNTY, et al. SAME v. INDEPENDENT SCHOOL DIST. NO. 7, GRAND RIVER, CLARKE COUNTY. SAME v. INDEPENDENT SCHOOL DIST. NO. 2, NORTH PRAIRIE DOYLE TP., CLARKE COUNTY. SAME v. INDEPENDENT SCHOOL DIST. NO. 2, RICHLAND TP., DECATUR COUNTY. (No. 34208.)

(Supreme Court of Iowa. Sept. 30, 1921. Supplemental Opinion on Rehearing, Dec. 15, 1921.)

1. Schools and school districts $\Leftarrow$ 39—Board of education had no authority after adjournment to change decision in establishing consolidated district.

Where county superintendent overruled written objections to a petition to establish a consolidated school district, board of education, after affirming the action of the superintendent, and adjourning and separating, had no authority to change their decision individually, and over the telephone, and sustain the objections.

2. Schools and school districts $\Leftarrow$ 38—County superintendent could not submit proposition of consolidated district including territory outside of that petitioned for.

Submission of proposition to establish a consolidated school district including territory outside of that petitioned for is not authorized.

3. Schools and school districts $\Leftarrow$ 38—Statutory provision as to leaving territory out of consolidated district held mandatory.

It was not proper for county superintendent to submit to voters a petition for establishment of a consolidated school district where districts were split, statutory provisions relating to splitting of districts being mandatory.

Appeal from District Court, Clarke County; P. C. Winter, Judge.

The first of the above-entitled actions is in quo warranto, to test the right to hold the office of school director in the consolidated independent school district of Hopeville, Clarke county, Iowa. Plaintiff claims that the district was never legally organized, and

therefore the persons claiming to have been elected directors thereof are not such officers, and that they have no right to exercise the functions. The case was tried to the court as in equity. The other cases were tried with it under a stipulation that they should abide the result of the quo warranto case. One of the other cases is a certiorari proceeding; others are actions brought in Clarke county and Decatur county to require the other school districts to turn over funds to the consolidated district. In the certiorari case the court found that the action of the board of education in attempting to change its decision by telephone, after the board had adjourned, was without effect, and that said board in fact affirmed the decision of the county superintendent, who had overruled objections filed, to the establishment of the district. In the other cases the court found that the different school districts were not required to turn over funds because the consolidated district had not been legally established. Decrees were entered in the several cases, but the record presented here is, for the most part, the record made in the quo warranto case, in which the trial court found for plaintiffs, and that the consolidated district had no legal existence, and that the defendants, who assumed to act as officers thereof, were without authority to do so. The defendants appeal. Affirmed.

Temple & Temple, of Osceola, and McGinnis & McGinnis, of Leon, for appellants.

O. M. Slaymaker and A. M. Miller, both of Osceola, for appellees.

PRESTON, J. 1. The several school districts sought to be consolidated are situated in three counties, Clarke, Decatur, and Union. No schoolhouse has been built in the new consolidated district, and no bonds have been issued. No money has been spent, except that the persons acting as directors of the consolidated district rented a building, or buildings, hired teachers, and maintained the school for the year now closed. As we understand the record, the schoolhouses in the several districts are in place.

February 9, 1920, there was filed in the office of the county superintendent of Clarke county a petition for the organization and establishment of a consolidated district. The superintendent thereafter gave notice thereof, as provided by the statute, which notice described the territory as it was given in the petition. Thereafter, one L. C. Smith filed written objections which, after referring to the petition and describing the territory, or a part of it, gave, as the grounds for his objection: First, that the description as given in the petition does not include all of said district No. 6; second, that the west boundary of the territory described above should be extended to the river known as Grand river. The objections were overruled

by the superintendent, and the objector appealed to the board of education. In due time this board was regularly convened, and on motion regularly made, the objections of Smith were overruled by the board, thus sustaining the county superintendent. This was in the forenoon. The board then adjourned. In the afternoon of the same day, the superintendent received a special delivery letter from Smith in regard to the matter, the substance of which was communicated by telephone by the superintendent to the other members of the board of education—or rather, as we understand the record, to all but one of them. Such communication was to the members of the board one by one. This was in the evening of the same day. The board was not again convened, but the individual members, except one, one by one, in the manner before indicated, assented or agreed that Smith's objections should be sustained, and thereafter the minutes of the meeting of the board in the morning, kept by the county superintendent, were destroyed or lost. If the action of the individual members of the board is valid, the result would be that the board extended and took in additional territory to that described in the petition. If such action is not valid, and the objections were in fact overruled by the board of education, according to their action as a board in the morning, this would leave the boundaries of the proposed consolidated district, and the territory embraced therein, the same as that described in the petition. Notice of election by the superintendent, and the proposition voted upon, included the additional territory suggested by Smith in his objection.

[1, 2] We think the board of education had no authority to change their decision after they had adjourned and separated, and that their action in that regard is without legal effect. *Mills v. Collins*, 67 Iowa, 164, 25 N. W. 109; 35 Cyc. 988, 24 R. C. L. 576. This being so, the result is that Smith's objections were overruled by both the superintendent and the board of education. In fairness to the county superintendent it should be said that she supposed that by the action of the individual members of the board of education the objections were sustained. But she included in her notice of the election, and the proposition voted upon, additional territory of several landowners—three, at least, which were not included in the petition, and were contrary to the finding of the board of education when it overruled Smith's objection. The effect of this was that the superintendent herself gave notice, and submitted the proposition, which included in the boundaries, additional territory outside of that petitioned for. This she could not do. *Brooker v. Ludlow*, 179 N. W. 145. In that case we held that this could not be done by either the superintendent or the board of education;

but it may be that this was qualified somewhat in *State ex rel. Martinson v. District of Scarville*, 181 N. W. 178, as to the board of education.

[3] 2. The point in paragraph 1 of the opinion is the one most relied upon, and most elaborately argued by both sides. It is contended by appellees that some of the territory left contained less than four government sections, and that other districts were split. We understand from the record that this is so, although the record is not very clear. The case was tried in the district court, probably before some of the later decisions on the subject. We said in *State ex rel. Martinson*, supra, that these provisions are mandatory. See, also, *State ex rel. v. Thompson*, 181 N. W. 434. In the last case, however, the proceedings, or a part of them at least, were had prior to the last change in the statute. We are of opinion that the trial court rightly decided the matter, and the judgment is therefore affirmed.

EVANS, C. J., and WEAVER, DE GRAFF, ARTHUR, STEVENS, and FAVILLE, JJ., concur.

Supplemental Opinion on Rehearing.

PER CURIAM. The original opinion is modified to this extent: Since the county superintendent submitted to the voters a proposition contrary to the order of the board of education while it was legally convened, the cause is remanded, with direction to the county superintendent to call another election on the petition as approved and found by the board of education in legal session.

As so modified, the petition for rehearing is overruled.

CAMPBELL v. HAGERTY. (No. 33932.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Appeal and error $\S$ 1011(1)—Findings on contradictory evidence conclusive.

Finding of trial court on points where there is a dispute in the evidence is conclusive.

2. Vendor and purchaser $\S$ 143—Vendee may not indefinitely hold possession and refuse to pay purchase price because of lack of abstract.

Vendee cannot indefinitely hold possession of land and refuse to pay balance of purchase price on the ground that vendor has not complied with his contract as to furnishing proper abstract.

Appeal from District Court, Guthrie County; J. H. Applegate, Judge.

Action at law to recover \$2,250, the balance of the purchase price on real estate sold by plaintiff to defendant. Trial to the court

without a jury. Judgment for plaintiff for the amount claimed, and that the warranty deed and abstract deposited with the clerk should be delivered to the defendant. The defendant appeals. Affirmed.

Allen T. Percy, of Dexter, and W. D. Milligan, of Guthrie Center, for appellant.
Carl Knox, of Stuart, for appellee.

PRESTON, J. [1] The parties entered into a written contract February 6, 1920, for two lots in the town of Stuart. By the contract, defendant was to have possession of the property March 1, 1920. He did take possession thereof three or four days thereafter, and testifies that he makes no complaint that he was not given possession on the 1st day of March. The contract price was \$2,750, \$500 of which was paid upon the execution of the contract. The balance was to be paid "when warranty deed and abstract is furnished showing good clear title, and possession is given," etc. The finding of the trial court upon points where there is a dispute in the evidence is conclusive. The evidence and circumstances shown justified the finding of the trial court that the deed was tendered by plaintiff in time. Plaintiff also furnished an abstract within the time required, which she claims was such an abstract as required by the contract. Defendant raised numerous objections thereto, and his contention is that plaintiff did not comply with the contract in this respect. This is the principal point relied upon by appellant; in fact his counsel stated in oral argument that he would stand or fall upon this proposition.

[2] Appellee contends, and the trial court found, that the abstract did comply with the contract. Appellee further contends that defendant, having taken possession of the property under the contract, and retaining possession thereof, has accepted the title which plaintiff has, and that he may not indefinitely hold possession of the property and refuse to pay the balance of the purchase price. We think the case turns on the last proposition, and we shall not, therefore, go into details as to appellant's objections to the abstract.

When the controversy over the abstract arose, and soon after March 1, and before this suit was brought, plaintiff in writing stated to defendant that she had been and was then ready to settle the matter according to the contract; that she demanded payment of the balance, and if not paid suit would be brought. In the same paper she offered to return the \$500 paid and to permit defendant to cancel the contract and surrender possession of the property to her. This offer was not accepted by defendant, and he

still retains possession, and refuses to pay the balance of the purchase price. Appellant states in argument that to cancel the contract would please plaintiff too well, and that he wants the property.

1. As said, we shall not take up separately, or go into details as to, the different objections. Some of them have been met, others cured by curative acts of the legislature; other defects are nearly forty years old, and so on. Some of the objections may not be wholly technical, but the trial court held that, taking into consideration the circumstances before mentioned, and proper presumptions and inferences, there was a compliance with the contract as to the abstract. In this we concur. Some of the objections are technical, and without merit. But in any event, under the record, defendant may not complain, because of his attitude in regard to possession of the property.

2. Appellee argues that, to permit defendant to retain possession indefinitely, without paying the balance of the purchase price, he still has the balance of the purchase money, \$2,250, which, at 6 per cent. interest, would earn \$135 a year, and, in addition, has the use of the property, the rental of which, with the interest, would make defendant a double income upon the payment of only \$500; and, further, that by taking and holding possession, he thereby accepts such title as plaintiff has, and that their remedy is upon the warranty, if hereafter he is damaged by a breach thereof. It may be that none of the parties which appellant alleges have an interest in the property or lien thereon will ever make a claim, and in that case defendant would suffer no injury. *Anderson v. Kyle*, 126 Iowa, 666, 102 N. W. 527. In *Houchin v. Salyards*, 155 Iowa, 615, 133 N. W. 48, we said, in effect, that, under circumstances such as are shown in this case, defendant may not take and retain possession, and refuse to pay the purchase price, and that defendant's remedy, if plaintiff's title fails, or he is unable to make conveyance as stipulated, he is to rescind the contract, or offer to, and restore the possession; that if he does not do so, but retains possession, he may do so only upon condition that he pays the purchase money; that it is considered he is willing to receive such title as the vendor is able to give, and content with the personal responsibility of the vendor upon the covenants in case the title actually fails, and the vendee is afterwards dispossessed. Other cases are cited, and other propositions suggested on argument, but it seems to us the proposition just stated is determinative of the case. The judgment is affirmed.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

GRAHAM et al. v. CLAPP. (No. 34047.)

(Supreme Court of Iowa. Sept. 27, 1921.)

1. Insane persons §2—Evidence held to sustain refusal of appointment of guardian for mental incapacity.

Evidence held sufficient to sustain finding that defendant was not of such unsound mind and mental incapacity as to necessitate the appointment of a guardian for the management of his business affairs.

2. Insane persons §1 — Test of mental unsoundness involves capacity to manage business in rational way.

The real test of mental unsoundness involves the competency of a person to manage his property and business affairs in a rational way, and unsoundness of mind justifying guardianship must be more than mere debility or impairment of memory.

3. Insane persons §2—Evidence of incompetency.

Evidence to support petition for guardianship of alleged incompetent must be clear and satisfactory.

Appeal from District Court, Jackson County; A. P. Barker, Judge.

Action at law to have a guardian of property appointed for the defendant as a person of unsound mind and incapable of managing his ordinary business affairs. Jury waived, and cause tried to the court. Judgment entered dismissing petition and taxing costs to plaintiffs. Plaintiffs appeal. Affirmed.

Farr & Thomas and F. D. Kelsey, all of Maquoketa, for appellants.

Wolfe, Wolfe & Claussen, of Clinton, for appellee.

DE GRAFF, J. Plaintiffs are the daughters of the defendant, Leonard Clapp. The petition is predicated on Code, § 3219, which provides that a guardian may be appointed for a person of unsound mind. Since the statute is silent as to the indicia of mental unsoundness, we must resort to judicial opinion and definition. It is not our purpose to set out in detail either the proof tendered in support of the allegations of the petition or offered by the defendant in his attempt to prevent the appointment of a guardian. Each case of this character is necessarily bottomed upon its own facts and upon final decision constitutes a weak precedent.

[1, 2] It appears that the defendant, Clapp, is a widower 85 years of age; somewhat feeble in health; at times forgetful; weak in vision, and has been for many years; somewhat deaf and has been for 20 years past; that he sometimes talked to himself,

which has been his custom for many years; that during the winter of 1918 he suffered some from rheumatism and perhaps diabetes. Conceding that he is subject to several physical and bodily infirmities that accompany old age, we must make answer to the pertinent inquiry whether these weaknesses and infirmities are such to warrant a finding that he is unsound in mind.

The facts herein which disclose mental unsoundness and which would warrant a court in an appointment of a guardian of his property are quite meager. His storekeeper, banker, and near neighbors vouch for his soundness of mind in business and social relations. It is well settled that the unsoundness of mind which will justify guardianship must be more than mere debility or impairment of memory. It must be such as to deprive the person of ability to manage his estate.

It is not shown that any one has been attending to defendant's business; that he ever drove a bad bargain; that he has ever or is now squandering his property or that he has ever dissipated his physical, mental, or financial resources. It is stated by some witnesses that he acted childish, and that he was easily influenced, but no facts are stated upon which to base such conclusions.

Some time prior to the institution of this suit the defendant deeded a farm costing \$7,000 to his son Dan for a consideration of \$5,600. A mortgage was executed by the son to the defendant for a balance of the purchase price at 5 per cent. interest. Subsequently to this transaction the defendant on his own initiative canceled this mortgage, and another contract was executed whereby it was agreed by the son that he would pay his father the equivalent of the interest, or the sum of \$280, yearly, as long as he lived. The cancellation of this mortgage and the substitution of an unsecured contract may not have been the acme of wisdom on his part, but the defendant gave his reasons for so doing, and they are such as might be offered by a person mentally sound. It is quite apparent that the father, like many fathers, was partial to his son. But it is also quite apparent that this son was not a dominant influence in his life and business transactions. Furthermore, the defendant thought with eight daughters living at the time of his death the pro rata share of this mortgage to the children would be so small that it did not warrant the continuation of

the existence of the mortgage. He anticipated trouble. It also appears that the old gentleman had some misapprehension of the law governing the distribution of property, and the duties enjoined upon a father toward male heirs, but this in itself is not an indication of mental unsoundness. It is chargeable to ignorance or a mistaken notion of things.

The occasional eccentric remarks of the defendant also cause counsel to comment and it is urged as an indication of unsound mind. We are not so impressed. It is quite common for old people to say things in a manner different from those of the present generation. Their minds are reminiscent and their thoughts often find expression in the language of a bygone day.

The real test of mental unsoundness involves the competency of a person to manage his property and business affairs in a rational way. If judgment and reason are dethroned to the extent that guidance by others is necessary in his ordinary business affairs, then a guardian should be appointed.

The law of this case is well stated in *Emerick v. Emerick*, 83 Iowa, 411, 49 N. W. 1017, 13 L. R. A. 757. See, also, *Wood et al. v. Wood*, 129 Iowa, 255, 105 N. W. 517; *Garretson v. Hubbard*, 110 Iowa, 7, 81 N. W. 174.

[3] The recent case of *Overmyer et al. v. Overmyer et al.*, 183 N. W. 582, is stronger on the facts than the instant record, but it was held that the evidence was insufficient to show mental incapacity of an 88 year old grantor at the time of the execution of the deed. Evidence in support of a petition alleging mental unsoundness must be clear and satisfactory, and not merely of that character which would cause a court to momentarily hesitate in its judgment.

Upon a careful review of this record we cannot say that the defendant fails to act with judgment and discretion in his business affairs or that he is unable by reason of physical retrogression or mental decline to judiciously and personally continue to control the small estate which he now owns.

We conclude, therefore, that the trial court correctly determined the question involved under the pleadings, and the judgment entered is affirmed.

EVANS, C. J., and WEAVER and PRESTON, JJ., concur.

OSGOOD v. NAMES. (No. 33651.)

(Supreme Court of Iowa. Sept. 27, 1921.)

1. Fences §17—Repairing after injuries held to warrant finding agreement to repair.

In action against adjoining owner for damage to cattle caused by defendant's breach of agreement to keep his portion of division fence in repair, involving a question as to existence of agreement, defendant's action in repairing a part of his portion of fence, on plaintiff's notice to him that plaintiff's cattle were going through fence, and in repairing the other part of such portion after plaintiff's cattle had been injured, held to warrant jury finding that repairs were made pursuant to such an agreement.

2. Fences §9, 13—"Partition fence" defined.

"Partition fence," within Code, § 2356, providing for fence viewers to determine rights and obligations of adjoining owners as to partition fence, and section 2361, providing for written agreement between adjoining owners as to portion of partition fence to be maintained by each owner, is a fence on the line between the two owners where there is no road, alley, or something else that would prevent the erection of such fence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Partition Fence.]

3. Fences §8—Adjoining owners may determine portions of division fence to be maintained by each, by parol agreement.

Adjoining owners may, by parol agreement, determine the portion of a division fence to be maintained by each owner, notwithstanding Code, § 2356, providing for determination thereof by fence viewers, and section 2361, providing for such an agreement in writing, the owners having the right to waive the provisions of the statute.

4. Estoppel §52—Parties may waive statutory provisions enacted for their benefit.

In the absence of express provisions, parties may waive a statutory provision enacted for their benefit when no principle of public policy is violated.

5. Fences §17—Burden of proof in action for injuries to cattle from defendant's failure to keep up portion of division fence stated.

In action for damage to cattle, caused by defendant adjoining owner's breach of agreement to keep portion of division fence in repair, plaintiff was required to prove that defendant was bound to keep in repair a certain portion of a division fence, that he neglected so to do, and that the injury proximately resulted from some negligence, the obligation and neglect to keep up the fence being the gist of the action.

6. Action §35—Statutory remedy must be pursued.

Generally, the statutory remedy for the violation of a right must be pursued.

7. Statutes §236—Remedial statutes liberally construed.

Remedial statutes, intended to provide against existing defects in the common law, must receive a liberal construction both as to the extent of the change and the means of their execution.

8. Fences §17—Damages for adjoining owner's failure to maintain partition fence recoverable, though statute specifies no remedy.

In action for injuries to cattle caused by defendant adjoining owner's failure to keep his portion of division fence in repair, as required by the statute governing partition fences, plaintiff could recover damage sustained, notwithstanding failure of statute to specify a remedy, the plaintiff in such case having a common-law action for a violation of such statutory right.

Appeal from District Court, Clarke County; P. C. Winter, Judge.

Action at law to recover damages for injuries to plaintiff's cattle in the sum of \$153, caused by the failure of defendant to maintain a certain part of the division fence between the respective farms of plaintiff and defendant under the terms of an alleged oral contract between the parties. Verdict of jury finding for the plaintiff, and judgment entered accordingly. Defendant appeals. Affirmed.

Temple & Temple, of Osceola, for appellant.

O. M. Slaymaker and A. M. Miller, both of Osceola, for appellee.

DE GRAFF, J. Plaintiff and defendant are adjoining farm owners, and the petition recites that a division fence between the land of the respective owners was agreed upon between them, and each had maintained his part thereof; that this agreement was oral and had been acquiesced in by the parties and each had attempted to keep up his part of the said fence; that subsequently to the agreement and prior to the injury complained of, plaintiff orally notified the defendant that his said fence was not sufficient, and requested that he repair same and make it stock proof; that, by reason of the negligence and failure on the part of the defendant to maintain a sufficient fence on that portion of the division line allotted and assigned to him, and without any negligence on plaintiff's part, plaintiff's cattle broke through and into defendant's corn field, and ate such a quantity of corn that one of the cows died and two others were seriously injured, causing damage to the plaintiff in the sum of \$153. Defendant answered by general denial.

In the case at bar the fence between the farms had never been established by fence viewers, and portions thereof assigned to the adjacent owners, nor had a written in-

strument been executed between the parties. Code, §§ 2356 and 2361. The contract rests in parol.

[1] About the time that plaintiff purchased his farm, he had a conversation with the defendant relative to the division of the fence which measures a distance of 240 rods between the adjoining lands. The import of that conversation is an agreement that the west end should be maintained and repaired by defendant, and the east end by the plaintiff. Subsequently, when notice was given by plaintiff to defendant that plaintiff's cattle were going through the fence on the west end, defendant fixed a part of said fence, and after the cattle incident he fixed the rest of it. This may be construed as a recognition by defendant of his duty in the premises, and a jury could find that the rebuilding and repairing was done by defendant in pursuance of an agreement between the respective owners.

[2-4] A partition fence, within the purview of the statute, is:

"A fence on the line between two proprietors where there is no road, alley, or something else which would prevent the erection of such fence." *Hewitt v. Jewell*, 59 Iowa, 37, 12 N. W. 738.

A parole agreement respecting a partition fence, if executed, is valid between the parties thereto, and invokes the remedial provisions of the statute. *Nelson v. Wilson*, 157 Iowa, 80, 137 N. W. 1048; *Little v. Laubach*, 183 Iowa, 1370, 168 N. W. 155; *D'Arcy v. Miller*, 86 Ill. 102, 29 Am. Rep. 11. If the statement of principle in *De Mers v. Rohan*, 126 Iowa, 488, 102 N. W. 413, intends the contrary, it is in this particular now overruled. We are not dealing with the rights of third parties, nor is the doctrine of constructive notice involved. In the absence of express prohibition, parties may waive a statutory provision enacted for their benefit when no principle of public policy is violated.

The alleged agreement between plaintiff and defendant contemplated that the parties should maintain and erect, if necessary, an allotted partition fence, and each undertook to erect and maintain such fence (which was performed in whole by one and in part by the other), and this was done pursuant to the terms of an oral agreement. The parties thereto are bound until a revocation thereof.

The liability in this case being predicated on the negligence of defendant in failing to maintain his part of the partition fence, we must inquire what is the character and quantum of recoverable damage? Under the pleadings, negligence is the test of recovery. The function of the contract between the parties is to fix the locus in quo of the duty of each adjoining owner, and to bring each within the scope and penalty of the breach in case of default.

[5] To entitle plaintiff to relief, he must

establish that defendant was bound to keep in repair a certain portion of the division fence, that he neglected so to do, and that the injury proximately resulted from such negligence.

"The obligation and neglect to keep up the fence is of the gist of the action, the foundation of the plaintiff's claim. This is not like an action of trespass *quare clausum*; in such case the gist of the action is the breach of the plaintiff's close. * * * Here the plaintiff bases his claim upon the duty and neglect of the defendant." *Tupper v. Clark*, 43 Vt. 200.

See also *Wilder v. Stanley*, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479; *Krum and Peters v. Anthony*, 115 Pa. 431, 8 Atl. 598.

[6, 7] It is suggested that, as the statute fails to give plaintiff a specific remedy in damages under the circumstances, he must fail. If a statute prescribes a remedy for the violation of a right, the party aggrieved must pursue the statutory remedy, and as a general rule cannot resort to any other. It is not the intent of the instant statute, however, to deprive a party of any right or remedy under a common-law agreement. Independently of any statute, parties may obligate themselves by contract to maintain boundary and division fences. Secondly, inasmuch as the common law did not require adjoining owners to maintain partition fences, statutes regulating the subject are remedial, and intended to provide against existing defects in the common law, such statutes, therefore, must receive a liberal construction, both as to the extent of the change and the means of their execution, as this will more nearly effectuate the intention of the Legislature. If the statute creates a right, and fails to prescribe a remedy for the party aggrieved by the violation of such right, it will be presumed that the Legislature intended to give such party a remedy by a common-law action for a violation of his statutory right. In working out modern legal problems, we necessarily and naturally respect our historic continuity with the past, and cite precedent. Without precedent judicial chaos would exist.

Although forms of action have long ceased to exist under our procedure, the principles underlying and distinguishing the old forms respectively are still of essential importance in determining the nature of the remedy which is applicable to the particular injury. Furthermore, the abolition of the common-law forms of pleading has not changed the rules of substantive law. The forms of action for injuries arising from the neglect to maintain or repair division fences were trespass and case. Trespass was the proper form to use where the injury was a direct one. For example, where the land of A. was invaded by the cattle of B., an action in trespass would lie. However, if the injury was not direct, but consequential, trespass on the case was the proper remedy. For

example, if A. brought an action against B. because fences were down which B. was bound to repair, per quod the horses of A. escaped and were killed, the action is on the case.

Plaintiff herein quite properly sued for a consequential damage based on the negligence of the defendant in the particulars alleged in the petition. Under the statute, the construction and maintenance of a partition fence is compulsory as to the "respective owners of adjoining lands, from which each derives any revenue or benefit," "when they cannot agree upon the portion of partition fences between their lands which shall be erected and maintained by each."

This is the only distinction between the common law and the statute in relation to partition fences, except—

"if there be no partition fence, and the line thereof has not been assigned either by the fence viewers or by agreement of parties, any animal trespassing across such * * * line shall not be distrained, nor shall there be any liability therefor." Code, §§ 2355, 2361, 2313.

In other words, under the English law nothing but the ideal invisible boundary which exists in contemplation of the law bounds the owner's land and separates it from his neighbor's. This constituted his fence. This rule compelled the owner of cattle to fence them in; the neighbor is not bound to fence them out. *Fletcher v. Rylands*, L. R. 1 Ex. 265, p. 280. By early judicial interpretation this principle was held not to be applicable to conditions in this state, and domestic animals were declared to be free commoners. *Wagner v. Bissell*, 3 Iowa, 396; *Frazier v. Nortinus*, 34 Iowa, 82. This is now the statutory rule with exceptions as to certain animals. Code, §§ 2313, 2312. The respective duties of adjoining owners in the case of partition fences are the same where stock are restrained from running at large as where they are not so restrained. *Miracle Stone Co. v. Roth*, 144 Iowa, 656, 123 N. W. 346. The wisdom of Legislature in framing positive laws to answer all the purposes of justice has seldom, if ever, been found equal to the subject, and the legislation on the instant matter neither changed nor intended to change the common-law obligations arising from the agreement of the parties in the construction or maintenance of partition fences.

Under the common law, the obligation to maintain a division fence is founded on agreement or prescription, and the right to recover damages in case is clearly recognized and distinguished from trespass quare or damage feasant. Although based on precedent, the doctrine is theoretically sound.

In an early decision of the Court of Exchequer it was held that an action was maintainable against the defendant for the defective state of his fences, which by agreement he was bound to repair, per quod the plaintiff's horses escaped into the defendant's close and were there killed by the falling of a haystack. *Powell v. Salisbury*, 2 Younge & Jervis' R. 391. In another old English case plaintiff's horse escaped into the defendant's field through defects in fences which the defendant was bound to keep in repair, and was there killed by falling into a ditch. It was held that the defendant was liable for the damages. *Anon.*, 1 Ventris' R. 264.

It may be said in this connection that, if cattle escape into an adjoining field through defects in a fence, which the adjoining owner is bound to keep in repair, the latter is not justified in driving them into the highway and leaving them there. Said Lord Denman, of the Court of King's Bench:

"It is perfectly clear that the least to be expected from a party in the situation of the defendant here is that he should put back the sheep into the place in which they were before they quitted it in consequence of his neglect." *Carruthers v. Hollis*, 8 Adolph & Ell. R. 113.

In the instant case the parties intended and contemplated by their agreement to place themselves within the protection of the statute governing partition fences, and the provisions of the statute and common-law rights and remedies not inconsistent therewith must be read into the agreement.

We conclude that the petition states a cause of action, that the instructions given to the jury are not vulnerable to the exceptions saved by defendant, and that the verdict is supported by the evidence.

Wherefore the judgment entered is affirmed.

EVANS, C. J., and WEAVER and PRESTON, JJ., concur.

GRIFFIN v. CHICAGO, R. I. & P. RY. CO.
(No. 33994.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Evidence ¶588—Jury may believe witnesses, regardless of conflicting testimony.

Notwithstanding a conflict, the jury had the right to believe plaintiff's witnesses as to failure to ring bell, and keep a lookout by defendant railroad company.

2. Railroads ¶350(22)—Automobile driver's contributory negligence held for jury.

Evidence on the issue of contributory negligence of the driver of an automobile struck by a train running backward around a curve through a cut with an embankment and buildings obstructing his view, held to present a question for the jury.

Appeal from District Court, Wapello County; Seneca Cornell, Judge.

This is an action for damages resulting in personal injuries to plaintiff, growing out of a collision between a train of defendant and plaintiff's automobile. Trial to a jury. Verdict and judgment for plaintiff for \$2,000. The defendant appeals. Affirmed.

J. G. Gamble and R. L. Read, both of Des Moines, and McNett & McNett, of Ottumwa; for appellant.

J. J. Smith and M. C. Gilmore, both of Ottumwa, for appellee.

PRESTON, J. But one error is assigned, and that is that the court erred in overruling defendant's motion for a directed verdict at the close of all the testimony, and erred in submitting the case to the jury, because it appears, as appellant contends, that plaintiff was guilty of contributory negligence as matter of law. Plaintiff charged negligence in the following respects: The operation of the train backward around the curve, and over the crossing at a dangerous rate of speed, and with the view of the approaching train obstructed by high banks; failure to give signals or warning of approach of the train; having no brakeman or lookout on the car approaching the street; the signal bell was not sounded at the approach of the train; and that the train was running backwards at a rate of speed in violation of an ordinance of the city. The accident occurred about 11:30 a. m. October 19, 1917, at the intersection of Seventh street and the Rock Island tracks, in the city of Oskaloosa. It was a clear day. Plaintiff was traveling from Spirit Lake to his home at Ottumwa, accompanied by one Carter. Plaintiff was sitting in the front seat at the left, driving; Carter to his right. They passed through the city, proceeding east on Sixth avenue to Seventh street, turned south on Seventh, driving south to the point of collision. Seventh street is largely traveled. The train, or part

of a train, was composed of a box car and two cars of coal. It was backing in a westerly direction at the time of the accident. The box car was farthest west, next the two coal cars, then the engine. There is a brickyard some distance east of Seventh street, and a switch to it. The track is a single track at the Seventh street crossing. The track east of the crossing curves to the northeast through a cut. The evidence tends to show that the track is nearer the north side of the cut close to the foot of the embankment. The surface of the street slopes toward the track both north and south of it, making a dip. Plaintiff had been over this crossing before, and says that, coming from Ottumwa, from the south, a train to the east could be seen farther as one approaches from the south. He had, on prior occasions, noticed the automatic electric bell, but that it did not sound on the occasion of the accident. Plaintiff introduced evidence to the effect that the electric bell did not ring at the time of the accident, and that it had not been ringing for two or three days prior thereto. An employee for defendant testifies to the contrary, and that the signal was working properly on the morning of the accident. Going south from Sixth avenue to the railroad crossing there are obstructions to the east, an embankment, houses, and outhouses, and there were tomato vines and weeds, which were alive at the time of the accident.

[1] There is a conflict in the evidence at different points as to whether the bell was rung and whether the brakeman was on the box car, whether or not he was calling to plaintiff, and so on. The jury, of course, had the right to believe plaintiff's witnesses, notwithstanding the conflict.

[2] Arguing from the testimony of defendant's engineer, and observations taken by him, and from his plat made for the purposes of the trial, it is appellant's contention that at a point 80 feet north of the crossing the engineer could see an object 6.8 feet above the rails, and 200 feet east of the center of the crossing, the only intervening obstruction being the bank; that at a point 60 feet north of the crossing the engineer, through his transit level, could see an object 6.1 feet above the rails at a point 200 feet east of the center of the intersection, and could see an object 4.4 feet above the rails at a point 100 feet east of the intersection; from a point 40 feet north of the tracks he could see 4.9 feet above the rails, and 200 feet east of the center of the intersection, and an object 1 foot above the rails at a point 100 feet east; that at a point 25 feet north of the intersection his view to the east along the track was unobstructed. From this it is claimed by appellant that, when plaintiff was 80 feet north of the tracks, the upper half, at least, of the box car and engine was visible to him,

had he looked, but that the flat cars would not be within his view. The box car was 13 feet high from the top of the rails. It is said by counsel for appellant that there is no dispute as to the correctness of these observations, or the blueprint.

Appellee does question the correctness and accuracy of the observations, plat, and the photographs as well. The engineer, who made the blueprint and testified as to the measurements, was assisted by a rodman who did not testify; the engineer testifies that the surveyor must rely on the rodman, and that he relied on the rodman doing what he was told; they were both in the employ of the defendant. The engineer testifies that he made the original drawing November 6th, from which he later made the blueprint. He does not remember anything of the remains of a garden there. So that at the time the original drawing was made the vegetation may have been down. A difference of a foot or two in the height of the embankment because of the vegetation would make considerable difference at the angle of vision of one in the street looking east. We think the claims just referred to, made on behalf of appellant, are not entirely borne out by the testimony for plaintiff. There is a conflict in the testimony of the engineer and plaintiff's witnesses as to the height of the embankment.

Going now to plaintiff's testimony: The ordinance was introduced making it unlawful to run or move locomotive or cars at a greater rate of speed than 6 miles per hour. Witnesses testifying for plaintiff say that the cut east of Seventh street was 10 or 12 feet deep, and became deeper farther east; that the north rail of the track was not more than 3 feet from the bank; there was one dwelling house on the west side of Seventh street south of Sixth avenue, where Mrs. Daniels, an eyewitness to this accident, lived, and on the east side of the street south of the avenue there were three houses; the Tilton house is farthest south, 70 or 80 feet from the railroad, and there were sheds and coalhouses on the Tilton lot, and tomato vines a foot high and weeds on top of the embankment; the ground at the Tilton house is about 5 feet above the street, and the farther south you go the higher the embankment on the Tilton lot; Sixth avenue is about 150 feet to 200 feet from the railroad track; that when one is on the track at Seventh street, you can see west pretty good, and east quite a ways; When you are 10 feet north of the track you cannot see along the track east, that within 10 or 12 feet of the track the surface of the lot east of Seventh street is 10 or 12 feet higher than the surface of the street. Mrs. Daniels testifies:

That she witnessed the transaction from her east front porch, and that she had a front view of the railroad crossing; Tilton's house to the east, next to the track, was in the way

of a full view of a train. "When I first saw the auto it was right by my house, and I was on my front porch. I noticed them as they approached the crossing; seems as though they began to slow down to go across; after I first saw the car I stepped inside the door, picked up some rugs, and as I went out again saw the train hit the car; it was about the center of the street. I could plainly see that the train ran into the automobile; the automobile was carried west 25 or 30 feet; it fell on the west sidewalk, and seemed to roll over, and then the box car slowed down. I saw the brakeman there immediately after the accident while they were getting the fellows out. I heard him say, 'Why, I was looking after the school children,' and he said, 'I thought the people that was passing could look out for themselves.'"

Plaintiff testified that when they turned out of Sixth avenue into Seventh street they were not going very fast; 12 or 15 miles an hour; and further:

"As we came south on Seventh we looked as best we could, he (Carter) would look one way and I would look the other, and we would listen for any alarm, and not hearing anything we would approach. We heard nothing or saw nothing. I heard no bell; would say we were 15 or 20 feet from the railroad track when I first noticed the box car, when Carter hollered; about the first I knew of the box car was when Carter called out, or else my attention had just been attracted that way when he hollered. I thought we were 12 or 15 feet from the north rail when my attention was called to the box car; it was coming at me like a streak of lightning. I had looked towards the east just a second before that, I thought, and saw nothing and heard nothing. I tried to turn the car down the track west, thinking if I could get it on the side I could get away from it; could not give the auto much of a turn before I reached the track, because the box car hit me before I had time to turn it very far; the box car struck just about where I was sitting. I did not see any person on the box car that was approaching; it was onto me so fast that I did not have any time to observe anything; would judge the box car was going considerably faster than I was going; I would say 15 or 20 miles an hour; I would judge we were 75 or 100 feet north of the track when I looked east the first time. I looked east to see if I could see anything or hear anything. I looked east over the embankment all I could, but saw nothing of the train. I had not slowed up; just wanted to have the car under control; in a car like that going 12 or 15 miles an hour you can stop it pretty nearly instantly; my brakes were good; the top of the auto did not obstruct my view where I was sitting; the car was a six cylinder, and the motor not noisy."

He also testified that the only time he ever stopped for a train at that crossing was when he was going from Ottumwa to Oskaloosa, and then he heard the electric bell, and stopped his car, and the train passed; that at other times coming back from Oskaloosa he had looked the same as he did this time.

Carter gave similar testimony, and said that plaintiff seemed to have the automobile under control as they drove along the street; that witness looked in both directions and did not see any railroad car or engine, or hear any bell ringing; thinks they slowed down to about 12 miles an hour when they got within 20 or 30 feet of the track; his best judgment is that the automobile was 20 feet from the track when he first saw the railroad car coming out of the cut; saw no smoke from the locomotive; heard no whistle; the corner of plaintiff's car struck against the corner of the box car; saw no one on top of the box car. "When I first saw the car, I immediately cried out; plaintiff tried to throw the steering wheel very quickly, but there was not much change in the course in that distance."

The brakeman and another witness gave testimony contradictory at some points of the testimony of plaintiff's witnesses. It is appellant's contention, taking into consideration the physical facts, the evidence as a whole, with all lawful inferences, and applying the evidence most favorable to plaintiff, it appears without conflict that plaintiff did not exercise ordinary care in approaching the crossing, and that he was guilty of contributory negligence as a matter of law; that he failed to use his senses of sight and hearing until he had passed the danger zone; that he did not have his car under control, and so on. Counsel rely upon *Yetter v. Railway*, 182 Iowa, 1241, 166 N. W. 592; *Sturgeon v. Railway*, 187 Iowa, 645, 174 N. W. 381, 383; *Landis v. Railway*, 166 Iowa, 20, 147 N. W. 318; *Powers v. Railway*, 157 Iowa, 347, 136 N. W. 1049. *Schaefer v. Railway*, 62 Iowa, 624, 17 N. W. 893; *Anderson v. Dickinson*, 187 N. W. 572, 174 N. W. 402; *Askey v. Railway*, 101 Neb. 266, 162 N. W. 647; *Bedmer v. Railway*, 181 Iowa, 642, 162 N. W. 43. By a comparison of the facts in the cases, just cited with the facts in the instant case, they can be readily distinguished.

Every one approaching a crossing should recognize that a railroad crossing is a place of known danger, and that care proportionate to the danger must be exercised in undertaking to cross. He must do whatever is necessary, as a prudent man, under the circumstances, to protect himself. In other words, he must exercise ordinary care under the circumstances. Generally it is a question for the jury. In some cases the undisputed evidence may be so clear that it becomes matter of law. Such was the situation in the cases cited by appellant. In the *Sturgeon Case* the plaintiff did not have his car under control, and he could have seen the engine in time to stop had he looked. The undisputed evidence so shows. So it was in *Sackett v. Railway*, 187 Iowa, 994, 174 N. W. 658. In the *Landis Case* the crossing

was substantially unobstructed as the photographs in the opinion show. It is needless to refer to the other cases cited.

In the instant case we have the testimony of two men who were in the car as it approached the crossing, and the situation as it appeared to them at the time, and that the car was under control. We do not overlook the cases holding that a person may not say he looked and did not see when by looking he must have seen; but in the instant case it was for the jury to say, under the evidence, whether plaintiff did look and whether he could or did see in time, and whether he had his car under control; in other words, whether, under all the circumstances, he acted as a prudent man would under like conditions.

The case of *Williams v. Railway*, 139 Iowa, 552, 117 N. W. 956, refers to a condition where crossing gates were open, as an implied assurance of safety. In the instant case we may remark in passing that a similar circumstance is found, showing that on prior occasions when plaintiff had crossed this place there was an electric alarm sounding, which was, as the jury may have found, absent at the time of this accident. In addition he and the party with him testify that they did look and could not see in time. The evidence is not so clear that such is not the fact, or that, looking, they could see, or that plaintiff did not have his car under control, as to justify a holding that he was guilty of contributory negligence as matter of law. In *Gray v. Railway*, 143 Iowa, 268, 276, 277, 121 N. W. 1097, 1100, 1101, a person was injured at a crossing where the view of the railroad was obstructed by cuts, buildings, and trees, but the extent or completeness of such obstructions were questions of dispute in the testimony. The court, speaking through Mr. Justice Weaver, said that—

We "have no inclination to abrogate the rule * * * that a railway crossing is a known place of danger, and that the sight of the iron rails across his path is a proclamation of warning to which no prudent man will fail to give heed. * * * But having the right to use it save only when the danger of collision is so apparent that a reasonably prudent person would not take the risk, or when the circumstances are such that as a reasonably prudent person he should investigate and satisfy himself that the way is clear, and fails to exercise that precaution, it becomes in the very nature of things a question of fact whether what he does or fails to do is consistent with exercise of reasonable care on his part. This is always a jury question, save in those exceptional cases where the facts are so clear and undisputed that all reasonable minds must reach a like conclusion thereon."

The first part of this quotation is now cited as not out of harmony with the instant case. The other part of the quotation is cited by appellee with numerous other cases,

as holding that the question of contributory negligence is one for the jury, except in the exceptional cases referred to. Appellee cites *Barrett v. Railway*, 180 N. W. 870, and cases therein cited, as in point, and to sustain their proposition that, under the evidence in the instant case, there was a jury question as to whether or not plaintiff was guilty of contributory negligence.

The opinion is already too long, and we shall not go into a further discussion of the cases. We are of opinion that there was a jury question here, and that the evidence sustains the finding of the jury. The judgment is therefore affirmed.

Affirmed.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

STUART et al. v. WHITE. (No. 33975.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Compromise and settlement §11—Universally favored.

Compromise and settlement of claims and suits based thereon are universally favored.

2. Compromise and settlement §6(4)—Settlement of disputed claims upheld, though claims not valid or enforceable.

Settlement of disputed claims based upon valid consideration will be upheld, though the claim may not be valid or enforceable at law or in equity.

3. Partnership §344—Stipulation entered on judgment docket held final settlement of interests of partners in assets and business of copartnership excepting patent rights.

Stipulation made and entered on the judgment docket in partner's action against copartner for accounting, whereby it was agreed "as a compromise and settlement of this suit" that defendant "hereby sells to" plaintiffs "all of his interests in the assets and business of the copartnership" excepting certain patent rights, for a specified sum, and that "the interest, if any, of all the parties to this suit, are not adjudicated or prejudiced by this settlement," held a final adjudication of the interests of the partners in the assets and business of the copartnership, excepting the patents; the provision as to the interests of the parties not being adjudicated, having reference merely to the patent rights.

4. Partnership §344—Partners retaining benefits of settlement entered on judgment docket made after examination of books could not recover amount shown by books to have been appropriated by copartner.

Where the books of a copartnership, brought into court for examination by partners suing copartner for accounting prior to final settlement as to the interests of the partners in the assets and business of the company,

showed that defendant partner had appropriated a certain sum as compensation for the use of a patent, the plaintiffs, having retained the benefits of settlement which was entered on judgment docket could not in a subsequent action against a copartner recover a portion of the amount so appropriated, on the ground that the copartner fraudulently concealed appropriation from them.

De Graff and Faville, JJ., dissenting.

Appeal from District Court, Linn County; John T. Moffit, Judge.

Action in equity for an accounting. Decree and judgment as prayed. Defendant appeals. Reversed.

Crissman & Linville, of Cedar Rapids, for appellant.

F. L. Anderson, of Marion, for appellees.

STEVENS, J. In December, 1911, the parties to this suit entered into an oral agreement for the formation of a copartnership at Cedar Rapids, Iowa, to be known as the Handy Sack Baler Company, for the manufacture and sale of a cement sack baler. The agreement provided that each of the partners would contribute equally to the capital of the business, without designating an amount, and that they would share the profits and losses in the same proportion.

The original device for baling sacks was the joint invention of the plaintiff Stuart and the defendant White, and the patent was issued in their joint names. The defendant, however, later invented an improvement, and obtained a patent thereon in his own name. The nature of the baling device patented in the name of Stuart and White, and of the improvement patented in the name of the defendant, is not material.

This action was brought for an accounting, and to compel the defendant to turn over to the plaintiffs two-thirds of the aggregate sum of \$1,903.13, which plaintiffs allege the defendant wrongfully appropriated to his own use from the assets of the copartnership, as follows: October 31, 1917, \$1,550.60; December 31, 1917, \$329.13; February 28, 1918, \$23.40.

The answer of the defendant admits the receipt of the above sums on the dates stated, but alleges that, by a modification of the partnership agreement, and the acts and conduct of the partners in the management and transaction of the partnership business, he became the owner of, and entitled to, one-half of the assets and profits thereof, and that the above sums were appropriated by him in payment of a royalty for the use, by the copartnership, of the improvement patented by him and used in the manufacture of the baler.

The court below found that the defendant

should account to the plaintiffs for two-thirds of the amount claimed, and judgment for \$1,266, with interest from the date of the filing of the petition, was entered against him therefor.

More than a year before the commencement of this action, plaintiffs, appellees herein, instituted a suit against the defendant, appellant herein, in the superior court of Cedar Rapids, Iowa, for an accounting of the business and assets of the copartnership, alleging in their petition that the defendant therein was claiming a one-half interest in the assets and profits of the concern instead of one-third, to which he was entitled under the oral contract of partnership, and praying that he be required to account to the plaintiffs for two-thirds of the assets and profits of the business, and that the patent issues to him upon the improvement referred to above be decreed to be the property of the copartnership. The ground upon which this relief was sought was that the parties, at the time of forming the copartnership, had agreed that defendant, who was possessed of inventive genius and who was to manufacture the baler, should be paid a salary of from \$3.50 per day to \$150 per month, and that during his employment he was to perfect the baler for the benefit of the firm, and that whatever improvement he made thereon would be for the benefit of the copartnership. The issue as to the ownership of the patent taken out on the improvement in the name of White and of the alleged equitable ownership thereof by the copartnership was, upon motion of the defendant, stricken by the court upon the ground that it was without jurisdiction to pass upon, or decide, the same.

On May 18, 1918, the day on which the suit in the superior court was assigned for trial, the parties entered into a stipulation in writing for the compromise and settlement thereof, as follows:

"It is hereby agreed and stipulated, as a compromise and settlement of this suit, as follows:

"Mr. T. G. White hereby sells to L. B. Stuart and J. C. Fulkerson all of his interests in the assets and business of the copartnership of the Handy Sack Baler Company, for the sum of one thousand dollars (\$1,000.00), excepting that the said White does not sell or convey any interest which he owns in the U. S. patents No. 1,130,780 and 1,042,544. And any other patent right. The interests, if any, of all the parties to this suit are not adjudicated or prejudiced by this settlement.

"Each of the parties to this suit to pay one-third of the court costs."

The defendant in the present action set up this compromise and settlement as a defense to plaintiffs' cause of action. By way of amendment to their petition, plaintiffs in this action allege that on the day the stipulation referred to above was entered into, the de-

fendant in the action in the superior court designedly and fraudulently and for the purpose of deceiving plaintiffs wrongfully withheld from them any information pertaining to the withdrawal from the assets of the copartnership, of the several sums of money in controversy, and that the said sums were, in fact, the property and a part of the assets of the copartnership. Other issues are involved in the present controversy, but, in view of the conclusion hereinafter announced, it is unnecessary to refer further thereto. Counsel have ably discussed the case upon its merits; but as, in our opinion, the stipulation entered into on May 18, 1918, for the purpose of compromising and settling the action then pending in the superior court is vital and controlling, we make no further reference thereto. Upon the question of the merits of defendant's claim to compensation for the use of the patented improvement and to the ownership of one-half of the assets and profits of the copartnership, we express no opinion, further than to say that the record discloses an apparent good-faith controversy between the parties as to these matters.

[1, 2] The compromise and settlement of disputed claims and suits based thereon are universally favored (*Owens v. Coal Co.*, 157 Iowa, 389, 138 N. W. 488; *McIsaac v. McMurray*, 77 N. H. 466, 93 Atl. 115, L. R. A. 1916B, 769, and when entered into upon a valid consideration will be upheld by the courts, although the claim may not be a valid one or enforceable at law or in equity (*Keefe v. Vogle*, 36 Iowa, 87; *Greenlee v. Mosnat*, 116 Iowa, 535, 90 N. W. 338; *Rowe v. Barnes*, 101 Iowa, 302, 70 N. W. 197; *Logsdon v. Moffitt*, 159 N. W. 182; *Cantonwine v. Bosch Bros.*, 148 Iowa, 496, 127 N. W. 657; *McIsaac v. McMurray*, supra).

[3] Plaintiffs do not ask that the stipulation compromising and settling the action for an accounting in the superior court be set aside and the status previously existing restored, but seek to retain whatever benefit or advantage accrued to them thereby, and to further compel the payment by the defendant of two-thirds of the amount in controversy. The record before us shows that the stipulation was signed, filed, and entered in full upon the judgment docket and its terms fully carried out and executed by the parties. Neither argument nor the citation of authority is necessary to sustain the contention of counsel for appellees that the compromise and settlement is conclusive and binding upon all of the parties according to its terms and provisions. The only issue presented by the record at the time of the settlement was that of an accounting, and this included all the claims of both parties. The expressed purpose of the stipulation was "the compromise and settlement of this suit"—that is, the action then pending in the superior

court. The effect thereof was to compromise and settle all matters involved in that litigation unless the provision therein that "the interests, if any, of all the parties to this suit are not adjudicated or prejudiced by that settlement," shall be construed as an expression of an intention to the contrary, or appellees have shown themselves entitled to relief upon the ground of fraud. It is too manifest for argument that the parties intended the stipulation to be a final settlement and adjudication of their interest in the assets and business of the copartnership, except the patents.

The fact that the defendant agreed to sell and convey all his interest in the business and assets of the company to plaintiffs, and that they agreed to, and did, pay him the sum of \$1,000 therefor, is sufficient upon this point. The specific exception mentioned in the stipulation related to the interest of the respective parties in and to the patents, and it seems to us the provision that "the interest, if any, of all the parties to this suit are not adjudicated or prejudiced by this settlement," following the reference therein to the patents, must be held to refer thereto and not to the compromise and settlement of the interest of the parties in the assets and business of the concern.

But it is also argued by counsel for appellees that, as the sums in controversy were legally a part of the assets of the copartnership and had been wrongfully appropriated by appellant, title thereto passed, by the terms of the stipulation, to plaintiffs. Appellees do not, however, in their petition, claim more than a two-thirds interest therein, and it is obvious, from a review of the evidence, that appellant did intend, by the terms of the stipulation, to sell or transfer the money that had been already appropriated by him as compensation for the use of the patent to the plaintiffs, and that they did not so understand the agreement. While not mentioned or referred to in the pleadings filed in that case, White, prior to May 18th, charged the copartnership, upon both the daybook and ledger of the copartnership, with the items in controversy and credited himself therewith.

[4] The fraud charged by plaintiffs on the part of the defendant is that he designedly and wrongfully concealed from them the fact that he asserted a claim to compensation for the use of the patent, as well as the fact that he had already paid himself therefor out of the funds of the company. Appellees testified that they did not know either of White's claim to a royalty, or that he had paid same to himself, until about 30 days after the compromise and settlement was entered into. The record, however, shows a conflict in the evidence as to just what information they had. The defendant testified that he told both of the plaintiffs that he expected a royal-

ty on his patent, but he does not claim that he orally informed them that he had paid himself any part thereof out of funds of the company. The books of the copartnership, which were kept by White, together with an invoice and statement of the assets, liabilities, and expenses of the copartnership, were brought into court for the examination and use of plaintiffs on the day thereof and before the stipulation was signed. The separate expense account furnished by the defendant did not show the specified items in controversy or that a sum had been appropriated as compensation for the use of the patent, but the entries upon both the daybook and ledger were full and complete and showed that fact. Plaintiffs further testified that they inquired of the defendant as to what had become of certain money amounting to about \$2,400, belonging to the company, that had come into his possession, and that he replied that same had been expended for various purposes, not, however, including in the items mentioned the charge for royalty. It is not, however, claimed by appellees that any untruthful statements were made to them by appellant. If, therefore, appellees were induced to enter into the stipulation by fraud upon the part of appellant, it must have consisted of his failure to mention his claim for royalty, or the payment thereof out of the funds of the copartnership. Appellees knew exactly what the assets of the company otherwise consisted of, and received all that was openly agreed on between the parties. The books were in court for the inspection of appellees, and the evidence tends to show that they, in fact, made an inspection thereof prior to May 18th and after the item of October 31, 1917, had been entered thereon. As stated, the record discloses that there was a good-faith controversy between the parties; that the settlement and compromise entered into was fully carried out. It would be manifestly inequitable to permit the plaintiffs in this action to retain all of the benefits and advantages of the settlement, and at the same time recover two-thirds of the amount then claimed by White and in his possession. Whether the facts disclosed would entitle plaintiffs to have the compromise and settlement set aside and the status previously existing restored, or not, we are not called upon to decide. The evidence tends to show that the value of the assets of the copartnership referred to in the invoice and turned over to appellees at the time the stipulation was signed was somewhat in excess of \$3,000. On the basis of the defendant's claim to one-half thereof, it is apparent that he made some concession in the settlement, and that the \$1,000 paid to him represented less than the probable value of his interest thereon.

It is our conclusion that the compromise and settlement entered into and carried out

between the parties is final and binding until set aside, and that appellees are not entitled to recover any portion of the amount in controversy from the defendant in this action.

It follows that the decree and judgment of the court below must therefore be, and is, reversed.

EVANS, C. J., and PRESTON, ARTHUR, and WEAVER, JJ., concur.

DE GRAFF and FAVILLE, JJ., dissenting.

DOWD v. SCALLY. (No. 32936.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Wills §634(10)—Devise of remainder, after life estate, to children, with share of deceased child to her issue, held to vest only half interest in surviving son on death of life tenant, though children of deceased sister died intestate prior thereto.

Under a will bequeathing a life estate to testator's widow, with the remainder in equal shares to his son and daughter, or the whole to the survivor if either died without issue, but providing that, if either died leaving issue, the "child or children shall take," on the death of the widow, "the same as would my said child if then living," where the daughter and then her children died before the widow, the son acquired, on the latter's death, only half interest in the estate, whether the daughter's interest was contingent or vested, her share in either case vesting in her issue, not as her heirs, but as devisees under the will, immediately on her death, before or after the termination of the life estate, and, on their death, though they also predeceased the life tenant, their interest passed by inheritance to their father as their only heir at law.

2. Wills §634(15) — "On the death of my wife" and "at the death of my wife" denote time or event on which remaindermen come into possession, not time remainder vests.

"On the death of my wife," "at the death of my wife," and like expressions in wills creating life estates denote the time or event on which remaindermen come into the right of possession and enjoyment, and do not control the time when the remainder vests.

De Graff and Stevens, JJ., dissenting.

Appeal from District Court, Webster County; H. E. Fry, Judge.

Suit in equity to determine and quiet title to real estate. Demurrer to petition overruled, and defendant appeals. Affirmed.

For former opinion, see 174 N. W. 938.

Healy & Breen and Kelleher, Hanson & Mitchell, all of Ft. Dodge, for appellant.

Healy, Thomas & Healy, of Ft. Dodge, for appellee.

WEAVER, J. The petition states the following facts: Patrick Scally, a resident of Webster county, died testate May 12, 1897, survived by his wife, Rose Scally, and two children, Mary Dowd (the wife of P. M. Dowd, plaintiff herein) and Thomas Scally, the defendant. At his death Patrick Scally, in addition to certain personal estate, was the owner of real property consisting of three town lots in Ft. Dodge and 280 acres of farm land. His will, which has been duly probated, gives to his wife in her own right and in lieu of dower certain town lots and all his personal property. Following these provisions is the third paragraph of the will, upon the construction and legal effect of which the decision of this case depends. We quote its language as found in the record, as follows:

"Third. I hereby give, devise and bequeath unto my son Thomas Scally and my daughter Mary Scally, share and share alike, all of real estate of which I may die possessed in which in this will I bequeath to my wife a life estate and life interest to be and become theirs in fee simple upon the death of my said wife. Should one of my said children die without lawful issue before my said wife's death then and in such case the survivors of my said children shall upon my said wife's death become the owner in fee simple of said real estate. Should either of my said children die leaving lawful issue then the child or children should take and inherit on the death of my said wife the same as would my said child if then living."

The property involved in this litigation is the real estate devised to the wife for life, with the remainder over to testator's said son and daughter. The dispute arises in the following manner: On August 28, 1910, the life tenant still living, the daughter, Mary Dowd, devisee in remainder of the one-half of said property, died intestate, survived by her husband, plaintiff herein, and by two children, Rose Mary Dowd and Harold Dowd, her only heirs at law. Thereafter, in February, 1912, both Rose Mary Dowd and Harold Dowd died intestate and unmarried, leaving their father, plaintiff herein, their only heir at law.

Thereafter, in August, 1916, Rose Scally, the life tenant, died testate, making the defendant, Thomas Scally, the principal beneficiary of her estate.

The plaintiff, surviving husband of Mary, daughter of Patrick Scally, and only heir at law of their deceased children, Rose Mary Dowd and Harold Dowd, claims to be the owner of an equal one-half of the farm of which Patrick died seized. The defendant, Thomas Scally, son of Patrick, asserts an undivided ownership of the entire farm in himself. Both trace their claim of title to a common source, the will of Patrick Scally, the material part of which is above quoted. The proper construction and effect

of this testamentary language is the question presented by this appeal.

I. Upon the facts admitted by the demurrer, the trial court sustained the plaintiff's claim of title to the undivided half of the property. The appellant challenges this conclusion on the theory that the will creates no vested remainder in either Thomas or Mary, but that such remainder was wholly contingent upon the event that Thomas and Mary should outlive the life tenant and, as Thomas alone survived the tenant, he alone succeeded to the entire fee. As an alternative proposition, appellant further contends that, even assuming the remainder over to Thomas and Mary was vested on the death of Patrick, it was yet defeasible, and that the death of Mary and her children before the lapse of the life estate had the effect to extinguish her right in the premises and leave Thomas the sole remainderman. On the original submission of the appeal the argument was largely confined to the question whether the remainder over to Thomas and Mary was vested or contingent, and an opinion was handed down affirming the vested character of such interest and sustaining the ruling of the trial court. A petition for rehearing was granted, and further arguments have been made by both parties. On reconsideration we are of the opinion that a settlement of the vexed question of the proper distinction between vested and contingent remainders is not necessarily involved in the case, and we refrain from entering again upon that discussion, believing, as we do, that whether as a technical proposition the devise to Thomas and Mary be vested or contingent, the result in this case must be the same.

[1] Looking to the express terms of the devise, it is seen that, subject to the widow's life estate, the land is given to the testator's two children, Thomas and Mary, in equal shares. There is in the will no provision by which either Thomas or Mary should in any event become entitled to more than the equal one-half of the property, save only the event of the death of one of them without lawful issue before the expiration of the life estate. That contingency did not occur. Thomas survived the life tenant. Mary died before the life tenant, but left lawful issue in the persons of Rose Mary Dowd and Harold Dowd. Where then and how did Thomas under the will of his father acquire anything more than the equal half interest which the plaintiff concedes to him? This objection to the appellant's claim can be avoided only by holding that the words "leaving lawful issue" are to be construed and given effect as if the testator had used the expression "leaving lawful issue who shall be living at the death of the life tenant." But this the testator did not say, either in terms or by implication; and it is not within the prov-

ince of the court to thus narrow or restrict the effect of his language. To do so is to make for the testator a will which he did not make for himself. It is sought in argument for appellant to give some such effect to the concluding clause of the devise, which reads:

"Should either of my children die leaving lawful issue, the child or children should take and inherit on the death of my wife the same as would my said child if then living."

The language is perhaps not a model of clearness; yet it is not open to reasonable doubt that the words "the child or children shall take" have reference to the "issue" who may survive a deceased child of the testator dying in the lifetime of the widow. There is not a word or expression in this clause indicating that it was made for the benefit of either Thomas or Mary, but is rather a provision for the benefit and protection of their children if either or both should die leaving issue before the death of the life tenant. It is not a devise of anything to either Thomas or Mary, directly or indirectly. It is more in the nature of a typical executory devise (book 2, Blackstone's Commentaries, p. 173) to become effective in favor of a grandchild or grandchildren of the testator in the event of their becoming orphaned under the conditions mentioned. So construed, it becomes immaterial whether Mary's interest under the will was contingent or was vested, subject to divestment or defeasance by her own death pending the life estate; for, whatever be the technical character of her interest, it was made subject to the executory provision for the benefit of her issue, and the estate so created vested in such issue immediately upon her death. They did not take through her as her heirs, but directly from Patrick Scally as devisees under his will.

If the death of Mary's children is to operate in some manner to entitle Thomas to all the property, of which he was expressly devised but one-half, it must be because of something in the will itself clearly indicating such intent on part of the testator. As we have already pointed out, it is not to be found in the first or second clause of the devise, which in unmistakable terms limits the share of Thomas to the equal one-half of the property and provides for its enlargement beyond such share only upon the death of Mary without lawful issue pending the life estate of the widow; a condition which did not occur and can now never occur. There is nothing more in the will affecting the devise except the final clause, which, as we have seen, is a provision for the benefit of the issue of a deceased child of the testator, a provision which by no possible construction can be said to enlarge or increase

the rights acquired by Thomas under the first clause.

The will makes no attempt to control the descent of the property beyond the issue of Thomas or Mary if either of them shall die pending the life estate. It provides no condition subsequent whereby, if the line of descent from the issue of one of them be broken, the estate shall pass to the other. Indeed, it would seem as if the will was framed with careful purpose to avoid such result.

II. An argument to the contrary by the appellant is predicated upon the expression in the final clause "the same as would my said child if then living." If we understand counsel at this point, it is that, as Mary's remainder could ripen into a right of possession and enjoyment only by her outliving the life tenant, it follows that the right to which her children succeeded upon her death was of "the same" character and subject to "the same" limitations, and, as they died before the life tenant, whatever right or interest they had was thereby extinguished. Let us suppose for the moment that the point is well made; in what manner does it strengthen the position of Thomas? If well made, it would, of course, affect the strength of the plaintiff's claim of title, but without in the least adding force or strength to the claim of Thomas. But the meaning which the appellant seeks to extract from the quoted words is forced and unnatural. That language is used by the testator to describe or indicate the character and measure of the devise he is making for the benefit of the orphaned issue of a deceased devisee. It is to be "the same" as his deceased child would have had if "then living" at the death of the life tenant. We have then only to remember what would have been Mary's right and interest under the will had she been living at the termination of the life tenancy, and, that being known, we shall have found the exact measure of the devise from Patrick Scally to Mary's issue. Had Mary been "then living" at the death of the widow, her title and right of possession and enjoyment of the one-half of the land would have instantly matured, and this would be equally true whether her remainder under the will was as a legal proposition vested or contingent. It follows, then, that, measured by the standard which the will itself prescribes, the devise to Mary's issue, Rose Mary Dowd and Harold Dowd, was of an estate which would ripen into a like right of title and possession at the falling in of the life estate. Such devise was not conditioned upon their survival of the life tenant and became vested in them immediately upon the death of Mary. The death of these executory devisees after the devise had thus become effective did not affect the character or quality of the estate so vested in them,

even though they predeceased the life tenant. Such estate was heritable and upon their death intestate it passed by inheritance to their father, the plaintiff. See *Ackless v. Seekright*, Breese (1 Ill.) 76; *Barnitz v. Casey*, 7 Cranch, 456, 3 L. Ed. 403; *Garrison v. Hill*, 79 Md. 75, 28 Atl. 1062, 47 Am. St. Rep. 363.

[2] III. Though not very urgently argued, some stress is laid by appellant upon the testamentary phrases "on the death of my wife" and "at the death of my wife" as tending to support the conclusion that the remainders created by the will did not vest until the termination of the life estate. For reasons already stated, we think it unnecessary to enter upon this discussion, except to say it is quite uniformly held that these and like expressions in wills creating a life estate denote the time or event upon which remaindermen come into the right of possession and enjoyment, and do not of themselves control the time when the remainder vests. *Haviland v. Haviland*, 130 Iowa, 611, 105 N. W. 354, 5 L. R. A. (N. S.) 281; *Shaffer v. Tereso*, 133 Iowa, 342, 110 N. W. 846; *Lingo v. Smith*, 174 Iowa, 461, 156 N. W. 402; *Atchison v. Francis*, 182 Iowa, 87, 165 N. W. 587, L. R. A. 1918E, 1087; *In re Ritzman*, 190 Pac. 783.

The trial court did not err in overruling the defendant's demurrer to the plaintiff's petition, and the decree rendered upon such ruling is affirmed.

EVANS, C. J., and PRESTON and ARTHUR, JJ., concur.

DE GRAFF, J. (dissenting). This appeal involves the construction of the will of Patrick Scally, deceased. A demurrer to the petition was filed by the defendant and overruled by the court. Defendant having elected to stand on the ruling, decree was entered in favor of the plaintiff adjudging him to be the absolute owner in fee simple in an undivided one-half interest to certain real estate in the city of Ft. Dodge and to 280 acres of Iowa farm land.

Omitting the formal parts, the Scally will reads as follows:

"Second. I hereby give, devise and bequeath unto my wife Rose Scally, the east half of lot No. 3 in block No. 15 in the original town of Ft. Dodge in Webster county, Iowa, and all of the personal property of which I shall die possessed, and I also give, devise and bequeath unto my said wife a life estate and interest in all the other real estate that I may own or possess at the time of my death and she shall have the use and rentals of said real estate during her life time, and shall have the right to mine coal upon said real estate and remove the same therefrom, and to exercise full control of said real estate and she shall pay all legal taxes levied upon or assessed against said real estate during her life. The above and foregoing provision for my wife is in lieu of dower.

(184 N.W.)

"Third. I hereby give, devise and bequeath unto my son Thomas Scally and my daughter Mary Scally, share and share alike, all of real estate of which I may die possessed in which in this will I bequeath to my wife a life estate and life interest to be and become theirs in fee simple upon the death of my said wife. Should one of my said children die without lawful issue before my said wife's death then and in such case the survivor of my said children shall upon my said wife's death become the owner in fee simple of said real estate. Should either of my said children die leaving lawful issue then the child or children should take and inherit on the death of my said wife the same as would my said child if then living."

A will should be read with an eye single on the intention of the testator, and, if that intention is expressed with reasonable clearness, canons of construction are not necessary to be invoked or applied. At the very outset there is little occasion to use the artillery fire of rules of construction to remove legal entanglements in the instant case, since the road of interpretation is open and free from barriers which frequently cause a court to hesitate in its progress toward a correct conclusion.

With this thought in mind, it is unnecessary to wander through the labyrinth of judicial precedent, and perchance, become lost in attempting to differentiate the rules of law defining and governing the subject of vested and contingent remainders. This might lead to confusion worse confounded. The distinctions understood, but not always correctly applied, need not find elaborate discussion in this dissent. Therefore it is not necessary to invoke the learning of Coke, Littleton, or Fearne to discover the polestar for judicial guidance in construing the kind of remainder which the testator, Scally, created in his will, his intent being reasonably plain.

The will in question was executed February 24, 1891. The testator died May 12, 1897. At the time of the making of the will the house of Scally consisted of Rose Scally, his wife, and his two children, Mary and Thomas. Mary died in August, 1910, and her two children in 1912. The widow died in August, 1916.

The primary question is: Were the two grandchildren of the testator at their death indefeasibly seized of an interest through their deceased mother in the property which Patrick Scally devised, so that a title inured to the plaintiff, the father of said children?

If the remainder over after the termination of the life estate in the widow, Rose Scally, is viewed as a vested remainder, then plaintiff's claimed interests attach. If the remainder over is contingent or executory, then no interests attach, and the decree entered by the trial court must be reversed.

The contingencies which the testator had in mind under the third clause of his will

are: (1) That survivorship of both of his children, Thomas Scally and Mary Scally, at the time of the death of the testator's wife, who was seized of the prior particular estate for life; (2) the survivorship of Thomas Scally at the time of the death of testator's wife, and the prior death of Mary Scally and any issue born to her; (3) The survivorship of Mary Scally at the time of the death of testator's wife, and the prior death of Thomas Scally and any issue born to him; (4) the survivorship of Thomas Scally at the death of the testator's wife, and the prior death of Mary Scally leaving issue who survived testator's wife; (5) the survivorship of Mary Scally at the death of testator's wife, and the prior death of Thomas Scally leaving issue who survived testator's wife.

These contingencies were each and all dependent upon the question of survivorship "upon the death of my (testator's) said wife."

It is beyond question that the language of the will with respect to either his children or his grandchildren in relation to the remainder interest means that the title and estate accrue upon the death of the testator's wife. Having in mind the time of death for the various parties in interest, the children of plaintiff-appellee were given nothing except upon a contingency which did not occur.

A contingent remainder passes no present interest and is limited to take effect either to a dubious and uncertain person or persons or upon a dubious and uncertain event. The prior particular estate may by chance be determined and the remainder never take effect. The condition may be precedent or subsequent. In the former the remainder cannot vest until that which is contingent has happened and thereby becomes certain. In the latter the estate vests immediately subject to be defeated by the happening of a condition. It may not be said, however, under the provisions of this will, that an indefeasible remainder interest vested in any child of the testator or the issue of any child of the testator, unless such child or issue of such child was alive when the testator's widow died. Neither may it be said that there was a defeasible estate up until the birth of children to Mary Scally and a higher quality of estate after the birth of children. The daughter, Mary, had exactly the same quality and character of interest under this will before her children were born as she had after their birth. It is the same as though the testator had said:

"It is my will that children of my children (in case either of my children die) shall have the same rights and only the same rights as their parent would have had under this will, and their right to take shall be measured by the same rules and limitations as the terms of this, my will, measure and control the right of my own children to take."

It is the uncertainty of the right which renders a remainder contingent, not the uncertainty of actual enjoyment. A contingent remainder happens when either the person to whom or the event upon which the future estate is to be enjoyed is at present uncertain.

It is the actual intent of the testator that we are seeking to find and to declare. The time fixed and actually meant by the testator, Scally, is reasonably clear on the face of the will, and we cannot permit any contradiction thereof by the presumption of a different intent under any canon of construction. Neither Mary nor Thomas Scally could prior to the death of their mother die seized of the remainder interest in this property. The language of the will does not postpone merely the enjoyment of the estate, but also the "ownership" and the "taking and inheriting" of the interest which the will provided they should acquire. The interest devised was "to be and become theirs in fee simple upon the death of my said wife," and "should one * * * die * * * before my said wife's death then * * * the children * * * take and inherit on the death of my said wife the same as would my said child if then living." The husband of Mary took nothing unless his children were seized at time of their death. This is not an executory devise. There was a defined limitation—a life estate—that constituted a prior particular estate. This estate came to a natural termination. It could not be hastened nor could it end in any other way. If the limitation over be named an executory devise, then it must take effect in derogation of the prior limitation. This did not and could not happen. Mary's death did not accelerate the estate. It was contingent in her, and upon her death her remainder interest terminated. Her children took nothing from her at her death, and it was only upon the contingency that the children were living at the termination of the testator's widow's life estate that they would ever enjoy or become vested; for the plain language of the will expressing the clear intent of the testator is that "the children should take and inherit on the death of my said wife."

The position of Thomas is doubly fortified. If it may be said that the will fails to give him the one-half of the estate in question, then he takes the one-half as the sole and only heir at law for the reason that the attempted disposition of this portion of the estate failed on the nonhappening of the contingency named. It is the plain intent, however, that Thomas should take all, if Mary died before the life estate ended or if she left no issue living when the life estate in the widow terminated.

Three primary rules govern remainders: First, there must be a prior particular estate created; second, the remainder must com-

mence or pass out of the grantor at the time of the creation of the prior particular estate; third, the remainder must vest in the grantee during the continuance of the particular estate or eo instanti of its termination.

The doctrine of contingent remainders depends chiefly on the third rule stated. The prior particular estate and the remainder are one estate in law. It is a unit of estate, and they must both subsist and be in esse at one and the same time, either during the continuance of the particular estate or at the very instant when the particular estate ends.

In the instant case testator's "said children" would, "if then living" ("then" referring to the death of the life tenant), "take and inherit" only at that time and not at a prior time; that is, not at the time of testator's death. In other words, to view the remainder as vested, it must vest either at the time that the prior particular estate commenced, to wit, at the time of the death of testator, or during the continuance of the prior particular estate, and not later than the very instant of its termination, which would be at the time of the life tenant's (widow's) death.

The testator clearly had the right to give expression in his will to any intention he desired. The words "before my said wife's death" cannot by any possibility be construed to mean "before my death." The express purpose and intent is predicated on these hypotheses: If the testator's two children survive the life tenant, the remainder should vest in them. This did not happen. If one child should die prior to the death of the life tenant and left living issue at the time of the death of the life tenant, such issue should have the same quality and quantity of estate that the deceased parent would have had if living at the time of death of the life tenant. This did not happen. If one child only was living at the death of the life tenant, the whole remainder should vest in the survivor. This did happen.

It has been held that in the construction of a will the court must not seek any particular construction that may be determinative of the rights of parties by the meaning of words used by the testator in a will, but it should be measured by the same rules that apply to contracts. *Mulliken v. Earnshaw*, 209 Pa. 226, 58 Atl. 286. After stating this doctrine, the opinion reads:

"No child takes a vested interest because until the happening of the contingency prescribed, the death of the widow, it cannot appear that he will be in the class to whom the devise is made, to wit, those then living, and if he should die before then, leaving issue, such issue would claim directly in their own right under the terms of the will. That this was the time actually meant by the testator is so clear on the face of the will that it would not admit of contradiction by the presumption of a different intent under any rule of construction."

All the terms of the instant will focus and gravitate around the words "upon the death of my said wife," and that date is the date when, and only when, the beneficiaries of the gift could be determined.

To acquire the title to an estate is to receive an estate in land from another person by virtue of some species of title, and we have no hesitation in saying that the testator used the words "take and inherit" in the sense of "acquire."

Clearly the estate did not pass to the remaindermen at testator's death, and it was not certain to whom it would pass at the time of his wife's death. No one knew at his death who would "take and inherit" or acquire the ownership. Issue of children in taking the parent's legacy must take on the same contingency as the parent would have taken it. In *re Cascaden's Estate*, 153 Pa. 170, 25 Atl. 1075.

The time to which words of survivorship refer primarily determines the character of the remainder; that is, whether vested or contingent. The time may be the death of the testator or the death of the life tenant or some other point of time. The intention of the testator controls.

If a doubtful construction arises the time will be construed as referring to the death of the testator. It is perfectly clear, however, in the Scally will that survivorship refers to the death of the tenant or owner of the particular estate. The final vesting free from any condition that would defeat the remainder cannot be determined in this case until the death of the life tenant, and it seems to us that this point is decisive in this controversy.

No inheritable estate in remainder was vested in either Thomas or Mary Scally or in Rose or Harold Dowd until the death of the owner of the prior particular estate, and the vesting at that time was conditioned upon survival. This condition was as operative in respect to the children of Mary as to Mary herself, as the plain language of the will is that such children only take "on the death of my said wife the same as would my said children, if then living." See in *re O'Donnell's Estate*, 252 Pa. 45, 97 Atl. 182; *Smith v. Chester et al.*, 272 Ill. 428, 112 N. E. 325, Ann. Cas. 1917A, 925; *Fraser v. Scranton Gas & Water Co.*, 249 Pa. 570, 95 Atl. 256; *Belding v. Parsons*, 258 Ill. 422, 101 N. E. 570; *Barr v. Gardner*, 259 Ill. 258, 102 N. E. 287; *Cummings v. Hamilton*, 220 Ill. 480, 77 N. E. 264; *Sanger v. Bourke*, 209 Mass. 481, 95 N. E. 894; *Brechtbell v. Wilson*, 228 Ill. 502, 81 N. E. 1094; *Kenwood Trust & Savings Bank v. Palmer*, 285 Ill. 552, 121 N. E. 186; *Hull v. Ensinger*, 257 Ill. 160, 100 N. E. 513; 20 Am. & Eng. Enc. of Law (1st Ed.) 841; 2 Washburn, Real Property (3d

Ed.) 507; *Underhill's Law of Wills*, vol. 1, p. 482; *Baker v. Hibbs*, 167 Iowa, 174, 149 N. W. 85; *Horner v. Haase*, 177 Iowa, 115, 158 N. W. 548; *Bladt et al. v. Bladt*, 181 N. W. 765.

In the instant case, as in the *Horner Case*, supra, it may be said that only upon the happening of the event (the death of the life tenant) may it be known who are entitled to share in the testator's bounty.

The point which determines the vesting is not whether the time is annexed to the gift, but whether it is annexed to the substance of the gift as a condition precedent. A remainder is vested when it is subject to no condition precedent, and is always ready, during its continuance, to come into possession of a certain person, already existing and ascertained on the termination of the prior particular estate. A remainder not so ready is contingent. I would reverse.

STEVENS, J., concurs in the dissent.

MANSKA v. SAN BENITO LAND CO. (No. 34023.)

(Supreme Court of Iowa. Sept. 30, 1921.)

Trial $\S$ 177—Jury not waived by each party moving for directed verdict.

Motion by each party for a directed verdict, without more, does not waive a jury and authorize the court to decide a controverted question of fact, as a matter of law, where otherwise the case would be for the jury.

Appeal from District Court, Monona County; Geo. Jepson, Judge.

Action at law to recover commission alleged to have been earned by plaintiff as defendant's agent in the sale of land. There was a directed verdict for plaintiff, and defendant appeals. Reversed.

Zumbrunn & Meyer, of Kansas City, Mo., and Miles W. Newby, of Onawa, for appellant.

Prichard & Prichard, of Onawa, for appellee.

WEAVER, J. It is the claim of the plaintiff that defendant, being the owner of 435 acres of land in Monona county, employed or authorized him as its agent to find a purchaser for said property at the stated price of \$85 per acre, for which service when performed defendant agreed to pay plaintiff a commission of \$2.50 per acre. Plaintiff alleges that, acting upon such appointment and authority, he did find and produce the defendant a purchaser, ready, able, and willing to buy the land at the price of \$85 per acre, thereby earning the agreed commission; but defendant neglects and refuses to pay the same.

The defendant denies the allegations of the petition. A jury was impaneled for the trial of the issues joined, and at the close of the plaintiff's evidence in chief the defendant moved for a directed verdict in its favor on the ground that the evidence was clearly insufficient to sustain a verdict for the plaintiff. The motion was denied and defendant proceeded to introduce evidence to sustain its defense. At the close of all the evidence, defendant renewed its motion for a directed verdict. The plaintiff also moved for a directed verdict against the defendant.

On these filings being made, the court denied the defendant's motion, sustained the motion filed by the plaintiff, and directed the jury to find for plaintiff for the full amount claimed by him. On the verdict so returned judgment was entered, and defendant appeals.

The position taken by the court on the questions so presented will be better understood by one or two brief citations from the record upon which this appeal has been presented. In denying defendant's motion for a verdict filed in chief, the court, after stating the situation as it has then been developed by plaintiff's testimony, said that "under the state of the record there is a question for the jury." When both motions had been filed at the close of all the evidence, the court announced its ruling in favor of plaintiff, saying:

"There are facts in this case in my judgment that, if a motion had not been made by both sides, would have warranted the court in submitting this case to the jury.

"Both sides having asked for a directed verdict that is a concession by both sides that it is a question of law only; that is, the uncontroverted evidence on one side or the other entitles one side or the other to a directed verdict."

"The court does not know that it can say any more in ruling on this motion that it has suggested to counsel in the way of suggestions, during the trial, and during the argument.

"The court is of the opinion that if Mr. Manska had the conversation with Mr. Doffing that he claims to have had, that the jury might well find that when he found a purchaser, Kehoe & Kempmeyer were in a position to take care of the transaction.

"As stated before, a great deal of counsel's argument would have full force was this an action between Mr. Mohr and Mr. Doffing to compel the performance of Mohr's contract. But it is not. This is simply an action to recover a commission for finding a purchaser, and *both sides having asked for a directed verdict, the motion on the part of the plaintiff will be sustained.*"

The italics in this quotation are ours, and the language so emphasized clearly indicates the controlling influence upon the mind of the court of the fact that each of the parties had asked a directed verdict, while the ruling, in its entirety, makes it equally clear that

were it not for the fact that both had so moved, the issues would necessarily have been submitted to the jury. If there was error in this ruling, it will necessitate a reversal without consideration of other errors assigned. The question is not a new one in our practice and has had the attention of the court on several occasions. The rule stated by the trial court has the support of precedents in some jurisdictions; but in other jurisdictions, including our own, it has been expressly disapproved. In *Bank v. Milling Co.*, 103 Iowa, 524, 72 N. W. 689, after stating the proposition and saying it seems to be established by the weight of authority, we expressly refrain from passing upon it. In a later case *German Bank v. Bates Imp Co.*, 111 Iowa, 432, 82 N. W. 1005, we said, "This court has never passed the question of application of the rule in our state and we understand that the practice with us has been different," and we refused to recognize it in the case there decided. Later, in *German Bank v. Bates Imp. Co.*, 111 Iowa, 435, 82 N. W. 1006, the point was again considered. There, as here, at the close of all the evidence the plaintiff and defendant each moved for a directed verdict in its favor; the court held with plaintiff and directed a verdict against defendant. There, as here, also, it was argued that both parties having asked a directed verdict, it was tantamount to an express waiver by each of the right to go to the jury, but we held otherwise. Such motions do not indicate any agreement or mutual concession by the parties, but rather an irreconcilable difference. Neither is willing as against the motion of the other to waive a jury, and there is no implication of such waiver from the mere fact that each thinks he has ground for asking a peremptory instruction. This holding was reaffirmed in *Walker v. Fruit Co.*, 113 Iowa, 428, 85 N. W. 614, 53 L. R. A. 775; *Teepie v. Dredging Co.*, 137 Iowa, 214, 114 N. W. 906; and again in *Hamill v. Brewing Co.*, 165 Iowa, 294, 143 N. W. 110. In the latter case we said the point "must be considered settled." For similar holdings in other states, see *Wolf v. Printing Co.*, 223 Ill. 501, 84 N. E. 614; *Popplitz v. Ins. Co.*, 85 Minn. 113, 88 N. W. 438; *Hite v. Keene*, 149 Wis. 207, 134 N. W. 383, 135 N. W. 354, Ann. Cas. 1913D, 251; *Lonier v. Bank*, 153 Mich. 253, 116 N. W. 1088; *Bank v. McCall*, 25 Okl. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217.

In the *Wolf Case*, supra, the Illinois court, after a careful consideration of the conflicting precedents upon the question of practice, says that—

To hold "that a request to the court to decide a pure question of law clothes the court with power to decide controverted questions of fact would be both illogical and inconsistent with the nature of the motion. When one party asks

the court to direct a verdict in his favor, the fact that the other makes a similar motion cannot in any way affect the rights of the first party."

In our own case, *Teepie v. Dredging Co.*, supra, the court was urged to disapprove or overrule our former precedents to this effect; but we said:

"It is true that the rule is different in many jurisdictions, but in our view the ends of justice will in general be subserved by adhering to the rule we have entered upon."

We find no sufficient reason in the present case to depart from the settled practice in this respect.

Counsel cite us to the opinion in *Conkling v. K. & L. Security Co.*, 183 Iowa, 665, 166 N. W. 384, as sustaining the ruling of the trial court in this case. An examination of the opinion referred to demonstrates it is not an authority for that contention. It there appears that a motion for directed verdict, having been made by both plaintiff and defendant, counsel for plaintiff in answer to a question by the court said "Yes, that waives a jury," and defendant's counsel did not contend otherwise or except, and this was held a waiver of the right to go to the jury. It is also to be noticed, as was there pointed out in the opinion, that the objection to the ruling was not presented or argued to this court as required by the rule and statute, and what is there said was at best dictum. Nor is any authority in support of appellee's position to be found in the other cited case, *Murray v. Brotherhood*, 180 Iowa, 626, 163 N. W. 421. The opinion there expressly concedes the general rule in this state to be as we have hereinbefore stated it, but says there are "some exceptions, as where both sides of the case either expressly or impliedly consent to a disposition of the case by the court." It is sufficient here to say there is in the instant case no showing of any express consent by the defendant to the decision of the fact issue by the court and nothing from which such consent is necessarily to be implied.

The assignment of error upon the order directing a verdict is well taken. That except for the supposed effect of the filing of the two motions the record presented an issue of fact for the jury was conceded by the trial court, and that there was such an issue an inspection of the record makes very plain.

The error in directing a verdict was necessarily prejudicial to the appellant, and the judgment appealed from must be and it is reversed, and the cause remanded for a new trial.

Reversed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concurring.

MANNING et al. v. CITY OF AMES.*
(No. 33929.)

(Supreme Court of Iowa. Sept. 27, 1921.)

1. Municipal corporations $\S$ 536—Equity will enjoin collection of void, but not merely voidable, assessment.

Equity will enjoin collection of special assessment for repair or reconstruction of pavement where absolutely void, but not where the assessment is merely voidable, since in such case the statutory remedy by filing objection with the city council under Code, $\S$ 824, must be pursued.

2. Municipal corporations $\S$ 293(2)—Resolution of necessity held sufficiently specific as to location of improvements.

Where a street a half mile in length needed repairs at various places throughout its entire length, a resolution of necessity providing for "relaying a portion of the creosote wood blocks on" such street, estimating that approximately 2,000 square yards of such street were in need of such repairs, held sufficient under Code Supp. 1913, $\S$ 810, requiring the resolution of necessity to "designate the location and terminal points of the proposed improvement," as against contention that particular places in need of repair were not designated.

3. Municipal corporations $\S$ 293(2)—Resolution of necessity providing for repair of pavement by applying coat of pitch held sufficiently specific.

Resolution of necessity providing for the repair of the surface of all creosote wood block paving on named streets by the application of a coat of pitch for the preservation of such paving held sufficiently specific, under Code Supp. 1913, $\S$ 810.

4. Municipal corporations $\S$ 488, 489(5)—Assessment for work not specified in resolution of necessity absolutely may be enjoined without previous objection before council.

Where resolution of necessity provided for improvement of named streets, the assessments for work done on intersecting streets not specified is absolutely void, and collection thereof could be enjoined by equity without the owner having filed objections with the city council under Code, $\S$ 824.

5. Municipal corporations $\S$ 488, 489(5)—City council's jurisdiction to make improvements not lost by failure to comply with resolution of necessity, and owner must object to irregularity.

Where the city council has obtained jurisdiction to make street improvements, the jurisdiction is not lost, though subsequent proceedings do not wholly comply with the requirements of the resolution of necessity, where they are of the same general character as provided for in such resolution, and the owner must object to such irregularities by filing objections with the city council under Code, $\S$ 824, and by appeal from city council's action in the city court under section 839.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 15, 1921.

6. Municipal corporations $\S$ 488, 489(7) — Substitution of oil for pitch in surfacing pavement mere irregularity, requiring owner to file objections with city council.

Where resolution of necessity provided for the application of a coating of pitch for the preservation of street pavement, the substitution of oil for pitch in making the improvement was an irregularity requiring the owner to file objections with the city council under Code, $\S$ 824, and was not such a departure from the subject-matter as to render the special assessment absolutely void, entitling the owner to injunctive relief without filing of such objections.

7. Municipal corporations $\S$ 290—Statute giving city council jurisdiction to make improvements must be substantially complied with.

In order for the city council to obtain jurisdiction of the subject-matter of a street improvement, there must be a substantial compliance with the requirements of the statute conferring such jurisdiction.

Faville, Stevens, and De Graff, JJ., dissenting in part.

Appeal from District Court, Story County; R. M. Wright, Judge.

Action in equity to enjoin the collection of special assessments levied to pay for certain work of repair and reconstruction of paving in the city of Ames. A decree was granted as prayed, and the City appeals. Reversed in part. Affirmed in part.

J. Y. Luke, of Ames, for appellant.

Lee & Garfield, of Ames, for appellees.

FAVILLE, J. Main street is the principal business street of the appellant city. It is six blocks long, and extends east and west. Grand, Duff, Douglas, and Kellogg avenues are all streets of said city, which are at right angles to Main street. Previous to the year 1918, all of Main street, and a portion of each of the other named streets, had been paved with creosoted wood block paving. In said year, a portion of said paving was out of repair and on July 15, 1918, the city council passed a preliminary resolution of necessity for repairing the same. Due publication of the notice of the hearing on this resolution of necessity was made in July, and at a meeting of the city council on the 5th day of August, 1918, the resolution of necessity was adopted, and also a resolution approving the plans and specifications of the engineer for the work to be done. The resolution of necessity recited:

" * * * It is deemed advisable and necessary to make improvements by repair and reconstruction of paving by relaying a portion of the creosote wood blocks on Main street, and repair of the surface of all creosote wood block paving on Main street and Grand avenue by the application of a coating of pitch for the preservation of the said paving; said work to be done in accordance with the specifica-

tions furnished by the city engineer and approved by the city council of Ames, Iowa. Approximate quantities: 2,000 square yards relaying wood blocks; 30,000 square yards pitching and sanding."

The published notice of the hearing contained a full copy of this resolution of necessity. The contract for the work conformed to the resolution of necessity. After the contract was let and the work started, it was discovered by the city council that portions of the paving on Duff, Douglas, and Kellogg avenues should also be repaired. Without publishing any additional or new resolution of necessity, or any notice, the city council proceeded by oral instructions to have the contractor make the needed repairs on these three avenues.

Pitch was not used to repair the surface of the paving on Main street and Grand avenue, but instead thereof a form of petroleum oil was applied to the surface of said streets. After the work was completed, and in December, 1918, notice of assessment for the cost of said work was duly published, and thereafter the city council adopted a resolution fixing the special assessment for the cost of said work against the property abutting on said streets. The appellees are property owners whose property is assessed for said improvement. None of the appellees appeared before the city council at any stage of the proceedings. After said assessment was levied, this action was brought to enjoin the collection of the same on the ground that the assessment was invalid and void.

[1] I. At the outset, we are confronted with the question whether under the facts of this case, the appellees can maintain this action in equity, or whether they are required to pursue the statutory remedy by filing objections before the city council, with right of appeal therefrom. If the proceedings were such as to render the assessments absolutely void, then a court of equity has the power to enjoin the collection of such void assessment. Such have been our repeated holdings. *C. & M. & St. P. Ry. Co. v. Phillips*, 111 Iowa, 377, 82 N. W. 787; *Ft. Dodge Electric Light & Power Co. v. City of Ft. Dodge*, 115 Iowa, 568, 89 N. W. 7; *Davenport Locomotive Works v. City of Davenport*, 185 Iowa, 151, 169 N. W. 106; *Shaver v. Turner Improvement Co.*, 155 Iowa, 492, 136 N. W. 711; *Nixon v. City of Burlington*, 141 Iowa, 316, 115 N. W. 239, 18 Ann. Cas. 1037; *Dunker v. City of Des Moines*, 156 Iowa, 292, 136 N. W. 536; *In re Appeal of Apple*, 161 Iowa, 314, 142 N. W. 1021; *Spalti v. Town of Oakland*, 179 Iowa, 59, 161 N. W. 17; *Polk v. McCartney*, 104 Iowa, 567, 73 N. W. 1067.

On the other hand, where the proceedings are not absolutely void, but merely voidable, the statutory remedy by filing objections be-

fore the city council must be pursued, and injunction will not lie. Code, § 824; Land Co. v. City of Des Moines, 144 Iowa, 625, 123 N. W. 340; Owens v. City of Marion, 127 Iowa, 469, 103 N. W. 381; M. & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103; Cheny and Flaherty v. City of Fort Dodge, 157 Iowa, 250, 138 N. W. 549; Durst v. City of Des Moines, 164 Iowa, 82, 145 N. W. 528; Ellyson v. City of Des Moines, 179 Iowa, 882, 162 N. W. 212; Evans v. City of Des Moines, 184 Iowa, 945, 169 N. W. 336.

The rules announced are plain. The difficulty lies in applying them to the facts of a particular case. Section 810, Code Supp. 1913, provides as follows:

"Street Improvements and Sewers—Preliminary Notice. When the council of any such city shall deem it advisable or necessary to make or reconstruct any street improvement or sewer authorized in this chapter, it shall, in a proposed resolution, declare such necessity or advisability, stating the one or more kinds of material proposed to be used and method of construction, whether abutting property will be assessed, and, in case of sewers, the one or more kinds and size, and what adjacent property is proposed to be assessed therefor, and in both cases designate the location and terminal points thereof, and cause twenty days' notice of the time when said resolution will be considered by it for passage to be given by four publications in some newspaper of general circulation published in the city, the last of which shall not be less than two nor more than four weeks prior to the time fixed for its consideration, at which time the owners of the property subject to assessment for the same may appear and make objection to the contemplated improvement or sewer and the passage of said proposed resolution, at which hearing the same may be amended and passed, or passed as proposed."

In *Shaver v. Turner Improvement Co.*, supra, we said:

"Moreover such proceedings are invitum, and the statutes are to be somewhat strictly followed. Especially is this true with reference to those preliminary steps which appear to have been intended as essential to the exercise of power by the city council. Section 810 clearly specifies what shall be done, and the section following inferentially declares that only upon so doing shall the order contemplated be made. Objections to the improvement or its character would be of no avail unless interposed previous to directing it to be made, and for this and other reasons suggested we are inclined to regard compliance with section 810 as a condition precedent to the exercise of the power by the council to direct the pavement of the streets or the laying of sewers."

Our holdings are to the effect that substantial compliance with the terms of the statute is a condition precedent to obtaining jurisdiction for making the improvement and the levying of taxes therefor. *Gilcrest & Co. v. City of Des Moines*, 157 Iowa, 525, 137 N. W. 1072; *Nixon v. City of Burlington*, supra;

Dunker v. City of Des Moines, supra; *Spalti v. Oakland*, supra; *Davenport Locomotive Works v. City of Davenport*, supra. With these general rules in mind, let us consider the situation in the instant case.

The sufficiency of the resolution of necessity to confer jurisdiction upon the city council is challenged. The resolution provides: First, for repair and reconstruction of paving by relaying a portion of the creosoted wood blocks on Main street in the approximate quantity of 2000 square yards; and second, for repair of the surface of all creosoted wood block paving on Main street and Grand avenue by the application of a coat of pitch for the preservation of said paving. The statute requires that the resolution of necessity shall "designate the location and terminal points of the proposed improvement."

[2] It is contended that the resolution of necessity did not confer upon the city council jurisdiction to proceed with the work of repair and reconstruction by re-laying the wood block paving on Main street because the resolution does not specifically designate the location and terminal points of the proposed improvement. The record shows that Main street comprises 6 blocks, being a little more than a half mile in length. It is apparent that the resolution of necessity specifically provided for repair and reconstruction work upon Main street. The evidence discloses that at various places throughout the length of Main street the existing wood block paving was out of repair. In many instances it had bulged, and the work contemplated by the resolution of necessity was the repair and reconstruction of the block paving throughout the entire length of Main street wherever it was so out of repair. It is perfectly obvious that it would be wholly impracticable, if not impossible, to designate the location and terminal points of these various patches on Main street where such re-laying was necessary. As shown by the resolution of necessity, it was estimated that approximately 2,000 square yards on Main street were so out of repair. These spots or patches of paving were, as we understand the record, scattered throughout the length of Main street in many localities. To have required the particularity of designating the location and the termini of each of these several patches that were to be repaired, in order to confer jurisdiction upon the city council to proceed, would make it practically impossible to do repair work of this character. We are of the opinion, and so hold, that, under the facts of this case, the resolution of necessity was sufficiently specific to comply with the provisions of the statute and confer jurisdiction upon the city council to undertake the work of repair and reconstruction by re-laying approximately 2,000 square yards of wood block paving on Main street.

[3] The resolution of necessity also provided for repair of the surface of all creosoted wood block paving on Main street and Grand avenue by the application of a coat of pitch for the preservation of said paving. This provision of the resolution of necessity was a sufficient compliance with the terms of the statute to confer jurisdiction upon the city council to do the designated work. The location and termini of the proposed improvement was sufficiently designated in the provision that the work was to be the "repair of the surface of all creosote wood block paving on Main street and Grand avenue." The material to be used was also designated as a coating of pitch for the preservation of said paving.

The resolution of necessity was not invalid in respect to the foregoing matters, and was sufficient to, and in fact did, confer upon the city council the power and authority to proceed with the improvement so designated and provided for in said resolution of necessity.

II. It is to be noticed, however, that no reference whatever is made in the resolution of necessity regarding the laying of any wood block paving on any other street or avenue than Main street in the appellant city. The evidence shows that a considerable amount of paving was re-laid upon Duff, Douglas and Kellogg avenues, and assessments were made against the owners of property abutting upon said avenues for the work so done upon said avenues. It appears that this work was done by the same contractor who did the work provided for in the resolution of necessity and the contract made in pursuance thereof. The work on these three avenues was done under oral instructions from the city council, and without any attempt to adopt any resolution of necessity whatsoever in respect thereto.

[4] It cannot be seriously contended that under the provisions of the statute the resolution of necessity can be extended so as to confer any jurisdiction whatever upon the city council to have improved Duff, Douglas, and Kellogg avenues and assess the cost of such improvement to the abutting property owners. As to the assessments levied for the work done upon Duff, Douglas, and Kellogg avenues, the whole proceeding from beginning to end was without any jurisdiction, and was absolutely void, and said assessments were invalid and illegal. A court of equity had the undoubted jurisdiction to enjoin the collection of any and all assessments levied against any property owners for any of the work done upon Duff, Douglas, and Kellogg avenues. To this extent at least the injunction issued in this case was proper, and the action of the trial court in respect thereto must be upheld.

III. In regard to the work of re-laying the wood block paving upon Main street, as heretofore pointed out, the resolution of necessity was sufficient to confer jurisdiction upon the

city council to proceed with said improvement, and the city council had jurisdiction and authority under said proceedings to assess property owners for the work of repair and reconstruction by re-laying the wood block paving upon Main street. The city council had jurisdiction and authority to levy a tax against property owners so situated as to be liable therefor for the cost of the said improvement, to wit, the repair and reconstruction by the process of relaying wood block paving on Main street. A special assessment against the property liable therefor for the cost of said improvement was not levied without jurisdiction, and was not invalid and void, and a court of equity was without jurisdiction to enjoin the collection of the same.

IV. As previously stated, the resolution of necessity adopted by the city council was sufficient to confer jurisdiction upon the city council to repair the surface of all the wood block paving on Main street and Grand avenue by placing thereon a coating of pitch. The undisputed evidence shows that pitch was not used for the purpose of surfacing all the wood block paving upon these two streets, but that, on the contrary, they were covered with a coating of oil. The record shows that pitch was used to a certain extent in the laying of the wood block paving, but when so used, it was used as a base in which the wood blocks were placed, but it was not used for the purpose of surfacing, as provided by the resolution of necessity, except where wood blocks were re-laid.

The engineer testified as follows:

" * * * We put a coat of oil on all the old creosote block paving except that which we re-laid. Where we re-laid it pitch was used, and where pitch was used we didn't oil it. Part of the paving was re-laid by putting in new blocks and part by putting in old blocks.

"The oil we used is what is termed 'stano-lene' from the Standard Oil Company. It is a by-product of petroleum. It was not put on with a sprinkler. It was spread on the blocks hot. We used a squeegee machine. It was put on real hot. It ran out of the machine; it ran along and spread it; it had a little spreader in front of it, that dragged the oil right along on the blocks. It was not sprinkled on; it was spread on. It was spread over the blocks and it soaked into the blocks. There was no coating on the blocks from the oil."

After the work was completed, proceedings were instituted for the levying of the special assessment to pay for the cost of the construction of said improvement. The city engineer prepared the plat of the assessable area and a schedule of the proposed assessment. This was duly filed with the proper city official, and the city council adopted a resolution accepting the work done by the contractor and published a notice of the filing of the plat and schedule of assessments. The published notice recited that a plat

and schedule had been prepared showing the assessments on account of the cost of the contracts, reconstruction, and repair of paving on Main street and Grand avenue, and notified property owners that the plat and schedule were on file in the office of the city clerk, and that all objections to the assessment as proposed must be filed with the city clerk. No question is raised as to the notice being sufficient in form nor as to the plat and schedule. None of the appellees appeared before the city council in response to said notice or filed any objections thereto.

Code, § 824, is as follows:

"Objections. All objections to errors, irregularities or inequalities in the making of said special assessments, or in any of the prior proceedings or notices, not made before the council at the time and in the manner herein provided for, shall be waived except where fraud is shown."

Conceding that the city council obtained jurisdiction by the resolution of necessity to repair the surface of the wood block paving on Main street and Grand avenue by coating the same with pitch, it is contended that the city council lost all jurisdiction of the subject-matter when it failed to surface said streets with pitch, but used in lieu thereof an entirely distinct and different substance, to wit, oil. It is the contention of the appellees that this was such a material departure from the provisions of the resolution of necessity that the action of the city council was without any authority, and was absolutely void, and that the special assessment for the said work of surfacing with oil was wholly invalid and void, and that collection of the same can be legally enjoined.

On the other hand, it is the contention of the appellant that, inasmuch as the city council obtained jurisdiction by a proper resolution of necessity and notice to surface the wood block paving on Main street and Grand avenue, the change in the material used from pitch to oil, as to part thereof, was such an irregularity only as did not oust the council of jurisdiction entirely, and did not render the subsequent assessment void, but that the property owners were obliged to pursue the statutory remedy by filing objections before the city council, with the right of appeal therefrom to the district court. In other words, it is contended that, jurisdiction having once legally attached, the statutory remedy for any "errors or irregularities" thereafter occurring in the proceedings must be pursued.

Our former holdings on this subject, it must be conceded, are not altogether consistent, and complete reconciliation of the same is apparently impossible. We have repeatedly held that, where there was a substantial defect in the parliamentary proceedings so that the city council did not obtain jurisdic-

tion legally of the subject-matter, the subsequent proceedings were invalid, and that an assessment could be enjoined. See cases *supra*. We have also had before us a number of cases where objections have been urged to the assessment on the ground that the work done was not a substantial compliance with the resolution of necessity or with the contract, and that because thereof the assessment should be modified or canceled. The question before us in the instant case is not of this character, but involves the proposition as to whether or not, where jurisdiction is obtained in a proper manner, and where there is a substantial departure from the provisions of the resolution of necessity in performing the work, must the statutory remedy by filing objections before the city council, with appeal therefrom be followed, or does the failure to comply with the provisions of the resolution of necessity cause the city council to lose entire jurisdiction of the subject-matter, so that the subsequent assessment is invalid and void, and can be enjoined by proceeding in equity?

In *Hubbell, Son & Co. v. Bennett Bros.*, 130 Iowa, 66, 106 N. W. 375, we held that the manner of performing the contract for making the improvement was jurisdictional and where there was a defect in the execution of the contract, collection of the assessment would be enjoined. However, in *Shaver v. Turner Improvement Co.*, *supra*, *Hubbell v. Bennett* was overruled, and it was held that defects in the performance of a contract must be raised by objections before the city council. In *Owens v. City of Marion*, 127 Iowa, 469, 103 N. W. 381, we said:

"Section 824 of the Code provides that 'all objections to errors, irregularities or inequalities in the making of special assessments, or in any of the prior proceedings or notices not made before the city council at the time and in the manner herein provided for, shall be waived, except where fraud is shown.' Of course, this statute does not cover defects which go to the validity, rather than the legality or regularity, of the proceedings. If they are void, or without jurisdiction, an equitable action will lie to have them so declared; and the statute expressly provides that there shall be no waiver in case fraud is shown. So that we have but two inquiries in this case: (1) Were the proceedings void because of any fundamental defects therein; and (2) is there any fraud shown? In arriving at a satisfactory solution of the first proposition a distinction must be preserved between those defects, if any such are shown, which were simply erroneous, irregular, or resulted in inequalities, and those which reach so much deeper as to avoid the entire proceedings. Plaintiff was a party to the assessment proceedings, and does not, therefore, stand in the attitude of a stranger. Being such party, the Legislature may provide a tribunal for the determination of all controversies growing out of the assessment, and, in the absence of fraud, or of such a showing as deprived that tribunal (the city

council, in this case) of the right to act at all, resort must be had to that tribunal for the correction of all errors, irregularities, or inequalities in the assessment, or in any of the prior proceedings or notices."

In *Land Co. v. City of Des Moines*, 144 Iowa, 625, 123 N. W. 340, we said:

"It is to be admitted that in some of our decisions language has been used mostly by the way of argument giving some support to the contention that, even where jurisdiction has been obtained to construct a work of public improvement, it may be lost by some omission or defect in the further development of the proceedings, and that advantage may be taken of such defect by injunction. This is perhaps more notably true of *Zalesky v. Cedar Rapids*, 118 Iowa, 714; *Comstock v. Eagle Grove*, 133 Iowa, 589, and *Bennett v. Emmetsburg*, 138 Iowa, 67, but without in any manner now questioning the correctness of the result reached in those cases, we are constrained to say that, in so far as the discussions therein tend to sustain the proposition that, where the jurisdiction of the city has once attached, a defect or omission subsequently occurring in the proceedings, and for which the statutory appeal furnishes ample remedy may be made the grounds of proceedings in equity for an injunction against the assessment, they cannot be approved."

In *Cheney v. City of Fort Dodge*, *supra*, we said:

"Under the statutory provisions we have recently held that the question whether the variance between the improvement, as constructed, and that provided for in the preliminary proceedings, is sufficient to invalidate the assessment is an appropriate matter of inquiry for the city council, and that the mere fact of such variance, without regard to its materiality and extent, does not deprive the council of jurisdiction to make the assessment; the remedy of the property owners being by objection before the council and by appeal from its action."

In *Durst v. City of Des Moines*, 164 Iowa, 82, 145 N. W. 528, which was an action in equity to enjoin the collection of a special assessment, we said:

"Jurisdiction of the parties interested in the institution of proceedings for such improvement is obtained by publication of notice of the preliminary resolution of necessity. Code, § 810. Jurisdiction to make special assessments for the cost of an improvement so authorized and constructed is obtained by publication of notice of the time when and place where objections thereto may be presented and considered. Code, § 823. These notices being given in the statutory manner, all property owners are presumed to have cognizance of the details involved in the preparation for and execution of the work of improvement, and, if there be any ground of complaint on account of errors or irregularities in the special assessments, or on account of any of the prior notices or proceedings leading up to such assessments, the party aggrieved must appear before the city council and make the objection on which he relies, and, failing so to do, his

objections are deemed to have been waived. Code, §§ 823 and 824. The only exception to this rule which the statute recognizes is where fraud is shown. If, having made his objections known to the city council as provided by law, they are overruled or ignored, he may have the proceedings reviewed upon appeal to the district court. Code, § 839. If there was ever any doubt whether this remedy was exclusive, and that under such circumstances, and without showing of fraud, no action can be maintained in equity to set aside or annul a special assessment for a work of public improvement, it no longer exists. *Railroad Co. v. Lindquist*, 119 Iowa, 144; *Owens v. Marion*, 127 Iowa, 469; *Nixon v. Burlington*, 141 Iowa, 316; *Land Co. v. Des Moines*, 144 Iowa, 629; *Reed v. Cedar Rapids*, 137 Iowa, 107; *Andre v. Burlington*, 141 Iowa, 65; *Durst v. Des Moines*, 150 Iowa, 370."

In *Ellyson v. City of Des Moines*, *supra*, we reviewed the authorities and pointed out that some of our earlier cases, such as *Gallaher v. Garland*, 126 Iowa, 206, 101 N. W. 867, and *McCain v. Des Moines*, 128 Iowa, 331, 103 N. W. 979, were decided before the enactment of the statute giving a right of appeal to the district court from the levying of special assessment. In the *Ellyson Case* we said:

"We think that jurisdiction was not lost because a part of the work may have been, as contended by appellees, more than repairing by patching. Clearly, the 390 feet before referred to was repairing by patching, even under appellees' contention, and for that reason the injunction should not have been granted; but, as to the rest of the work, it was of the same general character—that is, it was not like putting in a sewer under a paving resolution, as contended by appellees. The appellees could have raised the same questions as now presented by objections before the city council, or on appeal to the district court. The provisions in reference thereto are very broad. The question could have been raised as to whether any assessment should be made against any of the several properties or the amount thereof."

It is to be observed in this connection that the statute, Code, § 839, provides for an appeal from the action of the city council to the district court where "all questions touching the validity of such assessment, or the amount thereof, and not waived under the provisions of this chapter, shall be heard and determined." Code, § 824, together with section 839, provides a method by which "all objections to errors, irregularities or inequalities in the making of said special assessments, or in any of the prior proceedings or notices," must be urged before the city council, and "all questions touching the validity of such assessment" so urged before the city council are subject to review on appeal.

[5] The tendency of our recent holdings is to the effect that, where jurisdiction has been legally obtained by the city council, any sub-

sequent "errors, irregularities, or inequalities" in the proceedings of the council must be corrected, by pursuing the statutory remedy, and that an injunction will not lie to restrain the collection of an assessment because of such "errors, irregularities, or inequalities" in the proceedings subsequent to the acquisition of jurisdiction. We hold that where jurisdiction has once legally attached, it is not lost even though the subsequent proceedings do not wholly comply with the requirements of the resolution of necessity where they are of the same general character as provided for in the resolution of necessity.

[8] In the instant case, by proper proceedings, the city council obtained jurisdiction to improve Main street and Grand avenue by surfacing the same with pitch. In lieu thereof, and for the same general purposes, they substituted the material, oil, as to the greater part thereof. This was such an error or irregularity in the proceedings for which jurisdiction had attached that proper adjustment because thereof by reduction or cancellation of an assessment would have been proper for the consideration of the city council, but it did not constitute such a change of the subject-matter, of which the council had jurisdiction, as to render the proceedings wholly void. It therefore follows that the appellees' remedy was by the statutory method, and not by injunction, and, having failed to appear before the city council and object to the assessment under the express provisions of section 824 of the Code, the right to object is waived.

It is to be noticed that, under section 824, an exception is made to the requirement that the statutory remedy shall be pursued where fraud is shown, but in the instant case there is no actual or "legal" fraud in the action of the city council.

The foregoing discussion presents the views and conclusions of a majority of the court. The writer of the opinion is, however, unable to concur in the conclusion expressed in the last preceding division (IV) of this opinion. I concur in the proposition that the city council obtained jurisdiction by substantial compliance with the statute to undertake the work of coating the surface of the wood block paving on Main street and Grand avenue with a coating of pitch. I acquiesce in the proposition that for "errors, irregularities, and inequalities" in the proceedings, where jurisdiction has once been obtained, the taxpayer must resort to the statutory remedy. I concede that equity will not grant relief where there has been a substantial compliance with the general subject-matter regarding which the city council has obtained jurisdiction; but I cannot agree to the proposition that, where the city council has, by proper notice, obtained jurisdiction to un-

dertake the work of improving a street by coating the surface thereof with pitch, the city council can thereafter coat the street with an entirely different substance, as oil, and that this is an "error or irregularity," within the contemplation of the statute, for which relief can only be granted by objection before the city council.

Section 810 of the statute expressly provides that the resolution of necessity shall state the kind of material proposed to be used. The Thirty-Fourth General Assembly amended this statute by providing that the resolution of necessity shall state "the one or more kinds of material proposed to be used." It is very obvious that the Legislature, in amending this statute, clearly intended to give the city council the right to a choice in the first instance of the material that should be used. For example, in street paving, the city council might be uncertain, in advance of bids, whether it was advisable to pave with wood, concrete, brick, asphalt, or other material, but the statute expressly requires that the various kinds of material under consideration by the city council shall be designated and stated in the resolution of necessity. A resolution of necessity, reciting that it was proposed to pave with brick, would confer no jurisdiction on the city council to proceed to pave with asphalt, because the statute requires that the kind of material, one or more, shall be stated and enumerated in this resolution. If this is an essential prerequisite to the acquiring of jurisdiction, I think that it cannot be evaded by subsequent action on the part of the city council. If the resolution of necessity must recite the kind of material to be used (and it must), then the city council cannot, I think, obtain jurisdiction by naming a certain material in the resolution of necessity, and materially depart therefrom thereafter and use an entirely different material. In other words, it is my opinion that, if the designation of the material is essential to the acquiring of jurisdiction, a substantial departure from the named material in the construction of the improvement operates as a complete loss of the jurisdiction so obtained.

If the city council desired to surface these streets with either pitch or oil, it should have named both materials in the resolution of necessity, and then chosen the proper one at the outset, but it cannot name one in a resolution of necessity and choose that one and then use another, under the claim that it got jurisdiction to do so by the original resolution of necessity.

I think the proceedings in regard to the surfacing of the two streets with oil were absolutely void, and that the special assessment levied therefor should be enjoined; that no jurisdiction whatever was acquired in the first instance to surface these streets with

anything but pitch, and the attempt to use an entirely different substance was wholly without jurisdiction, and invalid. It is also to be noticed that there is no claim of estoppel except by failure to pursue the statutory remedy by objection before the council. There is neither allegation nor proof that the taxpayers knew that the council was using oil instead of pitch, and that they were being taxed for surfacing with oil instead of pitch. I think that so much of the assessment as was levied for the improvement in surfacing Main street and Grand avenue with oil was wholly void, and that the collection of the same should be enjoined. To this extent I dissent. I am authorized to say that Justices STEVENS and DE GRAFF join in this dissent as to this portion of the opinion.

[7] We hold that, in order for the city council to obtain jurisdiction of the subject-matter of a street improvement, there must be a substantial compliance with the requirements of the statute, conferring such jurisdiction. We hold that, under the facts of the instant case, there was no such substantial compliance with the provisions of the statute as gave the city council jurisdiction to undertake the work of repair and reconstruction on Duff, Douglas, and Kellogg avenues, and that the assessment for the cost of said improvement was absolutely void, and can be enjoined in a court of equity. We hold that there was a sufficient compliance with the provisions of the statute to give the city council jurisdiction to levy an assessment for the cost of repair and reconstruction by re-laying wood block paving of approximately 2,000 square yards on Main street, and that the assessment levied therefor was valid. We hold that there was such substantial compliance with the statute as gave the city council jurisdiction to undertake the improvement of coating the surface of the wood block paving on Main street and Grand avenue with pitch, and that the substitution of oil for pitch for the purposes of coating part of said wood block paving on said two named streets was not such departure from the subject-matter, for which jurisdiction had been obtained by the city council, as to render the special assessment levied therefor absolutely void, but that it was such an error or irregularity as is contemplated shall be reviewed by the city council on objections filed under the provision of section 824 of the Code, and that the appellees herein, having failed to file any such objections before the city council as to said special assessment, have waived their right to such objections and are not entitled to injunctive relief against the said assessment. As to this last pronouncement, the court is divided.

It follows from the foregoing that the de-

cree of the district court should be modified so that an injunction shall issue restraining the collection of any and all special assessments levied by the appellant city for the repair and reconstruction by re-laying wood block paving on Duff, Douglas, and Kellogg avenues. As to the other relief prayed for by the appellees, an injunction should have been denied.

The cause will be remanded to the district court for a decree in accordance with this opinion, or the parties may have a decree entered in this court, as they may elect. The costs in this court will be taxed one-third to the appellant and two-thirds thereof to the appellees. It is so ordered.

Reversed in part. Affirmed in part.

EVANS, C. J., and WEAVER, PRESTON, and ARTHUR, JJ., concur.

STEVENS and DE GRAFF, JJ., concur in part and dissent in part.

SANITARY CAN CO. v. NATIONAL PICKLE & CANNING CO. (No. 33931.)

(Supreme Court of Iowa. Sept. 28, 1921.)

Payment $\S$ 22—Acceptance of check on insolvent bank by which check was not paid held not to constitute payment.

Where seller sent draft on buyer to bank for collection, with specific instruction that payment should be in cash only or its equivalent, the bank's acceptance from the buyer of a check drawn on it, with sufficient funds in the bank to meet the check, at a time when the bank was insolvent, held not to constitute payment of the check, since the acceptance of the check was merely a conditional payment, and such a condition failed upon dishonor of the check.

Appeal from District Court, Lee County; John E. Craig, Judge.

Action brought at law to recover a money judgment for \$844.92, and interest on account, for a car of cans. Defendant pleaded payment. The case was transferred to equity. The court found there was due plaintiff from defendant \$1,137.92, but that there should be credited thereon, as conceded and offered by plaintiff, the net sum of \$502.73, which last amount was the dividend from proceedings in bankruptcy of D. H. Sage, or his estate, doing business as Sage Banking Company. This left a balance of \$634.48, for which judgment was rendered. The defendant appeals. Affirmed.

W. B. Collins, of Keokuk, for appellant.

Hollingsworth & Blood and L. J. Montgomery, all of Keokuk, for appellee.

PRESTON, J. The plaintiff, a manufacturer of cans in the East, shipped to the defendant a carload of cans at the agreed price of \$844.92, and drew a sight draft on defendant, dated October 1, 1914, for the amount thereof, with bill of lading attached, through the National Newark Banking Company, of Newark, N. J. The draft was payable to said bank, signed by plaintiff, and addressed to National Pickle & Canning Company, St. Louis, Mo. Upon the face of the draft, in red ink, was printed the notation:

"This draft must be paid in cash or its equivalent, the bank named as payee acting only as agent to collect and remit to the drawer."

It also recited:

"Bill of sale attached, deliverable only on payment hereof."

It is indorsed:

"Pay to the order of any bank for collection for account of National Newark Banking Co., Newark, N. J."

The transaction was treated as if the draft had passed through the Newark bank, although, by agreement between plaintiff and that bank, plaintiff sent out such drafts itself for collection, and accordingly the draft in question was forwarded for collection to the Sage Banking Company, at Alexandria, Mo., at which point defendant had a factory. The defendant treats that transaction as having been done by the Newark bank. The Sage Banking Company, receiving the draft, called up defendant company's manager, who came down on the evening of October 13, 1914, between 7 and 8 o'clock, to pay the draft, and take up the bill of lading attached, and gave defendant's check on said Sage Banking Company for the full amount. Defendant, as drawee of the draft, had to its credit on the books of the Sage Banking Company, about \$1,100, yet at the time the check was given the bank was insolvent, and had no funds on hand sufficient to pay the draft. The Sage Banking Company did not advise defendant's manager that his check was worthless, or that the bank was in a failing condition. Upon drawing defendant's check, as before stated, and with such worthless check, it took up the draft, received the bill of lading from the bank, and defendant afterwards procured and used the cans covered by the bill of lading. The check was marked across the face: "Paid. Sage Banking Co." But it appears that the bank clerk who received the check did nothing further with it, and did not charge it to the account of the defendant on the books of the bank. There was at no time after the check was received sufficient money in the bank to pay it, and the next day, between 1 and 2 o'clock, the bank closed its doors, and thereafter passed into bankruptcy.

Later, when the facts were made known to

the Newark bank, it, for the purpose of protecting both plaintiff and defendant, and all parties in interest, filed a claim in bankruptcy for the amount of the check; said claim setting out the facts and the existence of a dispute as to whether the draft was paid by the check and as to whether the bankrupt had exceeded his authority as a collecting agent, and expressly stating that the claim was filed without prejudice to any action against the defendant, either by the Newark bank or plaintiff. The claim in bankruptcy was allowed, and dividends paid to the Newark bank, and held by them for the plaintiff and the defendant herein, and for their protection, and after defendant had been requested to prove up for the entire amount of the account, and their refusal so to do. The net amount of the dividends, after deducting some \$80 or \$90 for expenses of filing and collecting, were credited on the claim sued on herein, as before stated.

During the pendency of the bankruptcy proceedings, defendant claiming that the draft covering the purchase of the cans, as well as the account for the cans, was fully paid by the check transaction, this suit was instituted, claiming that defendant owed plaintiff for the cans and upon the account and the draft drawn therefor. As said, defendant answered, claiming that the draft had been paid by the giving of the check. The trial court found for plaintiff, and in addition directed plaintiff to assign, or caused to be assigned, to the defendant the balance of said claim in bankruptcy, or cause to be paid to the defendant all dividends that might thereafter be paid on the claim, and such assignment to be made on the demand of the defendant, and so on. The clerk of the Sage Banking Company, who transacted the business in question for the Sage bank, knew the financial condition of his bank, and that it was insolvent, but, as said, did not advise defendant's superintendent of that fact.

Appellant's contention, as we gather from the errors assigned and brief point, is that plaintiff and the Newark bank selected the Sage Banking Company, at Alexandria, as agent to collect the draft, and bill of lading attached, rather than an agent at St. Louis, Mo., and selected the Sage Banking Company as its agent to present and receive payment of the draft, thereby justifying defendant in acting as it did in payment of the draft by the check. But the draft was to be paid in cash, or its equivalent, whether it was sent to one bank or another. That is the question in the case—whether, under the circumstances, the check transaction was a payment.

1. In appellant's argument and reply, and the two so-called additional arguments, all four of them refer to the two Iowa cases, *British & American Mortgage Co. v. Tibbals*,

63 Iowa, 468, 473, 19 N. W. 319, and *Griffin v. Erskine*, 131 Iowa, 444, 109 N. W. 13, 9 Ann. Cas. 1193. While other cases are cited, appellant seems to rely more especially upon these two. The appellee also relies on the *Griffin* Case and others. Appellee seeks to distinguish the *British & American Mortgage Co. Case* from the instant case, in this, that in that case there were no instructions expressly requiring a cash payment, but, on the contrary, payment by draft was suggested, and that, under the facts, it was shown that they did not expect that the maker would collect the cash and present it at the counter of the bank for payment. They point out that in the instant case the Sage bank, by the plain indorsement on the face of the draft, was expressly required to receive nothing but cash. The case was distinguished in *Griffith v. Life Association*, 141 Iowa, 414, 417, 119 N. W. 694, 133 Am. St. Rep. 177. It is no doubt true that the giving of the check of defendant by it to the Sage bank was conditional payment. But it was only a conditional payment.

We said in *Bellevue Bank v. Security National Bank*, 168 Iowa, 707, 150 N. W. 1076, that the general rule is that, when the holder of a check presents it at the counter of the bank upon which it is drawn, and receives payment therefor, the transaction is closed. It was also said in that case that the bank as the collecting agent, was within its duty in accepting from the maker of the note a check, if it had reason to believe the same to be good, but that the acceptance of such check operated presumptively only as a conditional payment of the note, and that, upon the dishonor of the check, the condition failed, and that the holder of the note was entitled to maintain his original cause of action. We said further in that case that, whatever difference there may be in the authorities on these propositions, they are sustained by a great weight of authority, and we are committed to them, citing the *Griffin* Case, and *Dille v. White*, 132 Iowa, 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510. The opinion quotes from the *Griffin* Case to the effect that checks, drafts, and so on, are extensively used in commercial transactions, and that, in authorizing an agent to make collections, it may be assumed, in the absence of instructions to the contrary, that the authority is to be executed in the manner usual and customary in the commercial world; that, while the agent may not accept anything but the actual cash in satisfaction of the claim, he may receive a check or draft, negotiable and payable on demand, which he has good reason to believe will be honored on presentation, as a ready and more convenient means of obtaining the money in conditional satisfaction of the debt, and that, if the instrument is honored by the drawee, payment relates back. The opinion also discusses the

question of conditional credit obtained upon the books of the bank as a conditional credit, and that it is subject to the honor of the checks.

But in the instant case there were specific instructions that the draft drawn by the plaintiff upon the defendant should be paid in cash only, or its equivalent. Though it appears that the defendant had an amount on deposit with the Sage bank larger than the draft, still the bank was at that time insolvent, and this fact was known to the Sage bank, and the party who took the defendant's check, so that the bank took a worthless check and sought thereby, as the agent of plaintiff, or the bank through whom plaintiff made the draft, to pay the draft, although authorized to accept only cash, or its equivalent. The Sage bank might as well have taken a carload of broken grindstones. Under the authorities before cited, the acceptance of the check would, at most, be a conditional payment. It appears, as before stated, that the check was not charged to the account of the defendant by the Sage bank, or its employees. There was, then, no conditional credit on the books of the bank. We do not understand either party to claim anything in that regard, although appellant cites authority to the proposition that the giving of the check by the defendant was an appropriation of the funds in its hands to the payment of the draft. But there were no funds to be appropriated. There was a paper balance in favor of defendant on the bank's books. But the bank was insolvent. We understand appellee to concede that the bank was, in a sense, plaintiff's agent; that is, for the purpose of collecting the money on the draft. The draft on its face so provides. But they contend, and cite authority, that by accepting a worthless check the bank exceeded its authority, and that, in regard to such excess of authority, the Sage bank was the agent of the defendant, and further that in so doing it was a matter between the defendant and the Sage bank, which does not affect the rights of the plaintiff as drawer of the draft against the defendant.

Appellee cites *Dille v. White*, 132 Iowa, 327, 347, 348, 109 N. W. 909, 10 L. R. A. (N. S.) 510, to the proposition that the loss incident to the bank's insolvency had already been suffered by defendant as a depositor, and that it cannot shift this loss to the plaintiff by checking it over in payment of the draft, and thus recoup its loss by receiving the goods and keeping them. Other cases are cited by appellee to the effect that the insolvency of an agent revokes the agency and that the acceptance of a draft for collection by an insolvent bank is a fraud. We shall not take time or space to discuss these later propositions. On the main proposition already discussed, we think there was no final or absolute payment of the draft in question by

the check given by the defendant to the Sage bank. In addition to the cases already cited, and as having a bearing, see 2 Michie, Banks and Banking, pp. 1395, 1397, 1482; McFarland v. Howell, 162 Iowa, 110, 116, 143 N. W. 860; 2 Bolles on Banking, 600; Gray v. Otto, 178 Iowa, 855, 160 N. W. 293; Morris v. Eu-
faula Bank, 106 Ala. 383, 18 South 11. With-
out further discussion, we are of opinion that
the trial court rightly decided the case, and
the judgment is affirmed.

EVANS, C. J., and WEAVER and DE
GRAFF, JJ., concur.

SCHMIDT v. POTTER et al. (No. 4890.)

(Supreme Court of South Dakota. Sept. 16,
1921.)

Appeal and error $\Leftrightarrow$ 933(4)—Presumed that
grant of new trial was on all grounds men-
tioned in order.

Order granting a new trial "for the reasons
urged in the motion for new trial, and for the
further reason that the court is of the opinion
that in the interests of justice a new trial
should be granted," held sufficient, notwith-
standing Rules for Trial Courts of Record No.
80 (40 S. D. preliminary p. 29), requiring such
an order to specify ground upon which it is
based, and providing that grounds not speci-
fied shall be deemed to have been overruled,
since appellate court will infer from such order
that the new trial was granted for all of the
reasons urged on the motion for new trial, as
well as in the interest of justice.

Appeal from Circuit Court, McCook Coun-
ty; L. L. Fleeger, Judge.

Action by Ed. J. Schmidt against L. B.
Potter and M. W. Hause, as individuals and
as copartners under the firm name and
style of Potter & Hause. Judgment for
plaintiff, and from an order granting a new
trial, he appeals. Affirmed.

H. Van Ruschen, of Salem, and Kirby,
Kirby & Kirby, of Sioux Falls, for appellant.
James R. McGee, of Salem, for respond-
ents.

GATES, J. The trial of this cause was
had to the court and jury and resulted in
verdict and judgment for plaintiff. Upon
the motion of defendants the court granted
a new trial "for the reasons urged in the
motion for new trial and for the further
reason that the court is of the opinion that
in the interests of justice a new trial should
be granted." Rule 80 of the Rules for Trial
Courts of Record (40 S. D. preliminary page
29) provides:

"The trial court, when granting a motion for
new trial, shall, in its order, specify each and
every ground upon which it bases such order;
all grounds urged upon such motion and not
specified in the order shall be deemed to have
been overruled by the trial court."

The sole assignment of error is that the
trial court erred in granting a new trial be-
cause "the opinion of the trial court that
a new trial should be granted in the 'interests
of justice' is not a ground for granting a
new trial." As the basis for this assign-
ment it is argued that, because the trial
court did not "specify each and every ground
upon which it based its order," it must be
inferred that the court denied each and every
ground specified as error upon the motion
for new trial. While the form of the order
does not comply with the spirit of the rule
and is not to be commended, we can only
infer that the trial court granted the motion
for *all* of the reasons urged upon the motion
for new trial as well as in the interest of
justice. It is therefore unimportant to the
determination of this appeal whether the
trial court had or had not power to grant
a new trial solely "in the interests of jus-
tice."

The order granting a new trial is affirmed.

SMITH and McCOY, JJ., not sitting.

NICHOLS v. NORDNESS. (No. 4916.)

(Supreme Court of South Dakota. Sept 16, 1921.)

1. Guaranty §82(2)—Bank not necessary party to action by buyer of bank stock against seller who guaranteed payment of notes.

Where seller of bank stock guaranteed the payment of notes held by bank, without the contract of guaranty purporting to have been made on behalf of the bank, the bank was not an indispensable party to the buyer's action against seller on such guaranty.

2. Property §9—Buyer of stock presumed to remain owner.

In action by buyer of bank stock against seller on seller's guaranty of payment of notes held by bank, or which had been rediscounted by bank with other banks, the complaint was not demurrable for failure to allege the buyer's ownership of the stock at the time of the commencement of the action, since court will presume that buyer remained owner thereof.

Appeal from Circuit Court, Day County; Frank Anderson, Judge.

Action by L. C. Nichols and others against R. L. Nordness. From an order overruling a demurrer to the complaint, the defendant appeals. Affirmed.

Waddel & Dougherty, of Webster, for appellant.

L. W. Bicknell, of Webster, and Haney & McCoy, of Huron, for respondents.

WHITING, J. This is an appeal from an order overruling a demurrer to a complaint. The demurrer confesses the following material facts: Defendant and plaintiffs entered into a written contract whereby defendant contracted to sell to the plaintiffs and plaintiffs contracted to purchase of defendant the entire capital stock of a bank, and whereby, as an inducement for such purchase, defendant contracted to guarantee to plaintiffs the payment of \$10,000 of the notes then held by said bank, or which had been rediscounted by said bank with other banks. Plaintiffs bought the stock of defendants; a selection of the notes was duly made; and there remains unpaid on said notes the sum for which recovery is sought.

[1] The demurrer was interposed upon the grounds: (a) that said complaint, upon its face, does not state facts sufficient to constitute a cause of action; (b) that it appears upon the face of the complaint that there is a defect of parties plaintiff, in that the bank is not made a party plaintiff; (c) that several causes of action have been improperly joined. Appellant seems to have abandoned the third ground for demurrer. The contract of guaranty does not purport to be upon behalf of the bank; and it clearly does not extend to or on behalf of the bank. It is therefore clear that the bank is not an indispensable party to this action, even if it would have been a proper party.

[2] There remains the question of whether or not the complaint set forth facts sufficient to constitute a cause of action against the defendant on behalf of the plaintiffs. While the complaint is not a model pleading, we think there is sufficient therein to show that these notes still remain the property of the bank. If so, plaintiffs are entitled to recover on the contract of guaranty if they have remained the owners of the stock of said bank. There is no direct allegation that they are now the owners of such stock. Does the complaint fail to state facts sufficient to constitute a cause of action because it fails to allege that the plaintiffs, at the time of bringing this action, were still the owners of the capital stock of the bank? The demurrer confesses that the plaintiffs became the purchasers of all of this stock. If defendant had answered, and upon trial plaintiffs had introduced the contract and had proven that, in accordance with said contract, they had purchased all of this stock and had offered no further evidence, we think a jury or court would be warranted in presuming, unless the contrary was shown, that they had continued to be the owners of said stock up to the time of bringing this action. It follows that, when, by the demurrer, defendant confessed that plaintiffs did become the owners of all of this stock, the trial court was justified in assuming for the purposes of the demurrer, that plaintiffs were conceded to have remained the owners of such stock.

The order appealed from is affirmed.

SMITH and MCCOY, JJ., taking no part herein.

⚡ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

BESTAK v. BENNETT. (No. 4935.) *

(Supreme Court of South Dakota. Aug. 31, 1921.)

1. Justices of the peace §45—Counterclaim exceeding \$100 beyond jurisdiction.

A counterclaim in a sum exceeding \$100 could not have been filed in a justice court.

2. Courts §169(5)—Counterclaim in sum of \$173 permissible in municipal court.

In an action begun in municipal court to recover \$33 overpaid by plaintiff in settling a debt due defendant, defendant's counterclaim in the sum of \$173 was permissible.

3. Trial §321½—Verdict by nine jurors held not permissible in action on account in municipal court.

In an action begun in a municipal court to recover \$33 overpaid by plaintiff to defendant in settling a debt, defendant counterclaiming for \$173, the action, as tried on appeal in the circuit court, was not cognizable by a justice of the peace, and the circuit court erred in instructing that nine jurors could return a verdict under Rev. Codes 1919, § 2516, providing that in all civil actions cognizable by a justice of the peace, etc., verdict may be rendered by three-fourths of the jury.

4. Appeal and error §1064(1)—Prejudicial error in instruction as to rendition of verdict by nine jurors not appearing, judgment must be affirmed.

In an action begun in municipal court to recover \$33 overpaid by defendant in settling a debt, defendant counterclaiming for \$173, so that the case as tried in the circuit court on appeal was beyond the jurisdiction of a justice of the peace, and nine jurors could not return verdict, as the court instructed, where the Supreme Court cannot say that three jurors agreed with nine solely because of the instruction of the court, prejudicial error in the instruction does not affirmatively appear, and judgment for plaintiff must be affirmed.

Appeal from Circuit Court, Minnehaha County; L. L. Fleeger, Judge.

Action by M. Bestak against J. B. Bennett. From a judgment for plaintiff, defendant appeals. Affirmed.

Kirby, Kirby & Kirby, of Sioux Falls, for appellant.

GATES, J. This action was begun in the municipal court of Sioux Falls to recover the sum of \$33 alleged to have been overpaid by plaintiff by mistake in settling a debt due defendant. The defendant denied the allegations of the complaint, and pleaded a counterclaim in the sum of \$173. Plaintiff was successful in that court, and defendant appealed to the circuit court. The circuit court instructed the jury as follows:

"In this case, gentlemen, the court will say to you that nine of you can return a verdict; that is to say, whenever nine or more of you agree upon a verdict, you will come back into court and render your verdict."

The jury returned a verdict in favor of plaintiff in the sum of \$83, with interest. The court then asked the foreman of the jury how many of the jurors voted in favor of the verdict:

"A. Nine, and then made it unanimous.

"Q. By the Court: On the first ballot nine? A. Nine.

"Q. And then all voted? A. All.

"Q. In favor of this verdict? A. Yes, sir.

"Q. So say you all, gentlemen? A. Yes, sir."

From the judgment entered pursuant to the verdict defendant has appealed, assigning as error the above instruction.

[1, 2] The Constitution of this state (section 6, art. 6) provides that the Legislature may provide for the decision of civil cases by three-fourths of the jury in any court. Pursuant thereto the Legislature enacted the provision now embodied in section 2516, Rev. Code 1919, viz:

"In all civil actions cognizable by a justice of the peace, except actions for the forcible entry and detainer, or detainer only, of real property, tried in the circuit or county court, the verdict may be rendered by three-fourths of the jury in the manner provided in the succeeding section."

In so far as plaintiff's cause of action is concerned, the action was one cognizable by a justice of the peace, but a counterclaim in a sum exceeding \$100 could not have been filed in a justice court. The counterclaim filed in this case was permissible in the municipal court.

[3] We are entirely satisfied that the action as tried in the circuit court was not one cognizable by a justice of the peace, and therefore that the court erred in giving the above instruction. The remaining question is, Was the error prejudicial?

[4] Did the three jurors agree with the nine solely because of the instruction of the court? From the record we are unable to answer that question. The answer may easily be in the affirmative or in the negative. If the defendant desired to lay a foundation for prejudicial error he should have asked the trial court to propound that question, or a similar one, to the jury. As it is prejudicial error does not affirmatively appear. Therefore the judgment must be, and it is, affirmed. *Mundon v. Greenameyer*, 44 S. D. —, 184 N. W. 257.

WHITING, J., not sitting.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 22, 1921.

YOUNGBERG v. YOUNGBERG. (No. 4819.)

(Supreme Court of South Dakota. Sept. 16, 1921.)

1. Divorce §249(6)—Divorced wife not entitled as of right to all of husband's homestead.

A divorced wife having no further interest in her husband's homestead, except as ordered by the court, the latter, on granting the wife a divorce, did not err in awarding her only a portion of the proceeds of the sale of the homestead; Rev. Code 1919, § 168, providing that the court may assign the homestead to the innocent party according to the facts in the case and in consonance with the law relating to homesteads, not necessarily entitling her to all her husband's property on the granting of the divorce.

2. Divorce §286—Finding that husband had creditors, though unresponsive to issues, held not prejudicial to wife.

Where the court, on granting a wife's petition for divorce, awarded to her all her husband's personal property and \$2,500 of the proceeds of the sale of his homestead, a finding of fact that there were creditors of the husband, though wholly unresponsive to any issue in the case, they having no standing in the action on the facts found, was not prejudicial to plaintiff, even if the court considered such finding in arriving at its judgment; the latter being eminently just and fair to her.

Appeal from Circuit Court, Clark County;
W. N. Skinner, Judge.

Suit by Sarah E. Youngberg against Oscar A. Youngberg for divorce. Judgment for plaintiff. From an award of part only of defendant's property, she appeals. Affirmed.

R. A. Dunham, of Clark, for appellant.
Sherwood & Sherwood, of Clark, amici curiæ.

GATES, J. Plaintiff was awarded a divorce from defendant upon the grounds of habitual intemperance, desertion, and cruelty. They had been married a year at the time of the desertion. There were no children. The property of defendant consisted of personal property not exceeding \$750 in value and the homestead; the latter being a 160-acre farm worth \$12,000 and incumbered to the amount of \$6,000. The court awarded plaintiff the personal property and directed the sale of the homestead. Out of such sale it was ordered that \$2,500 be paid to plaintiff and the residue to defendant, or, if defendant could not be found, then the residue was to be paid into court. The defendant had disappeared from his home and had not been heard from. He left, owing many debts.

[1] The plaintiff appeals from the judgment, and claims that the court committed a flagrant abuse of discretion in not awarding to her the whole homestead. Messrs. Sherwood & Sherwood have filed brief as amici curiæ, pursuant to permission granted. Youngberg v. Youngberg, 44 S. D. —, 181 N. W. 835. The real gist of appellant's claim is that, because of the disappearance of her former husband, and by reason of section 168, Rev. Code 1919, she should have all of his property, and that neither he nor his creditors should have anything. We apprehend that, if the former husband were still living on the farm, scant attention would be given to an assertion by plaintiff that she was entitled to all of his property upon the granting of the divorce. Section 168, Rev. Code, provides:

"The court * * * may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case, and in consonance with the law relating to homesteads."

Just what the last clause means it is not necessary for us to decide at this time. It certainly does not mean that plaintiff was necessarily entitled to all of defendant's property upon the granting of the divorce.

The theory of appellant, as revealed by the argument and citations, is that she has the same right in the homestead as though there had been no divorce. Such is not the law. She is no longer the wife of defendant. He is no longer her husband. Brady v. Kreuger, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 774; Rosholt v. Mehus, 3 N. D. 513, 57 N. W. 783, 23 L. R. A. 239. Except as otherwise ordered by the court, plaintiff had thenceforth no interest in the homestead owned by defendant. Brady v. Kreuger, supra. If the title thereto had been owned by plaintiff, the defendant, except as otherwise ordered, would thenceforth have had no interest therein. It is therefore clear that the trial court did not as a matter of law err in its judgment.

[2] The evidence is not before us. The sole question then is: Do the findings of fact support the conclusions of law and judgment? Or, conversely stated, are the conclusions of law and judgment in harmony with the facts found? We are unable to say that they are not. The tenth finding of fact, which found that there were creditors of the husband, was wholly unresponsive to any issue in the case, and had no proper place in the findings; but it was not prejudicial to appellant, because, even if the trial court considered such finding in arriving at its judgment (which does not affirmatively appear), yet such judgment was eminently just and fair to appel-

lant. On the facts as found the creditors have no standing in the present action. The judgment is affirmed.

SMITH and McCOY, JJ., not sitting.

KAYSER v. NELSON. (No. 4900.)

(Supreme Court of South Dakota. Sept. 16, 1921.)

Venue $\Rightarrow$ Statute relating to venue in action for "damages to persons" applicable only to actions for physical injuries.

Rev. Code 1919, § 2327, entitling the plaintiff to bring actions for conversion of personal property or for the recovery of "damages to persons or property" in the county where the damages were inflicted or the cause of action arose, is not applicable to all injuries suffered by a person, whether ex contractu or ex delicto, but can be invoked by the plaintiff only where the person has suffered a physical injury, and hence action for alienation of wife's affections was not included.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Damage—Damages.]

Appeal from Hutchinson County Court; R. B. Tripp, Judge.

Action by William M. Kayser against Harvey Nelson. From an order denying defendant's application for change of venue, the defendant appeals. Order reversed.

Spangler & Wire, of Mitchell, for appellant.

Wicks & Quinn, of Scotland, for respondents.

WHITING, J. Plaintiff seeks damages for the alleged alienation of his wife's affections. He brought action in the county where he alleges the wrong was committed. This was a county other than that of defendant's residence. Defendant, after proper demand, applied to the circuit court for an order changing the venue to the county of his residence. From an order refusing such change, this appeal was taken.

The sole question presented is the proper construction to be given to section 2327, R. C. 1919. In this state, as we think, in the majority at least of the Code states, in the chapter of the Code relating to "Place of Trial" (sections 2325-2328, R. C. 1919), there is to be found a section (our section 2325) providing that certain actions should be tried in the county where the subject of the action is located; then a section (our section 2326) providing that certain other actions should be tried in the county where the cause

of action arose; and then a section (our section 2327) that all other actions should "be tried in the county in which the defendant or defendants, or any of them, shall reside at the commencement of the action." By chapter 150, Laws 1915, what is now section 2327, there was added after the words above quoted—

"except that actions for conversion of personal property, or for the recovery of damages to persons or property, may at the option of the plaintiff be brought and tried in the county where the damages were inflicted or the cause of action arose."

In construing this exception, it should be construed as though, after the words "of damages," there were inserted the words "for injury," and as though the other word "damages" was changed to "injuries." What actions should be held to be included in "actions . . . for the recovery of damages for injury to persons"? Respondent cites cases wherein, in construing statutes relating to various matters other than place of trial of actions, a broad meaning has been given to the phrase "injury to the person," whereby it is held to include all injuries to persons, whether ex contractu or ex delicto. Thus it would include injuries from libel, slander, criminal conversation, seduction, malicious prosecution, assault, battery, false imprisonment, negligence, fraud, deceit, as well as from breaches of contract, because the committing of either, of any tort or the breach of any contract whereby another suffers an injury, is the breach of a duty owing to, or the violation of a personal right of, such other person. That this phrase should be given such a broad construction when found in certain statutes must be conceded. Thus we held in *Moberg v. Scott*, 38 S. D. 422, 161 N. W. 998, L. R. A. 1917D, 732, that "injuries done to one in his person" included an "injury to one's personal rights as well as physical injuries to the person." But it does not follow that this or any like phrase should be given such a construction wherever found in a statute.

Either we must hold that this phrase "damages to persons" includes only "physical" injuries, or else we must hold that it includes every violation of a personal right or breach of duty, and therefore that every action seeking money damages be brought "in the county where the damages [injuries] were inflicted or the cause of action arose." Was such a radical change intended by the legislators? We think not. If so, why any reference in such "exception" to "conversion of personal property" or "damages [injuries] to . . . property"? If we give the phrase "damages to persons" the broad construction urged by respondent, we make

needless any reference to conversion or injury to property, as they would be included in "damages to persons." Certainly the "damages" or "injuries" to "property" in the minds of the legislators were "physical"; and we can fairly assume that it was because they had in mind only "physical" injuries to persons that they made the otherwise unnecessary reference to "conversion of personal property" and "damages to persons."

The order appealed from is reversed.

SMITH and McCOY, JJ., not sitting.

WANGSNESS v. STEPHENSON. (No. 4928.)

(Supreme Court of South Dakota. Sept. 16, 1921.)

1. Evidence $\S$ 466—Agreement to rescind held not inadmissible, as varying terms of contract.

Evidence of an oral agreement whereby a purchaser in contract of sale of land surrendered the written contract and all his rights thereunder, in consideration of seller's agreement to repay, at a future date agreed on, the full sum which purchaser had paid on the contract, with interest, was not inadmissible as tending to vary the terms of the written contract; Rev. Code 1919, $\S$ 908, having no application either to the mutual rescission of a written contract or to an entirely new agreement valid in itself.

2. Evidence $\S$ 427—Parol evidence held admissible to show sale to third party was not act of "bad faith."

An oral agreement whereby purchaser of land under contract surrendered the written contract and all his rights thereunder, in consideration of seller's agreement to repay installments paid, with interest, even though it tended to vary the terms of a written agreement, was admissible in evidence to show that a sale to a third person in reliance thereon was not an act of "bad faith," within the meaning of Rev. Code 1919, $\S$ 1970, concerning damages in such cases.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bad Faith.]

3. Frauds, statute of $\S$ 140—Agreement surrendering written contract held not within statute.

An oral agreement whereby purchaser of land under contract surrendered the written agreement, in consideration of seller's promise to repay installments paid, with interest, was not such an agreement as, under the statute of frauds, would need to be in writing; no title to the land having been conveyed to the purchaser.

Appeal from Circuit Court, Minnehaha County; John T. Medin, Judge.

Action by Thomas Wangsness, as administrator of the estate of Sigfred Ulvig, deceased, against A. H. Stephenson. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Jones, Muller & Conway, of Sioux Falls, for appellant.

Boyce, Warren & Fairbank, of Sioux Falls, for respondent.

WHITING, J. Defendant, S., entered into a written contract to convey to one U. certain real property, upon the payment of the agreed consideration, which payment was to be made in installments. U. made some of the payments. Soon thereafter he died, and plaintiff was appointed administrator of his estate. Plaintiff thereafter brought this action, wherein he tendered all overdue payments and demanded specific performance of the contract, or, in case specific performance could not be had, damages for breach of the contract. S. pleaded that U., after having paid some upon the contract, and when in default as to one payment, desired to abandon the contract, and that he and U. entered into an agreement whereby U. surrendered the written contract and all his rights thereunder, in consideration of S. agreeing to repay U., at a future date agreed upon, the full sum which U. had paid upon such contract. S. further pleaded that, relying upon the agreement to cancel the contract, he had sold and conveyed the land to a third party, and therefore could not deliver title to plaintiff. S. offered judgment for the amount U. had paid and interest from the time such agreement was alleged to have been made. Findings were for plaintiff. From a judgment for damages for breach of contract, and from an order denying a new trial, this appeal was taken.

Upon the trial, and over objections that the agreement sought to be proven was oral, and therefore ineffective to vary the terms of the written agreement, S. was allowed to introduce proof of the agreement which he had pleaded, and he was also allowed to offer proof that, relying upon this agreement, he had sold and conveyed the land to a third party. But the trial court refused to make any findings as to the facts thus pleaded, although they were sustained by what seems to us undisputed testimony. Inasmuch as the judgment was for the amount that had been paid by U. and interest thereon from dates of payments, as well as for the difference between what U. contracted to pay for the land and the value of the land when S. sold it to the third party, it is clear that the court based its final rulings on section 1970, R. C. 1919, and that it held the offer to prove the oral agreement but an attempt to vary the terms of a written contract, and therefore ineffec-

tive under section 908, R. C. 1919, and the sale by S. to the third party an act of "bad faith" on the part of S. Section 1970, R. C. 1919, reads:

"The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid, and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

Section 908, R. C 1919, reads:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

[1, 2] The trial court was in error. The new agreement did not tend to vary the terms of the written agreement; but, even if it had, if it was entered into in good faith, when S. sold the land relying upon such new agreement, his act in selling said land was not an act of "bad faith."

Section 908 has no application, either to the mutual rescission of a written contract or to an entirely new agreement valid in itself. The evidence received established an entirely new agreement, based upon a mutual rescission and abandonment of the previous contract.

[3] A parol agreement whereby a written contract is rescinded is valid and may be established by any competent proof. 13 C. J.

600; *Tompkins v. Davidow*, 27 Cal. App. 327, 149 Pac. 788; *Enderlien v. Kulaas*, 25 N. D. 385, 141 N. W. 511. But here we have more than the mere rescission—we have the new agreement based upon new consideration. This new agreement was not such an agreement as, under the statute of frauds, would need be in writing. No title to this land had been conveyed to U.; the written contract was not in his, but S.'s, possession. That he could, under the facts proven, have compelled S. to carry out his covenant to repay the money, cannot be questioned. The law applicable to this case is well stated in *Adler v. Friedman*, 16 Cal. 189:

"The general rule is, that extrinsic verbal evidence is not admissible to contradict or vary the terms of a written agreement. This rule is not infringed by the admission of such evidence to prove that the written agreement has been discharged, or to establish a new and distinct agreement, upon a new consideration, which takes the place of, and is a substitute for the old. In the latter case, however, it must appear that the old agreement is rescinded and abandoned, and it is not competent to show by parol the incorporation of new terms and conditions. It is obvious, too, that the new agreement must be valid in itself, and such may be made the basis of an action."

See, also, *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154, 159.

The judgment and order appealed from are reversed.

SMITH and McCOY, JJ., taking no part herein.

FRANSEN v. KELLOGG TOASTED CORN FLAKE CO. et al. (No. 22501.)

(Supreme Court of Minnesota. Sept. 23, 1921.)

(Syllabus by the Court.)

Master and servant §332(2)—Liability for automobile driver's act held question for jury.

The defendant Kellogg Company furnished for the use of its codefendant Staninger, who was in its employ, an automobile to be used by him in advertising and selling its products. He was to drive it. The auto ran over and killed the plaintiff's intestate. It is held that the evidence was such as to authorize a finding by the jury that Staninger was driving the auto at the time in the business of the defendant, though there was no direct evidence to that effect, and that it was error to dismiss the action when the plaintiff rested.

Appeal from District Court, Ramsey County; O. B. Lewis, Judge.

Action by Julius L. Fransen, as administrator of his deceased son, against the Kellogg Toasted Corn Flake Company and another, for the death of plaintiff's intestate. Dismissed at close of case on defendants' motion, and, from an order denying his motion for new trial, plaintiff appeals. Order reversed.

Barton & Kinkad, of St. Paul, for appellant.

Sexton, Mordaunt & Kennedy, of St. Paul, for respondents.

DIBELL, J. Action by the plaintiff, as administrator, to recover for the death of his minor son, who was run over and killed by an automobile in La Crosse, Wis., on May 6, 1920. At the close of the case it was dismissed on the motion of the defendant. Kellogg Company. The defendant Rex Staninger answered but did not appear at the trial. The plaintiff appeals from the order denying his motion for a new trial.

The trial court was of the view that there was not sufficient proof that Staninger was driving the car nor that it was being driven in the business of the Kellogg Company and so dismissed the action. It is conceded that the evidence made the question whether the car which killed the boy was the car of the defendant for the jury.

Staninger was in the employ of the Kellogg Company. His territory included La Crosse and two or three adjoining counties. He was advertising and taking orders for the Kellogg Company products and was furnished advertising matter. He was furnished a Dodge commercial truck. It was lettered on both sides and on the back, according to the testimony of one of the com-

pany's sales managers, something like "Kellogg Toasted Corn Flake Company. Look for Signature." About 5:30 or 6 in the afternoon of May 6, 1920, a car sufficiently identified by various witnesses as the Kellogg car ran over and killed plaintiff's boy in one of the public streets. The police officers were notified at 6:30. They found the car parked at the hotel where Staninger was stopping. It was going in the general direction of the hotel when it ran over the boy. The officers found Staninger in his room about 6:45 washing. A drunken man was lying on the bed. The auto was not particularly examined that night, but the next day, on looking into it, advertising matter of the Kellogg Company was found.

That the truck was being driven by Staninger and was being used in the company's business at the time could have been fairly inferred by the jury. It was in business hours. The car was a business car. It was in La Crosse for Staninger's use in doing the company's business. He had charge of it. The company furnished no other car and had no other employé. No suggestion arises from the evidence that the car was being used in other than the company's business or was being driven by an unauthorized person.

Of course the plaintiff cannot recover of the defendant unless its auto was being used in its business at the time. Provo v. Conrad, 130 Minn. 412, 153 N. W. 753, and cases cited. But the evidence was such as to justify the jury in finding that the auto was being so used. In some jurisdictions, and there are many late cases to that effect, it is held that proof of ownership makes a prima facie case of authorized use at the time. Other cases hold that the employment of the driver must be shown; and still others that use in the scope of the driver's employment is a fact to be proved. Notes L. R. A. 1918D, 924; 46 L. R. A. (N. S.) 1091; Babbitt, Motor Vehicles (2d Ed.) § 827 et seq.; Huddy on Automobiles (5th Ed.) § 673 et seq.; Berry on Automobiles, § 1047 et seq. And in passing it may be noted that it has been held, under varying circumstances, that the fact that the vehicle doing the injury was painted or lettered with the name of the defendant is evidence of ownership, or of ownership and operation, by the defendant at the time. Edgeworth v. Wood, 58 N. J. Law, 463, 33 Atl. 940; Norris v. Kohler, 41 N. Y. 42; Seaman v. Koehler, 122 N. Y. 646, 25 N. E. 353; Bosco v. Boston Store, 195 Ill. App. 133; O'Malley v. Public Ledger Co., 257 Pa. 17, 101 Atl. 94. Our cases hold that proof that an automobile is for family use justifies an inference that the use at the time is an authorized use. Ploetz v. Holt, 124 Minn. 169, 144 N. W. 745; Johnson v. Evans, 141 Minn. 356, 170 N. W. 220, 2 A. L. R. 891. The auto

which did the injury was a business auto, intended for use in the defendant's business in soliciting orders and distributing advertising matter, and was itself lettered for advertising purposes. We need not inquire as to the prima facie effect of proof of ownership, or of proof of ownership and the employment of the driver, as proof of the owner's use at the time, for the evidence before us responds to all tests of a prima facie case. The case of *Robinson v. Pence Automobile Co.*, 140 Minn. 332, 168 N. W. 10, relied upon by the defendant, is not controlling. There the questions of the ownership of the auto and the identity of the driver were for the jury. Upon the evidence, not at all resembling that in the case at bar, it was held that it could not be inferred that the driver was engaged in the defendant's business.

We refrain from stating the testimony of the officers as to what Staninger said about the accident at the hotel. It may not have been competent evidence against the Kellogg Company. Without it there was a prima facie case. The inferences to be drawn from it were inferences of fact, and uncertain. Clearly it did not destroy the prima facie case made without it. An argument of fact might be made that it strengthened it, or that it weakened it.

Order reversed.

DROVERS' CATTLE, LOAN & INV. CO. v. McGRAW. (No. 22467.)

(Supreme Court of Minnesota. Sept. 23, 1921.)

(Syllabus by the Court.)

1. Evidence $\S$ 444(6)—Parol evidence admissible to show note not intended to be operative from delivery, but only on maker's failure to keep conditions.

Parol evidence held admissible to show that a contract in the form of a promissory note delivered by the maker to the payee, the plaintiff, was not intended to be operative as a contract from its delivery, but only on the failure of the maker to keep and perform all the conditions of the agreement.

2. Bills and notes $\S$ 516—Evidence held to justify verdict for defendant.

Evidence considered, and held sufficient to justify the verdict.

3. Court's charge held not to contain reversible error.

Charge of the court considered, and held not to contain any reversible error.

4. Counsel's conduct in argument held not reversible error.

There was no reversible error in the conduct of counsel for defendant in his argument to the jury.

Appeal from District Court, Meeker County; R. T. Daly, Judge.

Action by the Drover's Cattle, Loan & Investment Company against Elizabeth McGraw. Verdict for the defendant, and from an order denying its motion for judgment notwithstanding the verdict, and for new trial, plaintiff appeals. Affirmed.

Alva R. Hunt, of Litchfield, for appellant.
N. D. & C. H. March, of Litchfield, for respondent.

QUINN, J. Action to recover a balance claimed to be owing upon a promissory note executed by the defendant May 20, 1919, whereby she promised to pay to the order of the plaintiff, on October 15 thereafter, the sum of \$3,355.47 with interest at 8 per cent. The answer in effect alleges that at the time of the making of the note the defendant purchased from plaintiff and Swanson & Gearen 62 head of cattle then in the stockyards at South St. Paul; that as a part of said contract of sale plaintiff and W. E. Gearen stated to defendant that, if she would pay to them \$300 cash and give plaintiff a note and chattel mortgage on said cattle for \$3,355.47, and take them to her farm in Meeker county, and pasture, feed, and care for the same until plaintiff or Swanson & Gearen called for them, and then ship them back to South St. Paul, as plaintiff or Swanson & Gearen might direct, they would receive and sell the cattle, and, if they sold for more than the amount of the note, they would turn over the overplus to the defendant, and that in no event would she be asked to pay any sum or amount other than the first \$300, and that they would look to the cattle for the payment of the note; that, relying upon said statements, the defendant entered into the contract and paid the sum of \$300 by check, and signed the note in question; that thereupon defendant took said 62 head of cattle to her farm, pastured and cared for them from May, 1919, to November, 1918; that on or about November 1 Gearen requested defendant to send the cattle to South St. Paul to the Haas Commission Company, and pursuant thereto defendant did ship all of said cattle, save three that had died, to the Haas Commission Company as requested; that on November 6 the plaintiff notified defendant that the Haas Commission Company had turned over to them \$2,441.82 to apply on the note and that there still remained due thereon a balance of \$1,023.99 and interest; that the defendant has in all things performed her part of said agreement, and that she returned the cattle as requested, and has received nothing for pasturing and caring for the same. The reply puts in issue the allegations of the answer.

The cause was tried and submitted to a jury and a verdict returned in favor of the defendant. From an order denying its motion for judgment notwithstanding the verdict, or for a new trial, plaintiff appeals.

[1] In April, 1919, defendant resided upon a farm of 320 acres in Meeker county, this state, which her husband owned, and at his death left to the defendant and their seven children. On the trial defendant offered and was permitted, against plaintiff's objection to its competency, to prove by parol that, notwithstanding the delivery of the note, it was intended by the parties that it would become operative as a contract only in case she failed to live up to the terms of her contract in caring for and returning the cattle for sale in the fall and applying the proceeds thereof in extinguishment of the contract. The competency of such testimony is the only serious question in the case. The objection thereto was that it constituted an attempt to vary the effect of a written contract by parol.

Defendant testified, in effect, that she went to South St. Paul to procure some cattle to feed during the summer months; that she met Mr. Gearen, of the firm of Swanson & Gearen, dealers in cattle, and entered into an agreement to take 62 head of cattle at \$9.25 per hundred weight, amounting to the sum of \$3,655.47, agreeing to pay \$300 cash and to take the cattle to her farm, pasture and care for them during the summer, and in the fall return the same to Swanson & Gearen for sale as they might direct; that by such agreement they were to sell the cattle, apply the proceeds on the note, and pay Mrs. McGraw the overplus, if any there was, less freight and commission; that thereafter Mr. Gearen requested her to go with him to the plaintiff's office and have Mr. Green, who it appears was the secretary and treasurer of plaintiff and assistant cashier of the Drovers' State Bank of South St. Paul, prepare the note and mortgage; that the plaintiff's office was in the banking rooms of the Drovers' State Bank; that they there met Mr. Green and informed him of their purpose, and Mr. Green questioned her about the amount of property she had, etc.; that she then informed him of the terms and conditions of the agreement, and he told her that the agreement would stand, and that it was understood and agreed that they were to look to the cattle for the payment of the note, and that defendant would be asked to pay the note only through the sale of the cattle; and that she then signed the note

which Swanson & Gearen indorsed, and gave Green a check or draft for the cash payment of \$300.

For the purpose of this case it may be said that, had the note been made payable to Swanson & Gearen, and had the action been brought by them instead of the Loan & Investment Company, the oral testimony as to the transaction might have been received under the rule announced in *Bank v. Luckow*, 37 Minn. 542, 35 N. W. 434, and cases therein cited, and if found true and sufficient to establish defendant's contention, would be a complete bar to a recovery of the balance unpaid on the note. Plaintiff's situation is not different. If the testimony of defendant is true as to what she related to Green, the plaintiff would be deemed in law to have had full notice of the conditions of the transaction. *Swanson v. Gearen*, as individuals, indorsed the note before delivery. Green then turned it over to the Drovers' State Bank, together with the \$300 draft, and credit on the bank's books was given to Swanson & Gearen, subject to check, but it does not appear that the same was ever checked against. The plaintiff gave no consideration for the note so far as appears from the record.

[2-4] If the agreement was as related by the defendant—and her testimony in relation thereto stands uncontradicted—if she made known to the plaintiff at the time of the giving of the note all the conditions thereof as she testified she did, and if she kept and performed all the conditions of the agreement, and the undisputed evidence is to that effect, then the note never became operative beyond the amount the cattle might bring in the fall. It was delivered and held in the nature of a pledge that the agreement would be performed. The note expresses only the method of payment in case the maker failed to keep her contract. The following cases are in point. *Healy v. Young*, 21 Minn. 389; *Gammon v. Ganfield*, 42 Minn. 368, 44 N. W. 125; *Germania Bank v. Osborne*, 81 Minn. 272, 83 N. W. 1084. As stated in *Giltner v. Quirk*, 131 Minn. 472, 474, 155 N. W. 760, the evidence is admissible where the note was given as a part of a larger transaction, the facts with reference to which give an independent right to defeat recovery. We hold that the evidence was competent and sufficient to justify the verdict. We find no reversible error in the charge of the court, nor in the conduct of counsel for defendant.

Affirmed.

M. W. SAVAGE FACTORIES, Inc., v. CANADIAN NORTHERN RY. CO.
(No. 22326.)

(Supreme Court of Minnesota. Sept. 23, 1921.)

(Syllabus by the Court.)

Carriers $\Rightarrow$ 180(3)—Bill of lading provision as to time for suits for and notice of loss held not to apply where carrier's agent received and absconded with money collected for goods.

Defendant was the last carrier of an intrastate shipment, shipped under an order bill of lading by plaintiff to its order, "Notify R. L. Brown." Defendant's station agent delivered the shipment to Brown, the purchaser, without the bill of lading being presented, but received full payment for the goods. The agent absconded without turning over the money to either plaintiff or defendant. In this action for conversion it is held: The provisions in the bill of lading that suits for loss or damage to the shipment must be brought within a specified time, and that notice of loss or damage must be filed in writing within a certain time, do not cover a loss resulting from the facts herein found—following *Bardwell v. American Express Co.*, 35 Minn. 344, 28 N. W. 925.

Appeal from Municipal Court of Minneapolis; Mathias Baldwin, Judge.

Action by the M. W. Savage Factories, Inc., against the Canadian Northern Railway Company. Judgment for plaintiff, and from an order denying a new trial, the defendant appeals. Order affirmed.

C. Hector Baxter and Wm. T. Kelsh, both of Minneapolis, for appellant.

C. E. Warner, of Minneapolis, for respondent.

HOLT, J. The findings of fact are not challenged by any assignment of error, and are to the effect that plaintiff, engaged in business at Minneapolis, Minn., on December 6, 1916, shipped goods to R. L. Brown at Roosevelt, Minn., of the value of \$50.05, the goods to be delivered on payment of that sum; that the goods arrived at defendant's station at Roosevelt, and was by its station agent delivered to Brown, without the presentation of the order bill of lading, upon payment to the agent of the amount due plaintiff, and more; that defendant's agent absconded, and failed to turn over the money to plaintiff or to defendant; and "that plaintiff's claim on ac-

count of the failure to remit the amount due on said C. O. D. shipment was filed with defendant company on the 11th day of February, 1919." Judgment was ordered for plaintiff for \$50.05 and interest. The appeal is from the order denying a new trial.

The order bill of lading under which the shipment was made directed the delivery to be made to the order of plaintiff, "Notify R. L. Brown," and contained this provision:

"Suits for recovery of claims for loss, damage, or delay shall be instituted only within two years after delivery of the property, or, in case of failure to make delivery, then within two years after a reasonable time for delivery has elapsed."

There was also a provision that notice of claim of loss or damage must be filed in writing within four months after delivery. The assignments of error raise only the proposition whether the court erred in refusing to order judgment for defendant because the suit was brought more than three years after delivery of the shipment, and because the notice of claim was not filed within the time limited.

The points of shipment and destination were in this state, defendant being the last carrier. The answer averred that if the shipment was made it was interstate. This was denied in the reply. There was no finding or requested finding on that issue, nor do the stipulated facts tend to prove that it was interstate. We must therefore treat it as intrastate. Under the facts found the goods were delivered by the defendant's agent to the party who was to have them, and he in turn paid the agent the full purchase price of value that plaintiff was to receive. The agent was in charge of defendant's business at Roosevelt, and what he did or failed to do in the premises must be held to be the act or omission of defendant. The legal effect would then be that defendant received money to the use of plaintiff, and by failing to turn it over converted it. The loss sustained by plaintiff from the failure to turn over the money so obtained has by this court been held not to be a loss or damage covered by the provisions in the shipping contract referred to. *Bardwell v. American Express Co.*, 35 Minn. 344, 28 N. W. 925. Therefore the defense sought to be made is not available under the facts found.

Order affirmed.

$\Rightarrow$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

BLANKENBURG v. MINNEAPOLIS STEEL & MACHINERY CO. (No. 22418.)

(Supreme Court of Minnesota. Sept. 23, 1921.)

*(Syllabus by Editorial Staff.)***Pleading** §343—Where issue determinable only on trial was presented, defendant held not entitled to judgment on pleadings.

In a servant's action for injury alleged to have resulted from negligence of defendant's servants in operating an X-ray machine, where the pleadings raised an issue determinable only on trial as to whether the alleged negligence came within the Workmen's Compensation Act, defendant was not entitled to judgment on the pleadings.

Appeal from District Court, Hennepin County; Jos. W. Molyneaux, Judge.

Action by John A. Blankenburg against the Minneapolis Steel & Machinery Company. From a judgment entered upon an order vacating and setting aside an attempted dismissal by plaintiff, and ordering judgment for defendant for costs and disbursements, the plaintiff appeals. Reversed.

A. O. Edwards, Geo. T. Simpson, and John F. Dahl, all of Minneapolis, and Eugene S. Bibb, of New York City, for appellant.

Dille, Hoke, Krause & Faegre, and Cobb, Wheelwright & Benson, all of Minneapolis, for respondent.

PER CURIAM. This is an appeal from a judgment entered upon an order vacating and setting aside an attempted dismissal of an action by plaintiff and ordering judgment in favor of the defendant for its costs and disbursements.

The action was brought to recover damages for personal injuries. The defendant appeared and answered. In his reply plaintiff demurred to paragraph 3 of defendant's answer, which set up a settlement under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230), upon the ground that the same

did not state facts sufficient to constitute a defense, and further the reply put in issue other portions of the answer. Thereafter a hearing was had upon the demurrer and a decision filed overruling the same, with leave to amend the reply, which plaintiff failed to do. Some two months later plaintiff filed with the clerk a writing dismissing the action without prejudice. Subsequently the court, upon the return of an order to show cause set aside the attempted dismissal and ordered judgment in favor of the defendant for its costs and disbursements. Judgment was so entered, from which this appeal was taken.

The regularity of the order overruling the demurrer is not questioned upon this appeal. It challenges only paragraph 3 of the answer. It is set forth in the reply, in effect, that the cause of action alleged in the complaint is not subject to and does not come under the Workmen's Compensation Act. The injury complained of is alleged to have resulted from the negligence of defendant's servants in operating an X-ray machine in its hospital some time subsequent to the injury sustained by plaintiff while performing his usual labor in the course of his employment by defendant about its factories. Whether the injury referred to in the complaint was subject to the act cannot well be determined until a trial is had. It is alleged by plaintiff that it was not subject to the act, while paragraph 4 of the answer alleges that it arose out of and in the course of plaintiff's employment, and was subject to and limited by the provisions of the act. This allegation raises an issue of fact aside from the one raised by the paragraph demurred to, and, as we read the pleadings, was in issue at the time judgment was ordered in favor of the defendant. It follows that defendant was not entitled to judgment on the pleadings. Under this view of the case it becomes immaterial whether the dismissal was regular, plaintiff having the right to apply to the court for leave to amend his pleadings.

Judgment reversed.

§—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

SCHOOL DIST. NO. 135 OF HENNEPIN COUNTY et al. v. McCONNELL, State Com'r of Education, et al. (No. 22511.)

(Supreme Court of Minnesota. Sept. 23, 1921.)

(Syllabus by the Court.)

1. Schools and school districts $\S$ 37(3)—Under consolidation statute, petition by specified number of freeholders is jurisdictional.

Under Laws 1917, c. 453 (Gen. St. Supp. 1917, §§ 2696—7 to 2696—11), relating to the consolidation of school districts, the requirement that the petition be signed by a specified number of freeholders is jurisdictional.

2. Schools and school districts $\S$ 39—Right of appeal to district court in consolidation proceeding is statutory.

The right of appeal to the district court in a consolidation proceeding is statutory, and the statute cited does not give an appeal.

3. Schools and school districts $\S$ 39—Consolidation statute, giving appeal in consolidation proceedings, held not to operate retroactively so as to deprive parties of cause of action for injunction.

Chapter 441, Laws 1921, approved April 23, 1921, amending the 1917 act (Laws 1917, c. 453 [Gen. St. Supp. 1917, §§ 2696—7 to 2696—11]) in several respects and giving an appeal, does not operate retroactively, so as to deprive the plaintiffs of a cause of action for an injunction submitted on demurrer on April 19, 1921.

4. Schools and school districts $\S$ 38—In absence of right of appeal or other effective remedy in a consolidation proceeding, injunction may issue where proceeding is invalid.

In the absence of a right of appeal given by statute, and of any other effective remedy, aggrieved parties may enjoin the making and filing of an order setting forth the result of the election, as required by the statute; the election being invalid because of an insufficient number of petitioners.

(Additional Syllabus by Editorial Staff.)

5. Schools and school districts $\S$ 111—Taxpayers' delay until after vote on consolidation to enjoin action on insufficient petition held not fatal.

Where taxpayers of a school district delayed until after the vote on consolidation was taken, such delay is not fatal to the maintenance of an action for injunction on the ground that the petition was signed by an insufficient number of freeholders.

Appeal from District Court, Hennepin County; Jos. W. Molyneux, Judge.

Action by School District No. 135 of Hennepin County and another against J. M. McConnell, as State Commissioner of Education for the State of Minnesota, and oth-

ers, for an injunction. From an order sustaining a demurrer to the complaint, the plaintiffs appeal. Order reversed.

Thomas Kneeland and Ernest Malmberg, both of Minneapolis, for appellants.

Clifford L. Hilton, Atty. Gen., Montreville Brown, Asst. Atty. Gen., Frank J. Williams, Asst. Co. Atty., and Healy & La Du, all of Minneapolis, for respondents.

DIBELL, J. This action was brought in Hennepin county to enjoin the state commissioner of education from making or filing an order with the county auditor setting forth the result of an election in a school district consolidation proceeding under Laws 1917, c. 453, (Gen. St. Supp. 1917, §§ 2696—7 to 2696—11), and enjoining the county auditor from taking any action relative to a consolidation.

The plaintiffs appeal from an order sustaining a demurrer to the complaint.

[1] 1. The election was held on December 7, 1920. It resulted in favor of the consolidation. The point urged against its validity is that the petition for a consolidation was not signed by so many as 100 legal voters as is required by the statute; and that therefore the proceeding was without jurisdiction. The requirement that the petition be signed by the number specified in the statute is jurisdictional. *Schweigert v. Abbott*, 122 Minn. 383, 142 N. W. 723; *In re Consolidation, etc.*, 140 Minn. 475, 168 N. W. 552.

[2] 2. The defendants urge that the remedy of the plaintiffs is by appeal. No appeal was taken. The plaintiffs claim that no appeal is given. The right of appeal rests on statute. *In re Consolidated School District No. 41, Crow Wing County*, 183 N. W. 979. There is no express provision for an appeal. The trial court was of the opinion that the statute is an enlargement of Laws 1915, c. 238, section 4 (Gen. St. Supp. 1917, § 2694—4) of which provides for an appeal such as is provided in connection with the formation of school districts; and its further view was that thereby Gen. St. 1913, § 2676, relative to appeals, is applicable to the act of 1915, as apparently it is, and through it to the act of 1917.

Chapter 238, Laws 1915 (Gen. St. Supp. 1917, §§ 2694—1 to 2694—12), is the general consolidation act. This statute provides in section 4 for an appeal, as in the case of the formation of school districts, referring back to G. S. 1913, § 2676. Laws 1917, c. 410, approved April 20, 1917 (Gen. St. Supp. 1917, §§ 2694—4, 2694—5), amends sections 4 and 5 of Laws 1915, c. 238. It provides for an appeal. It does not affect sections 2 and 3, c. 238, Laws 1915, which prescribe the conditions of a consolidation and the requirements

of the petition. Laws 1917, c. 453, the statute upon which this proceeding is based, approved on the same day as chapter 410, does not purport to amend a former statute. It refers in its title to the "consolidation of certain school districts in connection with villages and cities of the fourth class." It provides in sections 1, 2 and 3, for the conditions of consolidation, the character of the petition, the conduct of the election, and the certification of the result. It does not provide for an appeal. Laws 1919, c. 342, amends "section 4, chapter 238, Laws 1915, as amended by section 1 of chapter 410, Laws 1917, relating to formation of consolidated school districts." It affects section 4 of chapter 238 as amended by section 1 of chapter 410. Section 4 as it appears in chapter 238, and as amended by chapter 410, provides for an appeal and chapter 342 provides for an appeal in similar terms. Nowhere do we find Laws 1917, c. 453, amended, prior to the submission of this action on demurrer, though, as noted later, it was amended shortly afterward.

We are unable to hold that the act of 1917 is so connected with the act of 1915 that the appeal for which the 1915 act provides is applicable to a proceeding under the 1917 act; nor can section 2876 be held to provide generally for appeals in later statutes relative to school district consolidations. No right of appeal was given. There might well have been, and so there might have been in the Crow Wing Case; but none was given.

[3] 3. The act of 1917 was amended by Laws 1921, c. 441, section 3 of which gives an appeal such as is provided in connection with the formation of school districts.

The election was held on December 7, 1920. The demurrer to the complaint for an injunction is dated March 19, 1921. It was heard on April 19, and sustained on May 16, 1921. The appeal from the order was made on June 11, 1921. The amending act of 1921, c. 441, was approved on April 23, 1921.

The defendants, without abandoning their other claims, contend that the 1921 amendment gives the plaintiffs an appeal, and that therefore the complaint does not state a cause of action for an injunction. They claim that the amending statute is retroactive. They rely largely upon *Oppegaard v. Board*, 110 Minn. 300, 125 N. W. 504, which was followed in *Sorkness v. Board*, 131 Minn. 79, 154 N. W. 669.

It may be noted that the 1921 amendment changes the number required to institute the consolidation proceeding, and the vote necessary to carry the election. The situation arising under the 1921 act, which an appeal would review, is quite different from the situation before us for review under the 1917 act.

Our view is that the 1921 amendment does not affect the cause of action for an injunction, which existed and was pending and in which a demurrer had been argued and submitted when the amendment was adopted, by giving an appeal which made relief in equity unnecessary. The *Oppegaard Case* did no more than sustain an appeal authorized by a subsequent statute. It did not affect a cause of action, pending and submitted to the court for decision, which was a valid one at the date of the later statute.

The contention that injunction will not lie because the plaintiffs had an adequate remedy by appeal is not sustained under the facts stated.

[4] 4. One of the plaintiffs is a taxpayer and elector in one of the affected districts. The other is an affected district. In some form there should be given an opportunity for an adjudication of the validity of the consolidation proceeding. There is no right of contest. Relief cannot be had by appeal. The existence of a right of appeal might be an answer to the complaint. *Certiorari* was used without objection to determine the constitutional validity of the 1917 act in *State v. School District*, 143 Minn. 433, 174 N. W. 414. It does not seem that relief can be given in *certiorari* because of the defect claimed in this proceeding. *State v. Clough*, 64 Minn. 378, 67 N. W. 202; *In re Marshall County*, 179 N. W. 371. Besides, the proceeding on its face shows no defect. If the districts were consolidated relief might be had if the Attorney General chose to challenge the consolidation by *quo warranto*. *State v. Board*, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 745. And see *Evens v. Anderson*, 132 Minn. 59, 155 N. W. 1040. But a consolidated school district is not organized. There remains the act of the commissioner, required by the statute, in making and filing the order.

[5] It seems that injunction is a proper remedy. In *Slingerland v. Norton*, 59 Minn. 351, 61 N. W. 322, it was held that an elector and taxpayer had a remedy by injunction where the petition was insufficient through a defect not appearing on its face. This was in a county seat removal proceeding where the court has not been alert in finding remedies. It is true that in the *Slingerland Case* proceedings had not gone so far as a vote. This fact is referred to by way of discussion in one of the opinions in *State v. Board*, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631, 35 L. R. A. 745. In *Evens v. Anderson*, 132 Minn. 59, 155 N. W. 1040, where an injunction was refused, there was an election in favor of consolidating, the order of consolidation was made, officers were elected, bonds were authorized, and the district was doing business as a public corporation. *Quo warranto* and not

injunction was there the remedy. We think, however, that the delay of the plaintiffs in this case until after the vote was taken is not fatal to the maintenance of the action. Order reversed.

BERGH v. STANEK. (No. 22426.)

(Supreme Court of Minnesota. Sept. 30, 1921.)

(Syllabus by the Court.)

Brokers §57(1) — **Contracts** §23 — Broker not entitled to commission for tender of contract not in accordance with authorization; and offer to accept with qualification not acceded to is rejection.

A broker authorized to sell for \$7,000 in cash, \$5,400 in 5 years, and \$10,000 in 10 years, all at 6 per cent., does not become entitled to his commission by tendering a contract which requires his principal to give a deed and take mortgages for the deferred installments and which provides that such installments shall be payable on or before the specified dates and that they shall not bear interest until nine months after the date of the contract, unless such contract is accepted by the principal. An offer to accept, qualified by a condition not acceded to, operates as a rejection.

Appeal from District Court, Swift County;
Richard T. Daly, Judge.

Action by H. E. Bergh against F. J. Stanek. Judgment for plaintiff, and defendant appeals. Reversed.

George D. Smith, of Grand Forks, N. D., for appellant.

Hudson & Hudson, of Benson, for respondent.

TAYLOR, C. Plaintiff is a real estate broker. Defendant is the owner of 320 acres of land in Swift county. The complaint contains allegations to the effect that defendant employed plaintiff to sell the land and agreed to allow plaintiff as his commission whatever amount he sold it for over and above \$70 per acre; that plaintiff procured and produced a purchaser ready and willing to buy the land for \$25,000 on terms satisfactory to defendant; that defendant refused to make the sale or perform the contract on his part, and asks judgment for the sum of \$2,600 as compensation for plaintiff's services. The answer puts in issue all allegations of the complaint except as admitted or qualified, and then sets forth that one Nels Amlie held a prior contract for the purchase of the land; that defendant authorized plaintiff to sell the land for \$70 per acre net to defendant, but with an express stipulation that no binding contract should be made nor

liability of any kind be imposed on defendant unless the prior contract should be terminated in proceedings then contemplated for canceling it; and that the prior contract has not been canceled but remains in full force and effect. The answer further sets forth, in effect, that the contract of sale negotiated by plaintiff was not upon the terms and conditions prescribed by defendant. The reply denied any knowledge of the existence of the prior contract until after the transactions set forth in the complaint.

The trial court made findings of fact and conclusions of law, and rendered judgment for plaintiff. Defendant appeals. There is no case or bill of exceptions, and the only question is whether the findings in connection with the pleadings sustain the judgment.

The court found as a fact that plaintiff had negotiated his sale before he had any notice or knowledge of the prior contract made by defendant with Amlie, and, as a result of this finding, the defense predicated upon the alleged agreement in respect to that contract has been abandoned so far as this appeal is concerned.

Plaintiff is not entitled to his commission, however, unless he produced a purchaser ready, able, and willing to buy on the terms authorized by defendant. McDonald v. Smith, 99 Minn. 42, 108 N. W. 291; Dunnell's Minn. Dig. § 1142.

The pleadings do not set forth the terms on which plaintiff was authorized to negotiate a sale, nor the terms of the sale which plaintiff in fact negotiated. The terms authorized are found in a letter incorporated in the findings of fact. The terms of the sale negotiated by plaintiff are found in a contract tendered to defendant, which is also incorporated in the findings of fact. On May 21, 1919, plaintiff wrote defendant that a certain unnamed party had made a proposition—

"that he would pay \$6,500 to \$7,000 cash, but he wanted the balance to run, which would be \$15,400 as follows: \$5,400 in 5 years, and \$10,000 in 10 years, all at 6 per cent., figuring a cash payment of \$7,000, \$2,000 now and \$5,000 March 1, 1920."

Plaintiff asked defendant to wire whether he would accept the proposition and added:

"I understand I will have to get my commission above the \$70 per acre mark, also understand that you want a payment of \$2,000 earnest money."

On May 23, 1919, defendant wired:

"You may close as per your letter of May 21, 1919."

On May 29, 1919, plaintiff mailed to defendant for his signature two copies of a

contract dated May 24, 1919, and signed by G. R. Watson, the proposed purchaser, and inclosed therewith a draft for \$2,000. The proposed contract acknowledged the receipt of \$8,000 as earnest money and part payment for the land, and stated that defendant agreed to sell and convey the land by warranty deed for \$25,000 on the following terms:

"Six thousand and no/100 dollars in hand paid as above and \$4,000 on June 24th, or as soon thereafter as warranty deed and clear title can be given. On June 24, 1919, said vendor will accept as part payment on said above-described land a mortgage for \$5,000 payable on or before March 1, 1925, with interest at the rate of 6 per cent. per annum payable annually from and after March 1, 1920, and will in addition accept as part payment for said land a second real estate mortgage for the sum of \$10,000 payable on or before March 1, 1930, with interest at the rate of 6 per cent. per annum payable annually from and after March 1, 1920. It is expressly understood and agreed that said G. R. Watson shall not pay any interest until from and after March 1, 1920, and it is also expressly understood and agreed that he shall be entitled to 6 per cent. interest on the \$10,000 he pays down from the time that deed is issued to him and until March 1, 1920—that is, the land is purchased on March 1, 1920, terms, with settlement on day that deed is given by said vendor and mortgage accepted.

"It is also agreed and understood that said vendor shall pay the 1919 taxes.

"Said purchaser shall have the right to go on and plow said above-described lands as soon as the crops are taken off."

There was an indorsement on the back of the contract, also signed by Watson, changing the above terms in certain particulars not of moment here.

Defendant refused to execute the contract, and on June 3, 1919, returned both contract and draft in a letter, in which he said:

"I just read the contracts, and I wish to say I cannot accept as they are. In the first place the buyer was to assume the mortgage, and in the second place they do not carry the clause as per my letter of April 15, 1919.

"You see that the other contract has not been cleared up, our attorneys are still working on it, and it may be cleared any time, so if you hold the contracts until everything is cleared, then we will proceed with them."

Further correspondence followed, but did not result in any agreement, and plaintiff brought this suit for his commission.

The terms of the contract tendered by

plaintiff were a wide departure from the terms stated in plaintiff's letter of May 21st, and authorized by defendant. We call attention to some of the more important differences. The contract required the giving of a deed on the payment of \$10,000 and the taking of mortgages for the deferred payments. The authorized terms contained no such provision. The contract provided that the purchaser should pay interest on the deferred payments only from and after March 1, 1920, while the authorized terms contemplated interest on such payments from the date of the making of the contract. The contract provided that the purchaser should be allowed interest until March 1, 1920, on payments required to be made by him before that date, while the authorized terms contained no such provision. The contract provided that one of the deferred payments should be payable on or before 5 years and the other on or before 10 years, while the authorized terms required the first of these payments to be payable in 5 years and the second in 10 years. The terms of the contract were materially and substantially different from those authorized and plaintiff did not become entitled to his commission by tendering such a contract. *Hamlin v. Schulte*, 31 Minn. 486, 18 N. W. 415; *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 908; *Hornsby v. Hause*, 35 Minn. 869, 29 N. W. 119; *Marble v. Bang*, 54 Minn. 277, 55 N. W. 1131; *Fairchild v. Cunningham*, 84 Minn. 521, 88 N. W. 15; *Clark v. Dayton*, 87 Minn. 454, 92 N. W. 327; *Rutherford v. Selover*, 87 Minn. 495, 92 N. W. 413; *Quist v. Goodfellow*, 99 Minn. 509, 110 N. W. 65, 8 L. R. A. (N. S.) 153, 9 Ann. Cas. 431.

Procuring a purchaser ready and willing to buy on terms different from those prescribed by the owner does not entitle the broker to a commission, unless such different terms are accepted and agreed to by the owner. 4 Ruling Case Law, p. 303, § 46. Defendant did not accept the contract tendered to him. His proposition to the effect that if plaintiff would hold the contract "until everything is cleared" he would then proceed with it was not acceded to, and did not amount to an acceptance of the contract as proposed. *Hamlin v. Wistar*, 31 Minn. 418, 18 N. W. 145; *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. 690; *Baker v. Brundage*, 131 Minn. 299, 154 N. W. 1086. An acceptance qualified by a condition not acceded to operates as a rejection of the proposition as made. Judgment reversed.

CHICAGO, B. & Q. RY. CO. v. BENSON
PRODUCE CO. (No. 22438.)

(Supreme Court of Minnesota. Sept. 30, 1921.)

(Syllabus by the Court.)

Limitation of actions — 177(2) — Complaint, showing action brought after expiration of limit, but not facts avoiding statute, does not state cause of action.

A complaint which shows that the time limited by statute for bringing the action had expired before the action was begun without showing the existence of facts which will avoid the operation of the statute fails to state a cause of action.

Appeal from District Court, Swift County.

Action by the Chicago, Burlington & Quincy Railway Company against the Benson Produce Company. Default judgment in favor of plaintiff, and defendant appeals. Reversed.

John I. Davis, of Benson, for appellant.

Hudson & Hudson, of Benson, for respondent.

TAYLOR, C. Defendant appeals from a judgment entered against it by default, and contends that the complaint shows on its face that the alleged cause of action was barred by the statute of limitations.

The action is for a balance of \$171.50 claimed to be due for freight and demurrage on a carload of potatoes shipped over plaintiff's railway from Minneapolis, Minn., to Chicago, Ill. It appears from the complaint that on or about May 29, 1913, the potatoes were delivered to the Great Northern Railway Company at Bellingham, Minn., to be transported to Minneapolis and there to be held for further shipping directions by defendant; that they were duly carried to Minneapolis where, by defendant's direction, they were delivered to plaintiff to be transported to Chicago; that plaintiff duly carried them to Chicago, and duly notified defendant of their arrival at destination, and requested defendant to direct what disposition should be made of them; that defendant failed to receive them or give any directions for disposing of them; that plaintiff was obliged to hold them in its possession for 10 days or more; that they were of a perishable nature, and had become spoiled and in bad condition and of little or no value; that plaintiff was compelled to, and did, sell them after notice to defendant; that after applying the proceeds of the sale on plaintiff's charges a balance in the sum of

\$171.50 remained due plaintiff; and that plaintiff demanded this sum from defendant about May 18, 1918.

The complaint does not give the date on which the potatoes arrived at Chicago, nor the date on which they were sold; but, as they were delivered to the carrier at Bellingham on or about May 29, 1913, and were duly transported from that point to Minneapolis and from Minneapolis to Chicago, and apparently were disposed of in the manner in which perishable freight in bad condition is usually disposed of where the owner, after notice, fails to accept it or to give any directions for disposing of it, we think it sufficiently appears that the sale must have taken place and plaintiff's cause of action must have accrued more than six years before April 7, 1920, the date on which this action was begun.

Plaintiff does not seriously contend to the contrary, but seeks to sustain its judgment on the ground that the complaint does not conclusively show that the cause of action was barred. In support of this contention it cites *Trebbly v. Simmons*, 38 Minn. 508, 38 N. W. 693. This decision, after stating that this court has repeatedly held "that a complaint showing upon its face that the statute had run is demurrable, or may be objected to after judgment, on the ground that it does not state a cause of action," further states that the objection "will not be allowed unless the complaint conclusively shows that the action is barred," and that it "would be difficult to imagine a case where that fact would 'clearly' or 'conclusively' appear on the face of the complaint, unless it expressly negatived all the exceptions which would prevent the statute from running." That this last statement was obiter is pointed out in *Ferrier v. McCabe*, 129 Minn. 342, 152 N. W. 734, in which the prior cases in this state are considered and analyzed, and in which the rule is established that, where the complaint clearly shows that "the time allowed by the statute for bringing suit expired before the suit was brought, and no fact is set forth avoiding the operation of the statute, the complaint is demurrable." This rule was approved and followed in *Riley v. Mankato Loan & Trust Co.*, 133 Minn. 289, 158 N. W. 391. Following the rule as explained and defined in the *Ferrier* Case, we hold that plaintiff's complaint fails to state a cause of action, for the reason that it shows on its face that the action was not brought until more than six years had elapsed after the cause of action had accrued, and fails to state any facts which will avoid the operation of the statute.

Judgment reversed.

IN RE COUNTY DITCH NO. 33, MARSHALL COUNTY. (No. 22347.)

(Supreme Court of Minnesota. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Drains $\S$ 82(3)—On appeal to determine county ditch benefits, trial is *de novo*, and the viewers' finding is not evidence.

The trial in the district court on appeal to determine benefits in a county ditch proceeding is a trial *de novo*; and the finding of the viewers in their report is not evidence.

2. Drains $\S$ 82(3)—Although viewers' findings are not evidence on appeal to determine benefits, a viewer is a competent witness.

The rule stated does not affect the competency of a viewer as a witness; and he may testify on appeal as to benefits.

3. Witnesses $\S$ 319—On appeal to district court, a viewer as a witness is subject to the usual credibility tests.

When the viewer becomes a witness his testimony is subject to the usual tests affecting its credibility and weight. He is not immune from attack.

4. Evidence $\S$ 558(7)—Where viewer testifies to the amount of benefits it may be shown on cross-examination that viewers did not fix such amount.

When a viewer testifies that benefits to an appellant's lands are \$20 per acre, it may be shown on cross-examination that the viewers, who were unanimous in their report, did not fix benefits to any land in the drainage district at so much as \$20 per acre, or in excess of \$4 per acre.

5. Evidence $\S$ 558(7)—Viewer may be cross-examined by reference to viewers' report fixing benefits at less than he had testified.

It may be shown on the cross-examination of such witness that other specific tracts, said by him to be benefited in the same degree as the land of the appellant, were found in the report of the viewers to be benefited in amounts which were but a fraction of the benefits which he testified accrued to the appellant's land. The extent to which the cross-examination may go is largely discretionary with the trial court.

Quinn, J., dissenting.

Appeal from District Court, Marshall County; Andrew Grindeland, Judge.

In the matter of County Ditch No. 33, Marshall County. From an order of the county board determining the amount of benefits accruing to his land in the construction of the ditch, Rasmus Oen appealed to the district court. On trial, the jury fixed the benefits, and from an order denying his motion for a new trial, Oen appeals. Order reversed.

James Manahan and J. D. Hoogesteger, both of St. Paul, for appellant.

A. N. Eckstrom, of Warren, for respondent.

DIBELL, J. Rasmus Oen appealed to the district court of Marshall county from the order of the county board determining the amount of benefits accruing to his land from the construction of county ditch No. 33. The jury fixed the benefits to one forty at \$6.25 per acre, to another at \$5 per acre, and to another at \$4.95 per acre. He appeals from an order of the district court denying his motion for a new trial.

The question is whether the court erred in refusing to permit appellant to show on the cross-examination of a viewer in the ditch proceeding, a witness for the county, that the amount of the benefits fixed for his lands by the viewers were less than the benefits to which he testified; and that the benefits to certain other lands, which he testified received a like benefit, were less than those fixed by the viewers for his land.

[1] 1. The trial on appeal to the district court to ascertain benefits is a trial *de novo*. *Rooney v. County of Stearns*, 130 Minn. 176, 153 N. W. 858, and cases cited. The finding is not evidence, and the importance of keeping it from the jury has been emphasized. *Dodge v. County of Martin*, 119 Minn. 392, 138 N. W. 675; *Cunningham v. County of Big Stone*, 122 Minn. 392, 142 N. W. 802; *Rooney v. County of Stearns*, 130 Minn. 176, 153 N. W. 858. The same principle was long ago applied to a similar situation in condemnation proceedings. *Sherman v. St. Paul, etc., R. Co.*, 30 Minn. 227, 15 N. W. 239; *Northern P. Ry. Co. v. Duncan*, 87 Minn. 91, 91 N. W. 271.

[2] 2. This rule does not affect the competency of the viewers as witnesses. Their testimony as to benefits does not infringe the rule, recognized in the three cases cited, that the assessments made by the viewers should not be used as evidence before the jury. *Falkenhagen v. Yellow Medicine and Lac qui Parle Counties, etc.*, 144 Minn. 257, 175 N. W. 102. The viewers may be called by either party as witnesses.

[3] 3. Becoming witnesses they are not witnesses of a kind different from others. They are subject on cross-examination to the usual tests to determine their credibility and the weight of their testimony. They are not immune. A party cannot use them as witnesses and then insist that they be protected against a cross-examination which unfavorably affects their testimony.

[4] 4. One of the viewers testified that the benefits accruing to the appellant's land was \$20 per acre. The appellant offered to prove on cross-examination that the viewers, who were unanimous in their report, did not fix

the benefits to any land in the drainage area at so much as \$20 per acre, or at an amount in excess of \$4 per acre. The offer was rejected. This was error.

Viewers are required to take an oath to perform their duties. It is their duty to fix benefits. The assessments for actual cost of construction are based proportionately on benefits. The viewer having testified that benefits were \$20 per acre it was proper to show that when performing his official duties he did not see benefits in excess of \$4 per acre. Make the illustration complete. Assume that a viewer testifies on behalf of the landowner that his property was not benefited or that the benefits were nominal; should it be held that the county could not show on cross-examination that he found the benefits substantial when he made his view and report? The injustice of a rule not permitting cross-examination is apparent. The jurors naturally infer, if they think of it at all, that his testimony corresponds with his finding as viewer. On the trial on appeal the law does not want the finding of the viewers as evidence. It is that finding which is being attacked and is under review. If a viewer is called by either party he is, like other witnesses, subject to cross-examination; and inquiry may be made of him of things he said or did at other times materially and directly affecting the credit or weight of his testimony. That it calls for the judgment which he expressed when a viewer does not make it improper.

[5] 5. On cross-examination a viewer, giving testimony for the county on question of benefits, testified that three quarters separately owned were benefited to the same extent per acre as the land owned by the appellant. The appellant offered to show as a part of the cross-examination, by reference to the report of the viewers, that one of these quarters was assessed at \$380, another at \$540, and the other at \$440. The proof was rejected. This was error.

It is everyday practice to ask an expert witness, testifying upon the value of lands, as to the value of nearby tracts, or of sales of similar property, or of the value which he has

put upon lands of like character, or about comparative values. The same principle is operative in the situation before us.

In a sense this is inquiring into collateral matters. The extent to which the examination may go is largely discretionary. The trial court is charged with the conduct of the trial; and, mindful of the rule that cross-examination of an expert witness on value to determine credibility and weight should be somewhat free, and of the other rule that the extent of cross-examination, especially when directed to matters in their nature collateral, is within its fair discretion, it should not permit the cross-examination unduly to prolong the trial or to continue when it ceases to be useful or becomes unfair. It may exercise its fair discretion. But such cross-examination is competent.

Order reversed.

QUINN, J. (dissenting). I dissent. In my opinion the viewers' report, under the rule adhered to by this court in the cases cited in the majority opinion, was properly excluded. As stated, a viewer, when called as a witness upon a trial before a court and jury in a drainage proceeding, as other witnesses, is subject to cross-examination. In the instant case the viewers' report was offered for the manifest purpose of showing the amount of assessments upon several tracts of land not involved in the trial. The cross-examination was in no way restricted except as to the offer of the report. Only the assessments on demandants' lands were under consideration. The question of benefits in such proceedings is largely a matter of opinion and must be arrived at by the viewers, oftentimes by compromising and arriving as nearly as possible at a correct amount, and the viewers' report does not necessarily represent the exact opinion of any one viewer, but rather the result arrived at by the three in equalizing the assessments on all the lands benefited by the system. A jury is called to assess benefits for the particular lands of demandants, while it is the duty of the viewers to determine and equalize the assessments on the lands benefited by the entire system.

STATE ex rel. MORGAN, Atty. Gen., v. CITY OF PORTAGE et al.

(Supreme Court of Wisconsin. July 13, 1921.
Dissenting Opinion Oct. 3, 1921.)

1. Municipal corporations $\S$ 864(3)—Compliance with order of Railroad Commission not mandatory if indebtedness would exceed constitutional limitation.

While St. 1919, $\S$ 927—16, in so far as it authorizes cities to acquire and construct public utilities, and issue bonds payable only from the revenue thereof and secured by mortgage liens thereon, does not create a corporate indebtedness within the constitutional limitation (article 11, $\S$ 3), a city cannot be coerced into complying with an order of the Railroad Commission to make improvements in its waterworks system pursuant to like provisions of such act relative to extensions, additions and improvements, if it would thereby exceed its constitutional indebtedness; the effect of such compliance being to mortgage the city's existing waterworks to secure the payment of a corporate debt incurred after the works were acquired by the city.

2. Municipal corporations $\S$ 864(3)—City cannot be compelled to make improvements in waterworks by issuing mortgage certificates, if effect be to exceed constitutional indebtedness.

The effect of St. 1919, $\S$ 927—19b, authorizing cities to issue mortgage certificates to pay the costs of public utility improvements without incurring a debt, within the constitutional limitation (article 11, $\S$ 3), being to mortgage the city's property to secure the payment of a debt which was not a lien on such property in the nature of a purchase-money mortgage, a city cannot be compelled to comply with an order of the Railroad Commission to make improvements in its waterworks system if to do so would result in creating a corporate indebtedness in excess of such constitutional limitation, though the latter has no application where the expenditure is incurred to perform a municipal function due to an overwhelming public necessity, such expenditure not pertaining to a governmental function but to a business voluntarily conducted by the city in its proprietary capacity.

Eschweiler, J., dissenting in part.

Mandamus by the State of Wisconsin, on the relation of William J. Morgan, Attorney General, against City of Portage and others. Petition dismissed, and alternative writ quashed.

An action of mandamus, commenced in this court by leave granted. The issues are presented to the court upon the petition, the alternative writ, and a motion to quash the alternative writ.

The action was brought to compel the city of Portage to comply with an order of the Railroad Commission directing the making of improvements in its waterworks system.

The Railroad Commission issued to the city a certificate permitting it to issue mortgage certificates to pay for the improvements under the provisions of section 927—19b. It is conceded that the city was, at the time of the making of the order, and has been at all times since, indebted to substantially its full constitutional limitation. Petitioner alleges that the city can comply with the order by availing itself of either section 927—16 or 927—19b as a means of raising money. The city refused to issue any certificates either under section 927—19b or 927—16, claiming that to do so would be in violation of the constitutional prohibition of section 3, art. 11, of the state Constitution.

Ralph M. Hoyt, Deputy Atty. Gen., and Wm. J. Morgan, Atty. Gen., for plaintiff.

Harlan B. Rogers, of Portage, for defendants.

John C. Thomson, of New York City, and T. L. McIntosh and R. M. Rieser, both of Superior, amici curiæ.

SIEBECKER, C. J. (after stating the facts as above). It is undisputed that, if the mortgage certificate the Railroad Commission authorized the city of Portage to issue for the purpose of securing funds for the improvement of its waterworks as directed by the Commission is added to the city's existing indebtedness, then the city's indebtedness will exceed the 5 per cent. limitation prescribed by section 3, art. 11, of the Constitution. It is the contention of the state that the city can comply with the order of the Railroad Commission in making the directed improvement of its waterworks by availing itself of the provisions of section 927—16 or 927—19b, Statutes, as a means of raising the necessary funds. This claim of the state is based on the ground that any funds raised by the city to make the contemplated waterworks improvement do not constitute an indebtedness of the city within the sense of the constitutional limitation under the provisions of these statutes. The question is therefore presented: Do the schemes prescribed by these statutes provide a means by which municipalities may "purchase, acquire or construct any public utility or utilities, * * * to provide for the payment thereof, and to provide for any extensions, additions and improvements that are necessary," without thereby incurring a municipal indebtedness in the sense of the constitutional limitations forbidding municipalities to become indebted in any manner or for any purpose to any amount exceeding 5 per cent. of the assessed valuation of the taxable property therein. An examination of section 927—16, Statutes, discloses a legislative attempt to accomplish these purposes.

Subsection 1 declares, whenever the voters

have determined by votes to purchase, acquire, or construct a public utility the governing authority "shall have power * * * to provide for the payment thereof, and to provide for any extensions, additions and improvements that are necessary," in the manner provided; namely, by setting aside the income and revenue of such utility as a separate and special fund, which is to be applied to pay the expense of its maintenance and operation and the payment of the purchase or construction price. This revenue is divided into fixed proportions for (a) maintenance and operation, (b) an adequate depreciation account, and, (c) the payment of the principal and interest of the bonds authorized by this statute. Subsections 3, 4, 5, 6, and 7 specify in detail how these three proportions of the revenue shall be made up and expended. Subsection 8 provides for the issuance of bonds to secure means for the payment of the utility, and "for any extensions, additions and improvements thereof, * * * which bonds shall be payable only out of the said special redemption fund." The obligations of such bonds for payment of the principal and interest "shall be a valid claim of the holders thereof only against the said special redemption fund and the fixed proportion or amount of the revenues pledged to such fund, and shall not constitute an indebtedness of such city, village or town within the meaning of the constitutional provisions and limitations."

Subsection 9 relates to the cost and value of services rendered by the utility to the municipality, and the payment thereof as a current expense, and the costs of such services for the municipality must, under subsection 10, be just and reasonable. By subsection 11, all the moneys relied on a sale of bonds "shall be applied solely for purchasing * * * or constructing such utility, and in the payment of the cost of any necessary extensions, additions and improvements," and "there shall be and there is hereby granted and created a statutory mortgage lien upon the public utility so purchased, constructed or acquired to and in favor of the holders of the said bonds * * * and the coupons of such bonds." It is provided that in case of default in payment of the bonds this lien may be enforced by action, and in case of the sale of the utility to satisfy such lien the purchaser shall be vested with an indeterminate permit to operate the utility. The result of these provisions is to provide for the payment of the purchase price of a utility when acquired or constructed, including necessary improvements, additions, and extensions out of the earning of the utility. In substance, the statute provides for the creation of a purchase-money lien on the utility and the application of the revenue it produces for the payment of the expense of its operation, depreciation, and the cost of

acquisition or construction. The effect of the scheme is to subject the utility to a purchase-money mortgage lien, which the city does not assume to pay by resorting to its taxing power or to its property or funds. The city assumes no financial obligation, but contracts to perform the duty of managing the revenues of the utility for the benefit of the purchase-money lienors, and if the utility pays for itself in the manner provided by the statute, then the municipality is to become the owner of the utility.

In speaking of the significance of the word "debt" as used in section 3, art. 11, of the Constitution, this court said in *Burnham v. City of Milwaukee*, 98 Wis. 128, 73 N. W. 1018:

"It means 'something owed,' 'money due or to become due upon express or implied agreement.' * * * It denotes, not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment [citing]. Under the Constitution as well as under the law of taxation, the question is, Is the city indebted?"

The court held in that case that contracts for the purchase of park land under statutes authorizing such purchases, upon terms "creating a lien thereon for such purchase money, without creating any corporate liabilities therefor," do not constitute a city indebtedness within the constitutional limitation restricting city indebtedness. In *Connor v. Marshfield*, 128 Wis. 280, 107 N. W. 639, the court re-examined the holdings in *Perrigo v. Milwaukee*, 92 Wis. 236, 65 N. W. 1025; *Milwaukee v. Milwaukee County*, 95 Wis. 424, 69 N. W. 819, and the *Burnham Case*, and reconsidered the question "whether, when a city purchased property, or acquired the right to purchase it, from the fact that rights in or burdens upon that property were held by others, so that the city, to hold it and protect the interest acquired in it, must pay large sums of money, the city thereby became indebted for such sums in the constitutional sense," and there stated that this court, in the *Burnham Case*, " * * * reviewed the conflicting array of decisions, and, rejecting the reasons of those the respondent now cite, we decided the question in the negative. The distinguishing element, as then defined, consisted in the fact that the city could not be coerced by the creditors of its grantor into applying to his claim either its general revenue or property owned by it at the time of the contract, but was free at its election to abandon the plan of acquiring or holding that which, prior to the contract, it did not own."

We can perceive no ground upon which to distinguish the scheme and plan embodied in section 927—18, Statutes, for the acquisition of utilities by cities from the principle

involved in these adjudications respecting the creation of corporate indebtedness. The plan embodied in this statute is declared by the Legislature not to create a municipal debt, and the municipalities are not committed to any expenditure of their funds or property except to pay for current services rendered by the utility to the municipality at reasonable prices out of current revenue. To the latter there can be no legal objection.

[1] We are persuaded that the effect of the provisions of section 927—16, Statutes, in so far as it authorizes the acquisition and construction of public utilities by cities, towns, and villages, and grants them power to provide for the issuance of bonds to be paid out of the income and revenue of such utility in the manner prescribed therein, is not to create a corporate indebtedness of any such city, town, or village within the meaning of the provisions of section 3, art. 11, of the Constitution. The point is urged that this scheme and plan of paying the cost of purchase or construction of any such utility in the manner prescribed out of the income and revenues cannot be legally applied to the cost incurred for improvements, extensions, or additions to a utility after the utility has been purchased or constructed, for the reason that the provision made for the issuance of bonds to cover the cost of such improvements, additions, and extensions necessarily pledges the property of the utility after it has been paid for in the manner prescribed, and has become the property of the city under the provisions of this statute. We think there is merit in this claim. It is manifest that, after the utility property has been mortgaged to secure the purchase-money lien created in the manner provided by this statute, it cannot again be subjected to a new mortgage lien for subsequent improvements, additions, and extensions, if such an indebtedness is in excess of the constitutional limitation, because such a mortgage of the utility property necessarily presupposes the creation of a corporate liability of the municipality for whose payment such security is given other than a purchase-money lien, and would amount to mortgaging property of the municipality to secure the payment of a corporate liability in the form of a debt which did not rest on such property as a lien in the nature of a purchase-money mortgage.

It is to be observed that the improvements, additions and extensions now referred to include such as are attempted to be made after the utility has been acquired by the municipality. It does not follow from this, however, that a city, town, or village may not, at the time of acquiring an existing utility, undertake to improve it, or make additions or extension thereto for the purpose of providing an efficient utility by putting it in proper condition to render ade-

quate service to the public, and treat the costs thereof as a part of the consideration of acquiring and constructing the utility, and provide for the payment of such costs out of the revenue derived from its operation in the manner prescribed by section 927—16, Statutes. It is considered that the part of subsection 11 of this statute, which attempts to confer authority on cities, towns, and villages to provide for the payment of the cost of extensions, additions, or improvements of a utility after it has been acquired by additional bond issues in the manner provided in the act, would be in violation of the constitutional limitation regulating municipal indebtedness if the cost of such improvements in addition to the corporate indebtedness should be in excess of the constitutional limitation.

Upon these considerations, it follows that the city of Portage cannot be coerced into complying with the order of the Railroad Commission under the provisions of section 927—16, for the reason that a compliance with the commission's order would result in mortgaging the city's existing waterworks to secure the payment of a corporate debt incurred after the works were acquired by the city. It is admitted that, if the city adds the costs of the ordered improvements to the waterworks to its present indebtedness, it will exceed the constitutional limitation of its indebtedness. As above indicated, if the city should attempt to make the improvement and pay for the same in the manner provided by section 927—16, Statutes, it would necessarily result in creating a corporate debt and thus violate the prescribed limitations of its indebtedness.

[2] It is urged by the state that, if the city cannot proceed to make the improvement of its waterworks as ordered by the Railroad Commission, then the provisions of section 927—19b, Statutes, furnish an exact means to enable the city to raise the money to pay the costs of the improvements without incurring a debt within the meaning of the constitutional provision limiting municipal indebtedness. The statute need not be repeated here. It suffices to call attention to its provisions, and to say that, if the method prescribed by the Legislature authorizing the city to execute a mortgage or trust deed upon the entire plant or a part thereof, that such "mortgage certificates" shall be secured by such mortgage or trust deed, and that "no municipal liability shall be created thereby," constitutes a scheme which is subject to the same infirmity as the one providing under section 927—16, Statutes, for additions and extensions to existing utilities. To carry out this scheme results in mortgaging the city's property to secure the payment of a liability which was not a lien on the city's property in the nature of a purchase-money mortgage, and con-

stitutes in fact an application of the property to the payment of a corporate debt. It must therefore be held that the city of Portage cannot make the improvements ordered by the Railroad Commission under the provisions of section 927—18 and section 927—19b, because it would result in creating a corporate indebtedness in excess of the constitutional limitation.

But it is urged that the city of Portage can be coerced to comply with the Commission's order under the scheme of section 927—19b, upon the ground that the constitutional limitation of municipal indebtedness has no application to an indebtedness of a municipality in cases where the expenditure is incurred to perform a municipal function due to an overwhelming public necessity. It must be borne in mind that the expenditure ordered and here in question does not pertain to a governmental function, but to a business the city is conducting in its propriety capacity, in which the city engages voluntarily. True, in the conduct of such business it can do nothing to the detriment of the public health, good order, and the general welfare. If it transgresses its legal duties in these respects, it can be coerced to obey the law. It does not follow, however, that a city, in order to remedy an evil like the one the Commission found exists in the city of Portage, can create an indebtedness in excess of the constitutional limitation. If a city can do this, it would afford an easy way to create large corporated indebtedness in cases like the instant one, through extensions and enlargements of a public utility of a city. We think that the municipal debt created by assuming to pay the expense of improving a city's water plant in order to furnish its inhabitants with a reasonably adequate supply of wholesome water, as the city of Portage was directed to do by the Railroad Commission, by the issuance of mortgage certificates as prescribed by section 927—19b, would create a debt within the constitutional provisions, and cannot lawfully be incurred if it exceeds the prescribed 5 per cent. limit. Upon the foregoing considerations, it follows that the city of Portage cannot be coerced by mandamus to carry out the order of the Railroad Commission.

The petition of the relator must be dismissed, and the alternative writ of mandamus is quashed.

ESCHWEILER, J. (dissenting in part). With so much of the decision as dismisses the relator's petition and quashes the alternative writ of mandamus I concur. That portion of the decision disposes of all that is squarely presented in this case. So much of the decision as suggests methods that may be pursued under either of the statutory pro-

ceedings discussed in the decision is upon questions not before us, and is not necessary for the determination of this case. For that reason, I shall content myself with saying that in my judgment such suggestions are an advance judicial approval of methods of avoiding the clear intent and express language of a constitutional provision, the recent amendment to which indicates the disapproval of the people of this state to there being piled up, either directly or indirectly, additional municipal burdens or obligations when the established limitation has been reached.

IN RE STATE BOARD OF LAW EXAMINERS.

(Supreme Court of Wisconsin. Sept. 27, 1921.)

Attorney and client $\S$ 40—License to practice fraudulently procured will be revoked.

An attorney obtaining license on representation that he was a practicing attorney in good standing in another state, when he had resigned as attorney in that state to avoid disclosure of unworthy acts in a disbarment proceeding, his license will be revoked.

Application by the State Board of Law Examiners to annul an order of the court admitting Julius Geweke to practice as an attorney. Granted.

W. W. Gilman, Asst. Atty. Gen., and Wm. R. Bagley, President of State Board of Law Examiners, of Madison, for plaintiff.

Julius H. Geweke, of Watertown, in pro. per.

SIEBECKER, C. J. An order was entered by this court on the 9th day of February, 1921, annulling the order admitting Julius H. Geweke to the practice as an attorney at law. The record then before the court shows that he had misled this court at the time he applied for admission to be licensed to practice as an attorney by misrepresenting that he was then a practicing attorney in good standing in the state of Illinois. The facts adduced in evidence show that he at that time had been guilty of gross professional misconduct. It appears that he had committed the offense of embezzling funds of his clients; that he willfully concealed from this court the fact that proceedings had been instituted against him in the courts of Illinois for his disbarment, and that he had evaded prosecution in such proceeding by resigning the position as a licensed attorney in such state before the charges so preferred against him came to a hearing. It is shown that he

offended against the law and was guilty of conduct unbecoming to a lawyer in good standing. His misconduct consisted in fraudulent misrepresentation to his clients as to the state of affairs concerning the business intrusted to him by them, and in having committed offenses of a grave and serious nature. It is a matter of surprise to learn that respondent was permitted to ply his nefarious practices for so long a time as he did. The unmolested continuance of his depredation evince a deplorable lack of activity for the preservation of honorable professional standing and an inexcusable neglect of having him disbarred from the ranks of attorney at law.

Courts and members of the legal profession are charged with the duty of having such transgressors speedily disbarred for the protection of the community and the maintenance of the honor and dignity of the profession. The office of attorney is a most important one, and demands of every member the strictest adherence to every tenet of morality. Ethical delinquencies by a member of the bar disgrace not only the offender, but:

"His shame defiles the law itself. The law must speak through the profession to other men. They depend upon the lawyer when they depend upon the law. He is identified with it. Its character as a useful and noble service depends upon the character of the profession. So, as men see the profession in individuals, rather than in the whole, it has happened that much unmerited reproach and obloquy has fallen on the law."

These words, spoken by the late Senator Vilas to the law class of the state university, are utterances which convey precious and solemn truths. They express an ideal that every member of the bar of honorable intentions aspires to achieve. This court, in *Vernon County Bar Association v. McKibbin*, 153 Wis. 350, 141 N. W. 283, declared:

"An attorney is an officer of the court and, in a sense, of the state. The position is one of much dignity and responsibility. It is very important to the people and the court that the standard of admission to the place and retention thereof should be as high as practicable

in law, and maintained as high as practicable in fact."

The comments of the former Chief Justice Ryan, in speaking to the members of the bar of their duty to preserve the power and influence of the profession, are pertinent and informing in this connection:

"A knavish lawyer is certainly the most dangerous of all knaves. For it is to the profession that in time of peril all rights of person and property are committed. The bar is the trustee of everything which man holds sacred, and the opportunity to betray is fearfully easy. Indeed it may be truly said that integrity of character is as essential to a lawyer as professional learning. For, without innate love of truth and justice, it is impossible truly to comprehend a profession essentially founded on truth and justice."

The power of courts to remove an unfaithful member from the office of attorney has been recognized and asserted by the courts of this state from an early day. In *re Mosness*, 39 Wis. 509, 20 Am. Rep. 55; In *re Orton*, 54 Wis. 379, 11 N. W. 584; *Bar Assoc. v. McKibbin*, 153 Wis. 350, 141 N. W. 283. See, also, *Wernimont v. State ex rel. Little Rock Bar Ass'n*, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156 et seq.

The case before us is so clear and flagrant a breach of professional ethics that comment on the facts is superfluous. The manner in which respondent exercised the privileges of an attorney shows him to be an unfit and unsafe person to hold the privileges conferred upon a licensed attorney. The court being officially advised that respondent has forfeited the rights to hold the office of attorney at law, there is no other course to follow than to have his license revoked and debar him from exercising the privileges of this office. It is a duty the court owes to the profession, to the people of the state and to an honorable and upright administration of justice. The petition praying for the revocation of defendant's license admitting him to the practice as attorney in the courts of this state must be granted.

DOERFLER, J., took no part.

IN RE ALLIS' WILL.

STATE v. ALLIS et al.

(Supreme Court of Wisconsin. July 13, 1921.
Dissenting Opinion Oct. 3, 1921.)

1. Taxation $\S$ 865—Statute subjecting proceeds of life insurance to inheritance tax includes only that effected and paid for by insured on his own life.

Under St. $\S$ 1087—1, subd. 7, as added by Laws 1915, c. 253, making insurance payable on the death of insured, subject to inheritance taxes, the intention of the Legislature was to include only such life insurance as the insured personally effects on his own life for the benefit of others and on which he pays the premiums.

2. Taxation $\S$ 865—Husband insuring life in favor of wife retains substantial interest in policy until his death, making proceeds proper subject of inheritance tax.

Under St. $\S$ 2347, providing that one effecting insurance on his life may make the policy payable, or assign it to a married woman, and that it shall be her sole and separate property, and in case of her surviving the term of the policy the amount shall be payable to her, free from the control, disposition, or claims of her husband, and under Laws 1903, c. 15, providing that she may, with the written consent of insured, assign or dispose of it, the rights of a wife as a beneficiary under the policy effected by her husband on his own life are contingent on her surviving the term of the policy, and he retains a substantial interest in the policy which does not pass until his death, and the proceeds are properly subjected to inheritance taxes by St. $\S$ 1087—1, subd. 7, as added by Laws 1915, c. 253, $\S$ 2.

3. Taxation $\S$ 856—Legislature has power to levy inheritance taxes.

The Legislature has power to levy inheritance taxes by exercise of the power of reasonable regulation and taxation of the transfer of property.

4. Taxation $\S$ 879(1)—Insurance on life policy for benefit of wife of insured amounts to a transfer of property.

If a husband insures his life for his wife's benefit and pays premiums thereon, he thereby, in effect, transfers property to her within the inheritance tax law (St. $\S$ 1087—1, subd. 7, as added by Laws 1915, c. 253).

5. Taxation $\S$ 893—Lack of direct evidence as to who paid premiums on life insurance raises presumption that insured paid them.

Lack of direct evidence as to who paid premiums on policies of life insurance necessarily leads to the presumption that the insured complied with the terms of the policy and paid the premiums.

Eschweiler, J., dissents.

Appeal from Milwaukee County Court; M. S. Sheridan, Judge.

Proceedings by the State of Wisconsin to determine the inheritance tax due on the estate of Charles Allis, deceased, in which Sarah E. B. Allis and the executors interposed objections. From the order made, the State appeals. Reversed and remanded.

An appeal from an order determining the inheritance tax due upon the estate of Charles Allis, deceased.

Charles Allis died July 22, 1918. At the time of his death there was insurance upon his life in the sum of \$306,000, of which Sarah E. B. Allis was sole beneficiary. The estate consisted of real and personal property. The value thereof for inheritance tax purposes was fixed by the county court at \$377,718.27, subject to deductions amounting to \$106,691.82, leaving the clear market value of the estate subject to the inheritance tax of \$271,026.45. Three of the policies in question were payable in a lump sum at the date of death of the deceased, while six were payable in monthly installments.

The executors of the will of the deceased and Sarah E. B. Allis individually interposed an objection to the court's considering the insurance as part of the estate for the purpose of determining the inheritance tax for the following reasons: (1) Because the interest of Sarah E. B. Allis was fully vested in all the policies before the passage of subdivision 7 of section 1087—1 Stats., and by virtue of subdivision 4 of section 1087—1, Stats., is not subject to the inheritance tax; (2) if the insurance in question is not exempt from the tax, then the law is invalid in so far as it attempts to tax life insurance which vested prior to the passage of chapter 253, Laws of 1915, for the reason that the Legislature cannot impose an inheritance or transfer tax upon estates or property which vested prior to the enactment of the law imposing the tax; (3) because chapter 253, Laws of 1915, if construed so as to impose a tax on the insurance in question, is unconstitutional because (a) it violated section 1, art. 8, Wisconsin Constitution, providing that the rule of taxation shall be uniform, and (b) it violates section 1, art. 1, of the Wisconsin Constitution and the Fourteenth Amendment of the federal Constitution, in that it denies to Sarah E. B. Allis the equal protection of the law and deprives her of her property without due process of law.

The county court held that no inheritance tax was due on account of the life insurance, and determined that the entire estate pass to Sarah E. B. Allis, widow of the deceased. Appeal is taken from this order.

William J. Morgan, Atty. Gen., E. E. Brossard, Asst. Atty. Gen., and John Harrington, Inheritance Tax Counsel, of Madison, for the State.

Miller, Mack & Fairchild, J. G. Hardgrove, and Paul R. Newcomb, all of Milwaukee, for respondents.

SIEBECKER, C. J. (after stating the facts as above). The Legislature in 1915 amended section 1087—1, Stats., relating to inheritance taxes by adding subdivision 7, providing:

"Insurance payable upon the death of any person shall be deemed a part of his estate for the purpose of the tax, and shall be taxable to the person or persons entitled thereto."

It is the claim of the state that all life insurance maturing upon the death of the person insured is properly subject to the tax prescribed in section 1087—1, Stats., upon the ground that the proceeds of such insurance policies can be treated by legislative action for the purposes of such taxation the same as the decedent's estate is treated, and that the payment of such proceeds to the beneficiaries can be made subject to inheritance taxation upon the principle that transfers of property by will, or by the intestate law of this state, or by deed or grant, intended to take effect in possession or enjoyment at or after such death, are taxable. It is common knowledge that life insurance is usually effected by the insured on his life for the benefit of another, and that he pays the premiums. In recent times life insurance effected by a person other than the insured for the benefit of the person effecting it and who pays the premiums has become established in business affairs. The latter class of life insurance creates relations between the parties to the contract materially different from those created by insurance of the former class.

[1] We are of the opinion that the Legislature intended that chapter 253, Laws of 1915, was to include only such life insurance as the insured effects on his own life for the benefit of another, and on which he pays the premiums.

[2] The conflicting rights asserted by the state and the widow of Mr. Allis make it necessary to consider the rights and interests the insured and the beneficiaries have in life insurance policies under the laws of this state. It is observed, as stated in *Boehmer v. Kalk*, 155 Wis. 156, 144 N. W. 182, by the late Mr. Chief Justice Winslow, that:

"Since a very early day it has been held in this state that one who insures his own life for the benefit of another and pays the premiums himself may at any time dispose of the policy, or may will it away without consent of the beneficiary"—citing *Clark v. Durand*, 12 Wis. 223 and *Armstrong v. Blanchard*, 150 Wis. 31, 136 N. W. 145.

In *Rawson v. Mil. Mut. Life Ins. Co.*, 115 Wis. 641, 92 N. W. 378, the court adverted

to this fact as peculiar to the law of this state, and said:

"In Wisconsin, however, there has existed from early times a principle of the law of life insurance which is unique and at variance with the law in most of the states. This principle is that a person who insures his own life for the benefit of another, and pays the premiums thereon, may [except a limitation by statute as to a married woman] dispose of the policy by will or in other manner not inconsistent with the terms of the policy, to the exclusion of the beneficiary named therein."

In *Opitz v. Karel*, 118 Wis. 527, 95 N. W. 948, 62 L. R. A. 982, 99 Am. St. Rep. 1004, wherein a gift of a policy was sustained as a valid one, it was noted that:

"Such a policy is not to be distinguished from ordinary choses in action, and comes within the operation of the legal rules applicable to agreements involving pecuniary obligations"—citing cases.

In *Slocum v. Northwestern Nat. Life Ins. Co.*, 135 Wis. 288, 115 N. W. 796, 14 L. R. A. (N. S.) 1110, 128 Am. St. Rep. 1028, a son and daughter of the insured as beneficiaries sued the company for damages on the ground that the company wrongly breached and terminated the policy. It is there held that such beneficiaries in the policy could not maintain the action. In speaking of the nature of the rights beneficiaries have under the general law, it was there declared:

"While such a right is a vested one, it is in its nature a mere 'expectancy' which is subject to be defeated by the act of the insured, and hence cannot be absolute and indefeasible until the death of the insured. The uncertainty of the beneficiary's interest, growing out of the contingencies incident to the power of the insured to thus deal with the policy, renders the rights and interests of the beneficiaries too hypothetical to be made the ground for damages for a breach of the contract. It is a mere expectancy of an unascertainable value, and hence cannot be made the basis of a claim for damages. Under the law of this state the rights of the insured in such a contract are valuable property rights, and for a deprivation thereof the insured is entitled to recover the damages as for other wrongful deprivations of valuable property rights."

This court characterized a husband's act in effecting life insurance on his life for the benefit of his wife and daughters in *Farr v. Trustees*, 83 Wis. 446, 53 N. W. 738, 18 L. R. A. 249, 35 Am. St. Rep. 73, in these terms:

"The assured, like a testator, makes provision in writing for his wife and children, to be enjoyed on his death."

We repeat these observations defining the rights of parties to an insurance policy in the law of this state because they are fundamental to a determination of the questions pre-

sented on this appeal. The contention of defendant is that Mrs. Allis, the beneficiary of these policies and the widow of the insured, became vested with the proceeds of these policies at the time of the issuance of these policies, and that there was no transfer of property to her within the contemplation of the inheritance tax laws of this state at the time of the insured's death, and hence no succession tax can be levied. The inquiry what the rights of Mrs. Allis are under these policies under the terms of section 2347, Stats., is a pertinent one. This statute, among other things, provides that:

"Any person, whether her husband or not effecting any life insurance on his own life or on the life of another may cause the same to be made payable or assign the policy to a married woman or to any person in trust for her or her benefit; and every such policy * * * shall be the sole and separate property of such married woman and shall inure to her separate use and benefit and that of her children, and in case of her surviving the period or term of such policy the amount of the insurance shall be payable to her or her trustee for her own use and benefit, free from the control, disposition or claims of her husband and of the person effecting or assigning such insurance and from the claims of their respective representatives and creditors."

In *Given v. Wis. Odd. Fellows' Mut. Life Ins. Co.*, 71 Wis. 547, 37 N. W. 817, the court relied on the rule adopted in *Foster v. Gile*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217, and held that, if a policy of insurance does not designate to whom the insurance shall be paid in case the beneficiary named dies before the insured, the appointment of the beneficiary is revoked by such death, and the insurance inures to the benefit of the estate of the insured. In *Ellison v. Straw*, 116 Wis. 207, 92 N. W. 1094, section 2347, Stats., is discussed at length, and it was declared that the dominant purpose of the whole course of legislation embodied in this section—

"* * * has been to provide, not for married women, but for widows, and that the full scope thereof cannot be effected other than by holding a married woman powerless to in any manner, directly or indirectly, assign insurance made for her benefit; * * * that the statute * * * preserves the insurance to the end that, in case of her surviving the insurance period, it may then be payable to her for her own use and benefit."

This decision was made in January, 1903. In March, 1903, the Legislature passed an act (Laws 1903, c. 15) enabling a married woman, with the written consent of the person effecting such insurance, to assign, incumber, or dispose of any right, title, or interest she may have in a policy of life insurance on her life, her husband's life, or other persons, as if she were unmarried, thus clearly recognizing

the fact that the insured has an interest in such a policy. From the history of the legislation, and the decisions of this court from an early day, it is manifest that, if a married woman is named as the beneficiary in a policy effected by her husband on his own life, her rights to the fund constituting the proceeds of the policy are contingent upon the event that she survives the term of the policy, and, if she does not survive her husband and leaves no children surviving, then the proceeds are a part of the husband's estate unless another beneficiary is designated in the policy. It is thus seen that the husband retains a substantial interest in such a policy. All the policies in this case matured upon Allis' death. But it is argued by respondent that the rights of the widow became vested when she was made the beneficiary of the policies, and therefore there is no transfer of property or of any interest therein from the husband to his widow as the beneficiary of the policies at the time of his death within the terms of the inheritance tax law. This claim is predicated on the ground that the policies were her sole and separate property, and that she is vested with absolute ownership thereof. This, we consider, is not the legal effect of her appointment as beneficiary. As heretofore indicated, the policies are property under the law in which the insured retains an interest, and her interests as beneficiary and widow were not absolutely vested in her until his death. Her interests in the policies and their proceeds were joined with his interest until the contingency of her surviving him had happened. Under such circumstances it must follow that a transfer of his interest in these policies took effect at the husband's death, and that she, in law, had not an absolute, but a qualified, ownership of the policies and their proceeds before his death. The nature and quality of such beneficial interest in these policies during the insured's life constitute a good ground for legislative action to subject the proceeds realized therefrom to inheritance taxation upon the basis that they "shall be deemed a part of his estate for the purposes of the tax and shall be taxable to the person or persons entitled thereto." It is not essential that such proceeds shall become a part of the deceased husband's estate upon his death in order to subject them to inheritance taxation. It is self-evident that by means of these policies the husband transferred a large part of his estate to his widow, which became effective at his death. This puts the transaction within the field of inheritance taxation.

[3] As declared in the case of *Nunne-macher v. State*, 129 Wis. 190, 103 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711, the Legislature has the undoubted power

to levy inheritance taxes by the exercise of the power of reasonable regulation and taxation of the transfer of the property. *State v. Pabst*, 139 Wis. 581, 121 N. W. 351; *Estate of Ebeling*, 169 Wis. 432, 172 N. W. 734, 4 A. L. R. 1519.

[4] In addition to the foregoing consideration it is manifest that this insurance fund in the hands of the widow is within the field of inheritance taxation even if it were considered that the husband's interests had been transferred to his widow before his death under the terms of the insurance contract. Such a transaction would in substance be a transfer of his property to her and constitutes in legal effect a transfer of the same kind as is accomplished by a gift. It must be borne in mind that the statute provides:

"Insurance payable upon the death of any person shall be deemed a part of his estate for the purposes of the tax."

Here we have a plain declaration that such a transfer which was intended to take effect in possession or enjoyment when the husband died shall be subjected to the tax upon the ground that the widow in fact came into possession and enjoyment of this property from him at his death. As stated in the *Ebeling Case*:

"Whether these gifts, therefore, be held to be gifts in contemplation of death or gifts inter vivos, they are not beyond the power of the Legislature to tax."

As above indicated, the result of buying these policies by the husband is that he in a proper and legal sense transferred to his widow a substantial part of his estate, and that such transfer became consummated in possession and enjoyment at the time of his death, and hence is one which the Legislature had the power to tax.

These considerations place the statute beyond the objections and claims of the re-

spondent to the effect that the life insurance received by the widow can in no sense be considered estate in which the husband had no interest, that there is no succession to or transfer of the property within the field of inheritance taxation, or that the property is not taxable because the widow's rights became fixed and vested before the passage of chapter 253, Laws of 1915, and that the act violates the Fourteenth Amendment to the federal Constitution by denying to the widow the equal protection of the law or depriving her of her property without due process of law.

[5] It is contended that there is no direct evidence to show that the husband paid the premiums on the policies in question. We think the lack of direct evidence on the subject necessarily leads to the presumption that he complied with the terms of the policy and paid the premiums. In the light of the foregoing considerations it follows that the county court erred in not taxing the proceeds of these policies as prescribed by section 1087—1, par. 7.

The order appealed from is reversed, and the cause remanded to the county court of Milwaukee county, with direction to enter an order directing that the insurance fund in question be subjected to the inheritance tax under the law in accordance with this opinion.

ESCHWEILER, J. (dissenting). As to the insurance policies taken out prior to the passage of the amendment to the inheritance tax law under consideration in this case and which insurance policies became payable to the wife beyond any possibility of control by the husband, she surviving, I think they became her property as to him, and she thereby then acquired such a vested interest in those policies as to place it beyond the power of the Legislature, by merely declaring it to be something which it is not, to make it subject to the inheritance tax.

DAVIS v. WALKER et al. (No. 33487.)

(Supreme Court of Iowa. Sept. 30, 1921.)

Appeal and error ⇨1033(8)—Appellant cannot complain of a rule of damages which resulted in benefit to him.

Appellant cannot complain of the rule of damages adopted by the court below, where such rule reduced appellee's recovery to less than he was entitled to receive.

Appeal from District Court, Jasper County; D. W. Hamilton, Judge.

Supplemental opinion. Rehearing denied. For former opinion, see 183 N. W. 612.

Preston & Dillenger, of Avoca, and E. M. S. McLaughlin, of Newton, for appellant.

E. J. Salmon, of San Diego, Cal., W. R. Cooper, of Newton, and McCoy & McCoy, of Oskaloosa, for appellees.

ARTHUR, J. Original opinion was filed July 14, 1921, and is reported in 183 N. W. 612. To avoid misunderstanding of our holding as to measure of damages adopted in this cause perhaps something should be added.

It is insisted by appellant in petition for rehearing that by assessing damages in the amount of the difference between the price which Walker paid Davis for the Jasper county land, as found from the evidence, and the reasonable market value thereof, we depart from and abrogate the rule theretofore announced by this court in many cases, and even in this case, that, as said in the Stoke Case, 153 Iowa, 274, 133 N. W. 709, 38 I. R. A. (N. S.) 465, Ann. Cas. 1913E, 270:

"The overwhelming weight of authorities in this country approves the allowance as to the measure of damages of the difference between the actual value of the property at the time of the purchase and its value if it had been what it was represented to be."

Our holding in the instant case is not intended to and does not effect a renunciation or abandonment of the rule announced in the Stoke Case, and other cases holding similarly. In such cases as the instant case, as in the Stoke Case, the party claiming damages flowing from fraud has properly insisted upon the rule that gives the defrauded innocent party the full benefit of his bargain. But a party guilty of fraud as was appellant, cannot consistently complain that the damage he has inflicted has been calculated in manner more favorable to him and less favorable to the injured party. In some jurisdictions, and notably in our federal courts, a party who has sustained damages is confined to measure his damages by the difference between the price paid, his outlay, and the value of the prop-

erty purchased; the defrauding party is bound to make good the loss sustained, but his liability does not include the defrauded party's expected bargain. Appellee, who has manifestly sustained great damage, may not be denied recovery because he has not availed himself of the approved rule which might yield him larger damages. The proof showing appellee entitled to recover under the so-called federal rule, the appellant cannot complain that appellee did not prove himself entitled to a larger amount under the general rule.

The original opinion must be adhered to, and the petition for rehearing is overruled.

SMITH v. EELLS et al. (No. 33986.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Vendor and purchaser ⇨3(3) — Contract with broker created agency to sell, and not option to purchase.

A written so-called "option," wherein the property owner agreed with the broker to sell on stated terms, stipulating: "I will enter into a contract on the above and all over the above \$13,000 is to go to" the broker "as commission"—establishes an agency to sell, and not an option to purchase.

2. Brokers ⇨60 — Abandonment of contract negotiated by parties does not defeat right to retain commission from deposit made by purchaser.

A commission is earned when the broker produces a purchaser accepted by the principal, and the subsequent agreement of the principal and the buyer to abandon the contract will not defeat the broker's claim for commission, nor place on the broker the burden of restoring to the purchaser a deposit on the price not in excess of the agreed commissions.

3. Contracts ⇨252 — Agreement to rescind implies obligation to restore status quo.

Where a rescission is agreed on without express or implied consent to waive the resultant obligation to restore the status quo of the parties, the right to insist on such restoration will ordinarily be recognized and enforced.

Appeal from District Court, Woodbury County; W. G. Sears, Judge.

Action at law to recover an amount alleged to be due plaintiff upon the rescission of a contract for the purchase of land. The facts are stated in the opinion. From a judgment in favor of defendants, the plaintiff appeals. Reversed.

Kass Bros., of Sioux City, for appellant.

Free, Goltz & Pickus and John F. Stecker, all of Sioux City, for appellees.

WEAVER, J. The claim of plaintiff is that in February, 1918, he entered into a con-

tract with defendant Kingsbury for the purchase of a tract of land on which he made certain cash payments and delivered to said Kingsbury or his agent, Eells, the promissory note of one Ford, and that thereafter by agreement of the parties the contract of purchase was rescinded, entitling plaintiff to a return of the payments made and a redelivery to him of the Ford promissory note. He further alleges that, in pursuance of such rescission, Kingsbury did return to him the cash consideration paid for the land, except a small sum of about \$7, but did not return, nor has he since returned, the Ford note and mortgage securing its payments.

The defendant Eells, answering separately, denies the petition, and by way of cross-petition alleges that at the time mentioned he was engaged in the business of selling real estate upon commission, and sold the land of Kingsbury to the plaintiff, Smith; that said sale was evidenced by written contract between Kingsbury and Smith, and for his services in that behalf and by agreement with Kingsbury he (Eells) received the sum of \$1,200, which sum, as we understand the record, was made up of a cash payment of \$7 and a delivery to Eells of the Ford promissory note and mortgage, computed at \$1,193. The cross-petitioner further alleges, on information and belief, that in May, after the date of the contract of sale in February, 1918, plaintiff Smith and defendant Kingsbury, by mutual agreement, but without the knowledge of cross-petitioner and with intent to defraud him of the commission earned in negotiating such sale, mutually agreed to rescind and annul their contract of sale, but that he (Eells) had no part in such agreement for rescission, and is in no manner bound thereby. The cross-petitioner therefore asks that he be adjudged to be the owner of the note and mortgage, and that plaintiff's claim against him be dismissed.

The defendant Kingsbury, answering separately, denies the petition, except as admitted. He admits that plaintiff delivered the note and mortgage to Eells, but denies that in receiving such payment Eells was acting as his agent. He alleges that, instead of selling his land to plaintiff, he in fact sold to Eells, and that later Eells sold it to plaintiff, and thereafter, at the request of Eells, he (Kingsbury) entered into a written contract for a sale direct from himself to the plaintiff, and pursuant to said contract plaintiff paid direct to Kingsbury the sum of \$800 in money and gave him his promissory note for \$1,000. The answer of this defendant also alleges the agreed rescission of said contract, and avers that he (Kingsbury) did return to plaintiff the cash payment of \$800 and the \$1,000 note.

On these issues the cause was tried to the court, which found for the cross-petitioner, Eells, that he is the owner of the Ford note

and mortgage, and is entitled to retain the same as his own property, together with the cash payment of about \$7 received by him. The court also found that plaintiff was entitled to recover nothing from the defendant Kingsbury. The plaintiff appeals.

I. It is conceded that as between the plaintiff, Smith, and the defendant Kingsbury the contract of sale was rescinded, and, this being the case, it was the plaintiff's right to demand from the seller a return or repayment of all the latter had received of the consideration for the rescinded contract. It is conceded, also, that he did return all of such consideration, except the amount of \$1,200 (in money and the Ford note), which were in the hands of Eells. Whether he is to be relieved of any obligation to return this \$1,200 depends in some degree upon the real relation existing between him and Eells and the plaintiff. Counsel for Kingsbury contends, as he logically must, that Eells was not the agent of Kingsbury, but was himself a purchaser from him, and that the sale to plaintiff was by Eells as of his own property, and apparently the trial court adopted this theory. For reasons hereinafter more particularly stated, we think the record does not sustain such finding.

[1] II. Stating his own defense and claim in his answer and cross-petition, Eells does not allege or pretend that he was acting otherwise than as Kingsbury's agent. He expressly alleges that he was in the business of "selling real estate upon commission"; that Kingsbury "was the owner" of the land, and that he (Eells) sold this land to plaintiff; and that "by agreement between him (Eells) and Kingsbury" he (Eells) "was to receive and did receive in full compensation for the sale of said premises to Smith the sum of \$1,200." This is the case Eells made on paper; it is so alleged in the pleading on which he went to trial, and its correctness in this respect is borne out very clearly by many other admitted circumstances. It is true he wobbles somewhat on the witness stand, and swears that while he had this land on his list, and after he had interested the plaintiff in its proposed purchase, he took an "option" on the land to himself, and then effected a sale to plaintiff, which he carried out by having Kingsbury figure as the seller in executing the written contract. This alleged "option" was reduced to writing, as follows:

"February 8, 1918.

"I hereby agree with H. A. Eells to sell my farm near Sargent's Bluff, the numbers of which are lot 1 of the N. $\frac{1}{2}$ of Sec. 24, Twp. 88, R. 48, for the sum of \$13,000.00 net to me. The payments to be made as follows: \$1,800.00 cash March 1, 1918, and \$500 per year and 6 per cent. interest each succeeding year until balance is paid.

"This agreement holds good until Tuesday night, 6 o'clock, February 12th. I will enter into contract on the above, and all over the

above \$13,000.00 is to go to H. A. Eells as commission.

"Receipt hereby acknowledged of \$200.00 for above option; \$200.00 to be deducted if sale is made. W. H. Kingsbury.

"When one-half is paid, W. H. Kingsbury will give deed and clear abstract."

further proceedings in harmony with the views herein expressed.

Reversed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concur.

As will readily be seen, this is not an "option" at all. It is written authority to Eells to sell the land for Kingsbury on the prescribed terms, and fixing the commission the latter was to receive if such a sale was accomplished. It only confirms the agency alleged in the cross-petition. The agency of Eells is too clearly established to be open to reasonable doubt.

[2] III. But, having found the agency of Eells, it does not necessarily follow that plaintiff may in this action compel such agent to return the commission he received on the contract of sale. Kingsbury having authorized his agent to make a sale, and having undertaken to pay a stated commission therefor, such commission was earned when the agent produced a purchaser who was accepted by the owner and a binding contract entered into between the parties. When that was done, and the seller had paid the promised commission, the right of the agent to retain it could not be defeated by the subsequent agreement of the seller and buyer to abandon and rescind their contract. It is nowhere claimed or shown that Eells had any part in the rescission of the contract or in any manner consented thereto. Under such circumstances, if the seller agrees to a rescission, the burden is upon him, and not upon his agent, to restore the consideration received, and this duty is in no manner modified or lessened if the agent has retained his proper commission out of a payment made by the buyer upon the purchase price.

[3] Parties may, of course, rescind a contract upon any terms or conditions to which they mutually agree; but where a rescission is agreed upon, without express or implied consent to waive the resultant obligation to restore the status quo of the parties, the right to insist upon such restoration will ordinarily be recognized and enforced. In this case it is alleged in pleading by each of the parties that in May, 1918, the plaintiff and Kingsbury did mutually agree to "cancel, abandon, and rescind"; but neither appellant nor appellee alleges any fact tending to limit or restrict the ordinary legal effect of a voluntary rescission. It follows of apparent necessity that the conclusion of the trial court, absolving the defendant Kingsbury from any duty to make full restitution to the plaintiff, cannot be sustained. The judgment appealed from is reversed, and cause remanded for

MILLER v. McCUTCHAN. (No. 33878.)

(Supreme Court of Iowa. Sept. 28, 1921.)

1. Covenants $\S$ 122—Evidence held not sufficient to sustain recovery on warranty in deed.

Where a purchaser attempts to recover on a broken covenant of warranty in a deed, evidence that a tenancy in the premises, not excepted in the clause of warranty, caused him to reduce the price to a purchaser from him to the extent of \$3,000 is not sufficient to sustain a finding of damages for breach of warranty.

2. Vendor and purchaser $\S$ 349—Allegations held not sufficient to show damage from breach of agreement to procure loan.

Where the vendor of property agreed to negotiate a loan to pay mortgage existing on the property, and on his failure to do so purchaser negotiated a loan, the purchaser's allegation that he had to pledge the rental income from the property to secure the loan, and that he was thereby deprived of the rents, was insufficient to show damages in absence of a statement that the rent was not applied to the mortgage debt.

3. Appeal and error $\S$ 984(4)—Costs $\S$ 118—Amount of cost bonds in discretion of trial court.

The amount of a cost bond required of a nonresident plaintiff is wholly within the discretion of the trial court, and the ruling thereon is not appealable.

Appeal from District Court, Lee County; J. E. Craig, Judge.

Action at law to recover damages for alleged breach of contract for the exchange of property, and for other damages alleged to have been occasioned to the plaintiff by false representations by the defendant. There was a jury trial. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

John M. Rankin and Hughes & Dolan, all of Keokuk, for appellant.

Herminghausen & Herminghausen, of Ft. Madison, for appellee.

WEAVER, J. The plaintiff, owning certain property known as the "Cook Block" in New London, Henry county, Iowa, and defendant, owning a tract of land in Marion county, Mo., entered into a written contract for the exchange of said properties by the terms of which defendant was to pay plaintiff the sum of \$2,500 "boot money." Both properties were incumbered, and by the terms of the

exchange plaintiff agreed to furnish defendant a loan of \$7,000, and defendant in turn agreed to furnish plaintiff a loan of \$8,000—the purpose of this agreement being to enable the parties to care for existing incumbrances. Each was to furnish the other a merchantable title to the property conveyed and to pay the taxes accrued thereon, and “all insurance upon the properties was to be transferred.”

In pursuance of the contract plaintiff conveyed the “Cook Block” to the defendant, the deed containing a clause excepting from the warranty a mortgage debt to the amount of \$7,000. The defendant having failed to pay the agreed difference, plaintiff brought this action at law to recover the same. In addition thereto he demanded damages because of an alleged shortage in the measurement of the Missouri land, for false representations made by the defendant in inducing him to enter into the contract, and for failure to pay taxes and insurance.

The defendant, in answer to these claims, admits the making of the contract, and that the “boot money” has never been paid, but seeks to avoid payment by a plea of counterclaims which, if allowed, will more than equal his admitted debt. The principal items of counterclaim are: (1) That the incumbrance on the Cook Block which was excepted from the plaintiff's warranty was limited to \$7,000, but the amount defendant was required to pay to remove the lien exceeded that sum to the extent of \$789.42 which excess is now due from the plaintiff; (2) that there was a further breach of the plaintiff's warranty in that there was an outstanding lease of the Cook Block by which defendant sustained damage in the sum of \$3,000; (3) that plaintiff failed to furnish defendant a loan of \$7,000 on the Cook Block and defendant was obliged to obtain it elsewhere to his damage in the sum of \$854.64; (5) that plaintiff falsely and fraudulently misrepresented to defendant the value and rental income of the Cook Block; that defendant relying thereon was induced to make the exchange to his damage in the further sum of \$6,000; and (6) a claim on an account in favor of the Farmer's Bank of New London against the plaintiff alleged to have been assigned to the defendant.

The plaintiff does not in this court contest the defendant's counterclaim for the excess of the lien on the Cook Block, over the agreed amount of \$7,000, but takes issue on all the other items. There was a jury trial, and verdict and judgment for plaintiff for \$2,079.03. The defendant appeals.

I. We shall take no time in discussing the details of the charges of misrepresentation and fraud made by each party against the other. There was no evidence on which to justify a finding of damages on this ground in favor of either party, and the trial court

might well have so ruled on its own motion and withdrawn these issues from the jury. But it is clear from the record that the jury fairly appreciated the situation and did not find either charge to have been sustained, and in so far as the errors assigned have reference to these issues we shall not discuss them.

II. Again, we think it unnecessary to consider assignments of error as to the counterclaim for the excess of the mortgage lien in the Cook Block over the contract amount of \$7,000. While it is true the plaintiff, in pleading, took issue on that claim, the evidence showed without dispute that the lien assumed by defendant was limited to \$7,000, and he was required to pay thereon an excess of \$789.42. The trial court charged the jury that defendant was entitled to recover the amount so paid in excess of \$7,000, and there is nothing in the record to indicate that the jury disregarded the instruction in this respect. On the contrary it is quite apparent that defendant was given his proper credit on this item.

[1] III. On the defendant's claim for damages to the amount of \$3,000 for breach of warranty in the conveyance by plaintiff by reason of the existence of an outstanding lease, the court charged the jury that the lease was an incumbrance against which defendant was entitled to the protection afforded by plaintiff's warranty, and that plaintiff was entitled to recover what he had paid, if anything, to discharge or remove such incumbrance. This was a correct abstract statement of the law, but was more favorable to the defendant than he was entitled to under the record made. There is no evidence that defendant has paid or removed the incumbrance. The testimony on which he relies to recover in this action is that in making a subsequent trade of the property the purchaser raised an objection because of the lease and that he (defendant) made such purchaser an allowance of \$3,000 in the trade on that account. Such a state of facts is insufficient to sustain a finding of recoverable damages. He does not claim to have removed the incumbrance or to have been put to any expense on account thereof, and even if we were to assume or hold him entitled to prove that the market value of the property was unfavorably affected by the lease, the fact that he had made some concession on that account to clinch a trade with a third person would be no evidence in support of such claim. There is therefore no testimony to support a finding for defendant on this counterclaim for anything more than nominal damages.

[2] IV. Neither can it be said that a finding by the jury against the defendant on his claim for damages because of plaintiff's failure to negotiate a loan of \$7,000 on the Cook Block is not sustained by the evidence. The

promise to procure a loan specifies nothing except the amount, nothing being stipulated as to time of maturity or rate of interest. The jury could also find that defendant not only never called upon plaintiff to procure it, but rather that defendant took the matter into his own hands, because he desired to increase the loan materially beyond the sum of \$7,000. Indeed, if we turn to his pleading the only injury he alleges to have suffered by having to procure the loan himself was in the fact that to obtain it he was required to pledge as security the rents accruing upon the property, by reason of which he says he was "deprived of the rents of the premises for that period, and thereby damaged in the sum of \$854.64." How this served to "deprive him" of the rents is difficult to understand. If they were collected by or paid over to the mortgagee, they operated as payments pro tanto on his debt, and he had the benefit thereof, the same as if such payments had been made directly to himself. This counterclaim as stated shows no right of action or recovery against the plaintiff, and a verdict thereon for the defendant would be without support.

V. Many exceptions were taken and errors assigned upon the charge to the jury, and upon the trial court's refusal to give other requested instructions. The charge is not faultless, but in so far as it is open to criticism the errors are principally of a technical character, and without prejudice to the appellant. We think it unnecessary to prolong this opinion for their further consideration.

VI. The real controversy turns upon questions of fact concerning which the evidence of the parties is in conflict. The issues of fact thus made were for the jury, and have been found against the appellant. There is no such showing of merit or equity or of convincing facts or circumstances as to suggest the conclusion that a new trial is required in the interest of substantial justice. The verdict is such as indicates the conclusion that defendant ought to pay the boot money according to his contract, subject to proper credit for the excess of the lien on the Cook Block, and in this respect we think the jury did not go astray. If the other items of claim and counterclaim were rejected by the jury, or by them set off one against the other as unimportant makeweights tossed into the judicial scales by the respective parties, we cannot say their verdict was erroneous.

[3] VII. The appellant assigns as reversible error the overruling of his motion to increase the cost bond required of the non-resident plaintiff from \$50 to \$500. It seems hardly necessary to say that the amount of a cost bond, if one be required, is wholly within the discretion of the court, and the ruling there complained of is not appealable. It may also be added that, the judgment in

favor of plaintiff being now affirmed, defendant will be relieved of any anxiety by reason of the court's refusal to increase the penalty of the bond.

Other assignments of error not expressly mentioned or separately discussed by us are necessarily controlled by the conclusions we have hereinbefore announced.

We find no reversible error in the record, and the judgment below is therefore affirmed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concurring.

WELLS v. FLYNN et al. (No. 33173.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Good will $\S$ 6(1)—Provision that vendor must look to the security of the property only is valid, and precludes personal liability, except for the initial payment.

A provision of a contract for the purchase of real estate and a business that vendor "must look to the name, business, personal property, accounts, and real estate herein described for the unpaid balance" is valid, and is sufficient to relieve the purchaser from any personal liability in default of payment of interest on the mortgage, liens, insurance premiums, and taxes.

2. Good will $\S$ 6(1)—Election to sue at law under contract held not to be a recognition of personal liability.

A provision in such contract that the vendor, in case of default by purchaser, may foreclose in equity "or bring an action at law" to recover amount due, is not a recognition of personal liability, where it is followed by the clause, "but only to the extent to which secured parties are personally liable under this contract."

Appeal from District Court, Polk County; Geo. A. Wilson, Judge.

The opinion sufficiently states the facts. There was a decree for plaintiff, and the defendants appeal. Affirmed in part. Reversed in part.

Sullivan & Sullivan, of Des Moines, for appellants.

John G. Myerly, of Des Moines, for appellee.

WEAVER, J. On April 14, 1914, plaintiff and the defendants Flynn and McDermott entered into a written contract by the terms of which the latter agreed to purchase from the plaintiff "the name, business, contracts, and personal property of the L. J. Wells Livery & Automobile Company," together with certain described real estate in the city of Des Moines, Iowa, for the actual consideration of \$80,000, though by agreement and

consent of the parties the expressed nominal consideration was \$100,000. The purchase price was to be paid in installments of \$20,000 on the signing of the agreement, \$10,000 on or before July 1, 1917, \$10,000 on or before July 1, 1919, and \$5,000 on or before July 1st of each year thereafter until the full consideration was paid. By the terms of the contract it was further agreed that—

"Should the parties become involved in litigation over the agreement, or the enforcement of the lien thereof, the district court of Polk county, on filing of a petition in foreclosure proceedings, should appoint a receiver to take charge of the property and business and to hold possession of the same until the litigation be completed, or until the unpaid balances, with interest, are fully paid, and all rents and profits derived from said business, personal property, and real estate, less costs and expenses of receivership shall be applied on the unpaid balances" secured thereby.

This provision of the contract is accompanied by the following clause, upon the proper construction and effect of which this controversy principally turns:

"It is also agreed that the taking of possession under such receivership shall in no manner prevent or retard the party of the first part in the collection of said unpaid balances by foreclosure or otherwise, it being expressly understood and agreed that the personal liability of the parties of the second part hereunder is strictly limited to the payment of forty thousand and no/100 dollars (\$40,000) on the execution of this contract, and party of the first part must look to the name, business, personal property, accounts and real estate herein described for his security for the unpaid balances amounting to sixty thousand and no/100 dollars (\$60,000)."

On March 28, 1916, the plaintiff instituted this action in equity alleging defendant's default in payments accruing upon the contract, asking the appointment of a receiver, demanding personal judgment against the defendants and the foreclosure of the defendant's equity of redemption, and for general equitable relief. No receiver was in fact appointed, but plaintiff appears to have entered into and thereafter held possession of both property and business.

Answering the petition, defendants took issue upon some of the alleged claims of the plaintiff, and further specifically pleaded the provision above quoted from the contract with reference to their personal liability, and deny plaintiff's right to recovery of a personal judgment against them, or either of them. They further allege that it was the express understanding and agreement of the parties that defendants should be chargeable with no personal liability beyond the initial payment, and that for any default in payment of the remainder of the agreed purchase price the plaintiff would look alone to the security afforded by his lien upon the property,

and they ask that, in case the court should hold such meaning and intent are not fully expressed in the writing, then that the instrument be reformed accordingly.

The trial court, having heard the evidence and considered the various items in dispute, found due to the plaintiff an unpaid remainder of \$22,333.74 on the contract price of the property, established the same as a first lien on such property, and awarded a special execution for its collection. It was further found that, of the amount so adjudged due and unpaid, the defendants were personally liable for \$3,498.22, and judgment was entered against them to that extent. The decree does not expressly disclose the items of indebtedness constituting the amount of the personal judgment, but an examination of the record makes it reasonably clear that it includes taxes accumulating on the property subsequent to the date of the contract, insurance premiums paid by the plaintiff, and interest accruing upon a mortgage indebtedness assumed as part of the purchase price of the property.

There was more or less controversy over the actual remainder left unpaid after giving defendants the benefit of all proper items of credit—it being the position of the defendants that the amount did not exceed about \$11,000. We shall not attempt to review the evidence upon this point, farther than to say that, while some of the items are involved in considerable uncertainty and doubt, we are satisfied that the trial court's conclusion is substantially correct, and the decree establishing the plaintiff's lien and ordering a foreclosure should be affirmed.

[1] The more serious question is upon that feature of the decree which charges the defendants with personal liability for the sum of \$3,498.22. The theory upon which the appellee relies in support of this finding is that the clause in the contract by which the personal liability of the defendants is "strictly limited" to the payment of the initial installment and providing that the plaintiff "must look to the name, business, personal property, accounts, and real estate herein described for his security for the unpaid balances of \$60,000," operates to relieve the defendants from personal liability for payment of the principal sum of \$60,000, and nothing more, and that their default in payment of the interest on the mortgages, liens, insurance premiums, and taxes imposes a personal obligation unaffected by the restrictive clause. And this we conclude was the thought of the trial court in framing its decree.

In our opinion this construction of the contract cannot be sustained. That it is competent for the parties to a contract to agree that for the payment of an indebtedness thereby created or assumed the creditor shall look alone to a designated security for his payment, and not to the personal liability of

the debtor is well settled. *Allison v. Hollembeak*, 138 Iowa, 480, 114 N. W. 1059; *Ball v. Wyeth*, 99 Mass. 339. If a man, contemplating a purchase of property of great value on deferred payments, is unwilling to pledge his personal liability beyond a limited amount, and says to the seller:

"I will take this property at the price you put upon it, providing that my personal liability be limited to the initial payment and for the remainder you must look alone to your vendor's lien"

—and the seller consents to the condition, there is no good reason why the law should not recognize the validity of the agreement or why the courts should not enforce it according to its terms. Such was the purchase in this case. Though it dealt with many and various items of property, it was a single purchase; and when the defendants had discharged their personal liability by payment of the first installment the contract in the plaintiff's hands was enforceable against the security alone. His claims subsequently arising for taxes, insurance, and interest are incidental to the preservation of such security, and may properly be added to the amount for which he may enforce such security; but there is no ground, legal or equitable, upon which it may be used to increase the limits of the personal liability of the purchaser, which has not only been definitely fixed, but has been in fact discharged by full payment.

A case involving a somewhat similar principle is found in *Reed v. Cossatt*, 153 Pa. 156, 25 Atl. 1074, decided by the Pennsylvania court. There a promissory note was signed by the maker upon condition that, if default was made in its payment, the holder should look alone to certain collateral securities for its collection. The note was not paid at maturity, and, certain interest having accrued thereon, the holder, conceiving the idea that the limitation upon the maker's personal liability affected nothing but the principal debt, sued to collect the interest. In denying such recovery the court said:

"If the obligee did not collect his semiannual payments, they simply remained unpaid, and were a constituent part of the entire sum of principal and interest due at the maturity of the paper. As such, the interest was simply a part of the gross sum due, and was to be collected in the same way as the principal."

So, also, in *Johnson v. Payne*, 11 Neb. 266, 9 N. W. 81, speaking of a claim by a mortgagee for taxes paid on the mortgaged property it is said that—

"Whatever * * * is due under the mortgage at the time of foreclosure, including taxes so paid, constitutes but a single and indivisible

demand, and cannot be separated and collected by several actions."

And in Massachusetts it has also been held that there may be a mortgage without personal liability on part of the mortgagor, and that an agreement for the extinguishment of such personal liability is not destructive of the character of the transaction as a mortgage. *Cook v. Johnson*, 165 Mass. 245, 43 N. E. 96.

Appellee argues that the closing words of the clause in the contract which speaks of the unpaid balances of \$60,000 indicates clearly that it was only as to such principal that personal liability was waived; but the point is not well taken. At the time when the contract was made and the initial installment paid, \$60,000 was the total "unpaid balance" on the purchase price. Had defendants then and there paid the \$60,000, plaintiff's interest or lien would have been entirely extinguished. In that situation the plaintiff's agreement to waive the personal liability of defendants for the entire amount unpaid, and to look alone to the security, left the latter exposed to no financial hazard under the contract, except such as might result from plaintiff's enforcement of his security.

[2] Our attention is also directed to another clause of the contract, which provides that, upon default made by the defendants in the performance of the agreement, the plaintiff was authorized to bring an action at law to recover the amount due, or at his option could proceed by action in equity to foreclose the contract. This right given to plaintiff to sue at law is thought to be an admission of personal liability; but such conceded right to so sue and recover at law is carefully guarded by adding thereto the words, "but only to the extent to which the secured parties are personally liable under this contract." Instead of being an admission by the defendants against their interest, this repeated restriction of liability serves to strengthen the defendants' contention as to the mutual understanding of the parties.

Without further discussion, we think the decree below, in so far as it sustains the plaintiff's claim for personal recovery from the defendants, must be reversed, and the relief granted to plaintiff must be limited to the foreclosure of his lien for the sum found his due. Special execution for that purpose may issue, but the award of general execution against the property of appellants is set aside.

Affirmed in part.

Reversed in part.

EVANS, C. J., and PRESTON and DE GRAFF, JJ. concurring.

BENNETT v. PRIMER et al. (No. 174.)

(Supreme Court of Iowa. Sept. 28, 1921.)

1. Wills §184(1)—Will held not revoked by codicils.

Where the second of two codicils to a will referred to the original will, and stated that the testator desired to change the terms and provisions thereof, and that the codicil was to be annexed to and become a part of the will, and established a trust for a time for certain purposes, the income of which was to be used for the care of his wife, and to pay a certain amount annually to S., and the first codicil referred to the will, and merely changed the word "heir" to "children or issue," the legal effect of the codicils was not to revoke the will.

2. Wills §184(1)—Will not revoked by codicil, unless by conflict in terms or by express provisions.

In order that a codicil shall operate as a revocation of any part of will, it must do so by express provision, or its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that of a change in the testator's intention.

3. Wills §476—Will and codicil should be construed together.

A will and codicil should be construed together, and unless there is an irreconcilable conflict or discrepancy between them, the codicil is no more the last expression of testator's intent than if it had been written as a part of the original instrument.

4. Wills §687(5)—Beneficial interest in trust estate held merged with remainder.

Where a trust was created for support of testator's widow and for the benefit of a niece, with an estate in remainder to the niece on the widow's death, and court elected to take a distributive share for the widow, who was insane, at the death of the widow, intestate without issue, the estate in remainder merged with the niece's beneficial interest in the trust estate, giving her a fee.

Appeal from District Court, Keokuk County; Chas. A. Dewey, Judge.

Action in equity to construe a will. The trial court construed the will and codicils together, and as claimed by plaintiff, and by defendant Mattie M. Primer, giving to her the estate. The other defendants appeal. Affirmed.

F. M. Beatty and C. C. Heninger, both of Sigourney, for appellants.

Willcockson, Hamilton & Updegraff, of Sigourney, for appellee Bennett.

Stockman & Baker, of Sigourney, and John D. Denison, of Des Moines, for appellee Primer.

PRESTON, J. The property of the deceased is for the most part real estate, about 100 acres of land in Keokuk county, Iowa,

and a home place in town. There was a small amount of money, and the executor has collected rents on the property since the death of testator. The testator, Benjamin H. Veach, died February 13, 1917, without issue. His will, and two codicils, were admitted to probate in February, 1917, and plaintiff Bennett was appointed administrator and trustee, in place of Mattie Stanton Primer, who had filed a written declination to serve, because of her residence in California. Testator left a widow, Henrietta Veach, who died intestate in November, 1918, without issue. Henrietta was adjudged insane in July, 1918, and committed to the hospital at Mt. Pleasant. She was an inmate of the hospital at the time of her husband's death, and she died while an inmate. After the death of testator, and in April, 1917, the district court elected for the widow to take the distributive share of the estate of testator, in lieu of the provisions of the will and codicils made in her behalf. The defendant Mattie M. Primer, formerly Stanton, was a niece of Henrietta Veach, and for some years lived with testator and his wife. She was past 30 years of age when testator died, and was 32 years of age at the time this action was brought. She was married in October, 1915, and has two children, who are now living. The other defendants are the heirs of testator, some of them brothers, sisters, grandchildren, and so on.

The will, executed in 1901, after providing for payment of debts, etc., provides:

"Second.—I give and bequeath unto my beloved wife, Henrietta Veach, all my property, both real and personal, for the period of her natural life. She to make use of same for her sole use (and the education of Mattie Stanton) so long as she may live.

"And I hereby direct and will that after the death of my said wife Henrietta Veach, the remainder of said estate, both real and personal, I give and bequeath to Mattie Stanton in case she is living at the death of her aunt Henrietta Veach.

"What real property is left to Mattie Stanton shall not be sold until she is thirty years old, but she shall have full control of it. And in case the said Mattie Stanton should not live and die without heirs, then I direct that the real property be sold and the proceeds added to what personal property there may be. The sum of same to be equally divided among my nieces, including my wife's nieces by whatever name they may bear.

"I hereby appoint as executrixes my wife, Henrietta Veach, and Mattie Stanton. I request that they be not required to give bond as such."

The first codicil, executed in 1911, makes but one change in the original will, and provides:

"It is my will that all of the aforesaid will be and remain as therein written, excepting, however, that where the word 'heir' appears

therein that said word be erased therefrom and the word 'children or issue' be inserted in its place and stead."

The second codicil, executed in August, 1914, about a year after his wife had been committed to the asylum, omitting formalities, provides:

"Under date of September 5, 1901, I made, published and declared my last will and testament, in and by which I did bequeath and devise my property, and now wishing to change the terms and provisions of said will, I now change the terms and provisions thereof as follows:

"I. I hereby cancel the appointment of Henrietta Veach, as an executrix of my estate, and hereby nominate and appoint Mattie M. Stanton, or her successor to be appointed by the court, as the sole executrix of my last will.

"II. I give and devise all of my property to Mattie M. Stanton as my executrix, in trust for the purposes and to be disposed of as follows:

"(a) So much of the income of my property as is necessary shall be used for the care, comfort, support and maintenance of my beloved wife, Henrietta Veach, so long as she shall live, and I do so order, will and direct.

"(b) Out of any remainder of the said income and rentals arising from my property, there shall be paid yearly to said Mattie M. Stanton an amount not exceeding five hundred (500) dollars.

"(c) In the event that the income of my property shall not be sufficient to provide the needed amount for the care, support and maintenance of my said wife, and the said sum above given to Mattie M. Stanton, then the said Mattie M. Stanton as executrix herein, shall be and is hereby authorized and given full power, at such times and on such terms as she deems best, to sell such part or parts of my real property as shall be deemed by her necessary to provide for the said support of my wife and the said provision made for her, and the additional amounts thus provided for said purposes.

"III. The provisions herein made for my wife, Henrietta Veach, shall be in lieu of dower and distributive share in my estate.

"IV. I hereby request that said Mattie M. Stanton shall not be required to give bond as executrix herein, except that if any of my real estate shall be sold under the provisions of my will, then that said executrix shall give bond in such amount as the court shall deem right and proper in the premises.

"V. And lastly it is my desire that this second codicil be annexed to and become a part of my said last will and testament, the same in all respects as though the provisions hereof had been inserted therein in lieu of the original provisions therein specified."

The facts are not disputed, and the trial court found the facts as before stated, and ruled that the defendants other than Mattie M. Primer had no interest in the property, and judgment was rendered against them for costs. The court found for plaintiff and defendant Mattie, as follows: That under the terms and provisions of the said last will and testament and the codicils thereto

of the said Benjamin H. Veach, deceased, the said testator devised to the said Mattie M. Primer (née Stanton), in trust, the income of his property for the care, support, and maintenance of his wife, Henrietta Veach, and the payment to the said Mattie M. Primer of the sum of \$500 annually during the life of Henrietta Veach, and so much of the corpus of his estate, after using the said income for such purpose, as should be needed to provide for said care for his said wife and the payment of said annuity to the said Mattie M. Primer, said trust to terminate at the death of said Henrietta Veach; that subject to the said trust the said will devises all of testator's estate to said Mattie M. Primer; and that upon the death of said testator the said Mattie M. Primer becomes vested with a fee-simple title in and to all of the estate of said testator. And by appropriate order and decree it directed the administrator to proceed in the settlement of the estate and in accordance with the decree.

Appellants' contentions, summarized and stated as briefly as may be, are that the court erred in failing to find that testator's intention as to his entire estate was expressed in the second codicil—the claim being that, because the disposition of the property there made was inconsistent with the provisions of the original will, said codicil superseded and revoked entirely the original will, and that the first codicil may be disregarded, and that the last codicil alone constitutes the last will of testator; that under the last codicil the property should go to testator's heirs, according to the rules of descent; that upon the termination of the trust the entire estate, under a proper construction of the codicil, should go to the defendants, heirs of the testator. There is also some suggestion that under the provisions of the codicil a contingent remainder is devised, or the limitation by way of remainder after the gift of the life estate.

[1] 1. The principal argument is based upon the proposition that the last codicil entirely revokes and supersedes the original will. It is doubtless true, as contended by appellants, that, where there is a conflict between the terms of the will and a codicil, the codicil being the last expression, it will govern; but it does not follow that the original will is necessarily revoked. Manifestly testator desired and intended to make some changes by the codicil. That was the very purpose of it. It is probable that one of the objects in making some change was because of the changed conditions in regard to his wife, Henrietta. It is thought by appellants that a subsequent will or codicil disposing of the entire estate in a different manner revokes the former will. The argument proceeds upon the assumption that the entire estate is disposed of by the codicil and in a

different manner; but it will be observed that the original will gives a life estate to the widow, and the only provision anywhere disposing of the remainder is found in the original will. The last codicil establishes a trust for a time and for certain purposes, the income to be used to care for his wife and a certain amount to Mattie Stanton. This was the purpose and scope of the codicil. Furthermore, both codicils refer to the will, and the expressions therein fairly show, we think, that it was not testator's intention to revoke the original will, and the legal effect of the codicils is not to revoke it. The first codicil makes no change, except to change the word "heir" to "children or issue." The last codicil refers to the original will, and states that he desires to change the terms and provisions thereof; that the said codicil be annexed to and become a part of his said will, and so on.

[2, 3] A codicil does not necessarily revoke the provisions of the will of which it becomes a part. Ordinarily, it republishes and reaffirms, and is to be construed with it as one entire instrument, and does not revoke, unless by some plain direction, or by force of the clear import of language in some inconsistent or repugnant provision. In order that a codicil shall operate as a revocation of any part of a will, in the absence of expressed words to that effect, its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that of a change in the testator's intention. It is fundamental that a will and codicil should be construed together, and unless there is an irreconcilable conflict or discrepancy between them, the codicil is no more the last expression of testator's intent than if it had been written as a part of the original instrument. Numerous authorities are cited on these several propositions, and others, but it is clear to us that appellants' contention as to the revocation cannot be sustained, and we shall not prolong the discussion in reference thereto.

2. A brief analysis of the original will is that it provided for payment of debts; a life estate to Henrietta and for her use, and the education of Mattie Stanton, as long as Henrietta should live; at death of Henrietta, remainder to Mattie Stanton, if Mattie should be alive at Henrietta's death, otherwise to Mattie's heirs; but, if Mattie is alive when Henrietta dies, then Mattie to have the remainder of the estate and control of it, but not to sell it until she is 30 years old; should Mattie die before Henrietta, without heirs, the remainder left at Henrietta's death to be divided among the nieces of Benjamin and Henrietta; appoints both Henrietta and Mattie executors. The first codicil changes the word "heir," as before stated. The second codicil leaves the pro-

visions as to payment of debts as in the original will and makes the following changes: Mattie appointed sole executrix; gives all the property to Mattie, as sole executrix, in trust for the purpose of supporting Henrietta during her life from the income; Mattie to have \$500 annually out of the balance of the income, and rentals, if sufficient; if not, Mattie to sell so much as may be necessary. It contains the expressed intention that it shall become a part of the original will, etc. Construing the three instruments together as one, there is given to Mattie, executrix, as trustee, a particular estate for the life of Henrietta, with power of alienation, if necessary; the trust estate is seized to the use of Henrietta and Mattie, for support of Henrietta and the annual payment to Mattie during the life of Henrietta; if Mattie should predecease Henrietta, without children or issue, the property was to be sold and divided among the nieces of testator and his wife at the wife's death; if Mattie should predecease Henrietta, leaving children or issue, the estate and remainder vested in Mattie should go to her children or issue at Henrietta's death; if Mattie, with or without issue, should outlive Henrietta, she would take the estate and remainder, limited as to the sale until she should reach 30 years. The conditions in regard to children or issue of Mattie, as to her age, are out of the case, and need not be considered, since she has children, and she is past 30, and such conditions existed at the time of testator's death.

[4] Plaintiff Bennett, as trustee, took the particular estate for the life of Henrietta, charged with benefits to her and Mattie, and with power, for the life of Henrietta; but the court, for Henrietta, elected to take her distributive share in the estate in lieu of the provisions made for her in the will. So that at Henrietta's death intestate without issue, Mattie's estate in remainder merged with her beneficial interest in the trust estate, thus giving her the fee. Because of the election for the widow, her death, and the other conditions existing at the death of testator before stated, there was an acceleration and merger. The trustee holds the legal title merely to perform the duties imposed by the trust, and is not the holder of a beneficial interest. 21 Corpus Juris, 1037, states the rule thus:

"It is generally held, although there is authority to the contrary, that whenever the legal and equitable estates in the same land become united in the same person the equitable is merged in the legal estate, unless it is the intention of the party in whom they unite, or manifestly to his interest, or essential to the ends of justice, or necessary to protect the rights of an innocent third party, or necessary to carry out the purposes and intentions of the donors, that the estate should be kept separate."

None of these exceptions obtain in the instant case. It was to Mattie's interest that the estates should merge. *Sherlock v. Thompson*, 167 Iowa, 1, 148 N. W. 1035, Ann. Cas. 1917A, 1216. 3 Corpus Juris, 208; *Ellsworth College v. Emmett County*, 156 Iowa, 52, 60, 135 N. W. 594, 42 L. R. A. (N. S.) 530. See also, as having a bearing, *Lingo v. Smith*, 174 Iowa, 468, 156 N. W. 402.

We shall not again review these and the other cases. We are of opinion that the trial court rightly construed the will, and the decree is affirmed.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

PURFIELD v. SCHLEICHER. (No. 71.)

(Supreme Court of Michigan. Oct. 3, 1921.)

Landlord and tenant — §152(4)—**Lessee's specifications held not in accord with lessor's contract to build store front satisfactory to lessee.**

Under a lessor's covenant to install a store front satisfactory to lessee, lessor could not be compelled to build according to lessee's specifications, providing for fronts on both front and side streets, though the building of a front on the side street was a necessary incident, where the changes proposed for the side street were substantial and expensive.

Appeal from Circuit Court, Washtenaw County, in Chancery; George W. Sample, Judge.

Suit by William P. Purfield against Frederick G. Schleicher. Decree for defendant, and plaintiff appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

Arthur Brown, of Ann Arbor (E. R. Sunderland, of Ann Arbor, of counsel), for appellant.

Cavanaugh & Burke, of Ann Arbor (Henry C. Bogle, of Detroit, of counsel), for appellee.

CLARK, J. The bill seeks specific performance of a covenant in a lease of the first floor and basement of a store building for a term of approximately 10 years. The covenant:

"And the said party of the first part [the defendant] further agrees to install, at his own expense, before September 1, 1919, a new modern store front complete, consisting of two show windows, with tiled entrance and inclosed backs, and of a design satisfactory to the said second party [the plaintiff], the said second party, however, to pay the said first party 10 per cent. per annum of the entire cost of said

improved front and after the completion of the same during the continuance of this lease. Payment to be made in monthly installments and paid at the time the monthly rent is paid to said first party."

The building was on the corner of Liberty and Fourth streets in Ann Arbor, facing Liberty street. Originally it was of two stories, having eight-inch brick walls. Later a third story was added. The walls were somewhat cracked by settling. Other tenants used the upper stories. About September 3, 1919, plaintiff obtained from an architect plans and specifications for the store front, satisfactory to him, and submitted them to defendant, requesting construction. Defendant consulted a builder, who advised that the proposed front would cost more than \$3,000. The store property had cost \$5,500. Defendant refused the front proposed.

Defendant's principal objections were: The proposal was too expensive, beyond the cost contemplated; the plan called for the removal of a brick pier at the corner and the substitution of a steel column, with consequent shoring to support the upper stories, risk incident thereto, and the invasion of an upper story; and the construction of two fronts, one on each street, was requested. The bill prayed:

"A decree requiring the defendant to specifically perform the said contract in respect to the construction of said store front by at once taking steps to install a store front substantially like the store front so designed, planned, and specified by the plaintiff."

The trial court found:

"I am of the opinion that the plaintiff is not entitled to the relief asked. The testimony of witness Pipp that he was called by the plaintiff, after the plaintiff had entered into the lease in question, to prepare plans and specifications of a double front facing on East Liberty street, stands uncontradicted. I do not believe the lease entered into contemplated a front to be built on Liberty street and another front to be constructed on Fourth avenue.

"The specifications provide: 'Cornice: Box around I-beam lintels on both Liberty street and Fourth avenue fronts, framing all work as shown.' 'Before ordering structural steel the mason contractor shall verify all dimensions and determine size and exact location, and shall check walls of both fronts for steel location of present lintels at Liberty street front.' Thus it seems to me that in contemplation of the plaintiff he is demanding that a double front, or two fronts comprising show windows, shall be placed in said building, when as a matter of fact it would seem that the lease does not comprehend such action by the defendant."

The bill was dismissed. Plaintiff has appealed.

Plaintiff contends that this is a "satisfaction contract," that no materials were nam-

ed, that there was no limit of cost, and that the design was to be satisfactory to him. He testified:

"I could dictate; the contract would allow me to. I can dictate any old thing I want to, and Mr. Schleicher was liable for it; that is the way the contract reads."

And he further contends that this contract is:

"One where the personal taste, feeling, sensibility, fancy, or individual judgment of the party to be satisfied are especially involved. * * * It is * * * with him purely a personal matter, of which he is made the sole judge. It is his right to say whether he is satisfied or not; it cannot be left to another to say that he ought to be satisfied"

—citing Wood Reaping & Mowing Machine Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; United States Electric Fire Alarm Co. v. Big Rapids, 78 Mich. 67, 43 N. W. 1030; Housding v. Solomon, 127 Mich. 654, 87 N. W. 57; Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N. W. 457; Schmand v. Jandorf, 175 Mich. 88, 140 N. W. 996, 44 L. R. A. (N. S.) 680, Ann. Cas. 1915A, 746; Holton v. Monarch Motor Car Co., 202 Mich. 271, 168 N. W. 539; McCarren v. McNulty, 7 Gray (Mass.) 139; Barnett v. Beggs, 208 Fed. 255, 125 C. C. A. 455.

Defendant contends that plaintiff must be denied relief here prayed because: (1) The proposed plans and specifications are not in accordance with the contract. (2) The plaintiff has not acted in good faith. (3) Specific performance of this agreement may not be granted. The remedy is at law.

We think, as did the trial court, that the proposed plans and specifications were not in accordance with the contract. The finding above quoted as to "two fronts" is criticized, and counsel for plaintiff insist that the building of a front or show window on Fourth street was but a necessary incident to constructing a store front on this corner building. But the changes proposed for the Fourth street side were substantial, expensive, involving the enlargement of the window there and the construction of a "front." This, as pointed out by the trial court, was recognized by the architect. It was beyond the contract.

Though unnecessary to a decision of the case, we may in passing express doubt that the installing of the steel column with its incidents above set forth can be claimed in good faith to be within the contemplation of the contract. It is therefore unnecessary to consider further the question of good faith. And we need not determine whether this contract is of the class claimed by plain-

tiff, nor whether specific performance might be decreed.

The decree is affirmed, with costs to defendant.

HARRINGTON v. OTSEGO COUNTY BOARD OF SUP'RS. (No. 345.)

(Supreme Court of Michigan. Oct. 3, 1921.)

Certiorari ~~60~~—Writ dismissed, where no return by judge to whom directed, and no effort made to secure one.

Where no return to a writ of certiorari by the judge to whom it was directed was made, and no effort shown to secure one, the writ will be dismissed.

Certiorari to Circuit Court, Otsego County; Guy E. Smith, Judge.

Application by William A. Harrington for a writ of mandamus against the Otsego County Board of Supervisors. Application denied, and relator brings certiorari. Writ dismissed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, and BIRD, JJ.

W. A. Harrington, of Gaylord, for appellant.

W. L. Townsend, Pros. Atty., of Gaylord (C. S. Reilly, of Detroit, of counsel), for appellee.

MOORE, J. The relator presented a claim against the board of supervisors. It was disallowed. Instead of appealing to the circuit court (see section 2300, C. L. 1915), the relator applied to the circuit court for a writ of mandamus to compel the board of supervisors to allow his claim. After a return and full hearing the circuit judge denied the application for a writ of mandamus. Upon the application of the relator a writ of certiorari was issued out of this court, directed to the circuit judge, for the purpose of reviewing the proceedings.

The record does not show that the attention of the circuit judge has been called to the issuance of the writ of certiorari, nor has he made any return thereto, and the only return in court is a return made by the clerk of the copy of the files and records in said cause. The attention of the relator was called to the situation by the clerk of this court as early as July 22, 1921, and there is nothing in the record to indicate any effort to secure a return from the circuit judge.

Under these circumstances this court feels compelled to dismiss the writ of certiorari.

KREFT v. GREAT LAKES STONE & LIME CO. (No. 16.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Master and servant ⇨286(40)—Negligence in instructing servant using dynamite held for jury.

In an action under the Survival Act for death of a servant who received injuries resulting in death when tamping dynamite into drilled holes with a long stick, whether master properly warned and instructed decedent as to the proper manner of tamping the dynamite held for the jury.

2. Master and servant ⇨157 — Warning required.

Adequate instruction and warning to be given a servant as regards dangers of his work is such as a man of good common sense with ordinary intelligence and prudence would deem necessary to give the very man he is instructing or warning, and it might require a much higher degree of instruction to some child or boy of immature mind than it would in the case of an adult experienced man, and in warning and instructing a servant the master has the right, and it is his duty, to consider and act upon his own knowledge of the servant's experience or his want of the same.

3. Master and servant ⇨157 — Charge on warning of danger from use of dynamite held proper.

In an action under the Survival Act for damages for death of servant, court did not err in charging that mere general warning as to the danger to be apprehended from the use of dynamite would not be sufficient, but there must be some specific warning and instruction as to the exact use of the dynamite that was to be placed in the holes in question that would satisfy the requirements of the law as to the giving of notice or warning.

4. Master and servant ⇨265(11, 14)—Burden of proof concerning negligence in warning and contributory negligence.

In action under the Survival Act for damages for death of servant, plaintiff has the burden of proving defendant's failure to adequately warn and instruct in the use of explosives, and willful negligence would be a complete defense, but in proving the latter element the burden is upon the defendant.

5. Master and servant ⇨150(2)—Servants should be fully instructed as to use of dynamite.

There is always danger in the handling of dynamite, and workmen employed in using it, if not already aware of the danger, should be fully informed concerning it.

Error to Circuit Court, Alpena County; Frank Emerick, Judge.

Action by Bertha Firsch Kreft, administratrix of the estate of Frederick Firsch, deceased, against the Great Lakes Stone & Lime Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, BIRD, and SHARPE, JJ.

Henry & Henry, of Alpena, for appellant.
I. S. Canfield, of Alpena, for appellee.

SHARPE, J. Defendant asks reversal of a judgment entered on a verdict for plaintiff in an action to recover damages for the death of plaintiff's intestate while in defendant's employ. The assignments of error raised substantially the same questions presented to the trial court on a motion for a new trial. His opinion in denying such motion so well states the facts and the law applicable thereto that we adopt it as our own:

"The plaintiff's intestate, Frederick Firsch, was killed on July 22, 1918, by the premature explosion of a charge of dynamite which he was assisting in placing in position for use in carrying on the business of the defendant in quarrying stone at its plant on the Lake Huron shore in Alpena county.

"The method employed by the defendant was to drill to a considerable depth a series of holes in a line at a proper distance back from the edge of the excavation of the quarry, load these holes with dynamite, and explode the same by electricity.

"In this operation there were two sets or gangs of men employed, the 'drillers,' who drilled the holes to be subsequently loaded or charged with dynamite, with which latter work the drillers had nothing whatever to do, and the 'blasters,' who placed and pushed with a pole when necessary, the sticks of dynamite into the holes at the proper depth and position to be exploded.

"On the morning of the day of his death the deceased was taken from his work at 'plug drilling' in the bottom of the quarry by the foreman of the 'blasters' and put to work assisting such foreman in loading drill holes with dynamite. In pushing the dynamite, with a pole provided for that purpose, into the fifth or sixth hole, an explosion occurred which caused the death of Mr. Firsch a few hours afterward in the ambulance which had come out from Alpena to remove him to the hospital in town.

"This action is brought under the Survival Act [Comp. Laws, §§ 12383-12403] to recover damages for the alleged negligence of defendant resulting in the death of plaintiff's intestate, and the sole ground of negligence submitted by the court to the jury was the claimed failure of defendant to instruct its employee as to the proper handling of dynamite when being placed or pushed into place in the drill holes, or to warn or caution him of the danger attending the same.

"Mr. Firsch, a young man 30 years of age at the time of his death, owned and carried on a small farm situate about five miles from the plant of defendant. In the fall of 1917 he had worked at the quarry at duties not connected with blasting, except upon one occasion which will be referred to hereafter, and, returning in the spring of 1918, he had worked at and about drilling until haying time, when he was away on his farm for a while, returning to work at the quarry on the morning of July 22.

"Mr. Cooley, the foreman in charge, stated in his testimony what occurred on that morning as follows:

"A. On the morning of July 22, Monday morning, Mr. Firsch had returned to work after being absent for a week or 10 days. I met him at the foot of the bluff about the middle of the quarry, and he asked me what I had for him to do. I says, "Fred, go over to No. 2 shovel and drill whatever big stones is laying alongside." I says, "I will be over that way after a little," * * * and I went over, * * * and we went up the hill and we started loading. We loaded the first hole, and we loaded the second hole, and on the third hole I began to think that the pole was being handled a little reckless, and I said, all I said to Frederick, I says, "Frederick, handle the pole careful," I says, "take it easy; we have got lots of time," and we went on about our loading.

"Q. Did he obey your instructions in that regard? A. He obeyed my instructions until the pole went down the hole at the time of the explosion.

"Q. On that morning state whether or not he used the tamping pole at any time without your express instructions? A. After that first instruction I gave him he didn't. Whenever the pole went down in the hole I asked it to go—asked him to let it down."

"As to the experience of, and warnings given to, Mr. Firsch in the short time the latter worked at the quarry in the fall of 1917, Mr. Cooley testified that Mr. Firsch worked for a few days at 'plug drilling,' but mostly at other work.

"Q. During the fall of 1917 I will ask you to state whether or not Mr. Firsch did any tamping on the hill. A. The fall of 1917 Mr. Firsch helped me on one blast * * * Mr. Firsch handled the tamping pole probably for three holes on the dynamite. I remember calling him, "Come and take the pole until he (Weise) gets back." He came over and took the pole, and we started loading the first hole, and I didn't see where it was necessary, the way he was handling the pole, to give him any instructions on that shot. He handled the pole very gently. He only helped me load two or three holes in that one shot."

"These two occasions, one in 1917 and the other on July 22, 1918, are the only ones when deceased was required to do or did any work in placing or pushing the dynamite into the drill holes in the limestone cliff of the quarry.

"And the foregoing testimony of Mr. Cooley, defendant's foreman and witness, and the testimony of plaintiff's witness Ellsworth, embraces the whole case as to what instructions and warnings were or were not given to deceased, and the meritorious question on this motion is: 'Was the subject of defendant's duty and liability in regard to such instructions and warnings properly submitted to the jury?'

[1] "First. The testimony of Cooley and Ellsworth raised an issue that was necessarily for the jury, and not the court. If it be admitted that Foreman Cooley warned or instructed deceased in exactly the words as testified by him, and as assumed by the court in the charge that he did, it still would remain a question for the jury whether such instructions were adequate or sufficient.

"This proposition should be kept in mind while considering many of the questions raised

on this motion, particularly as to the rejection by the court of certain requests to charge preferred by defendant.

[2] "Second. Such issue was submitted to the jury by the court under instructions of the following substance: In the first place the jury was most emphatically told that the only ground of negligence submitted to them, or which they should consider at all in reaching a verdict, was the asserted failure of defendant to properly instruct deceased in the use of dynamite placed or pushed into the drill holes, or to warn him of the danger of improperly handling the same. And in this connection the jury was further told that Mr. Cooley in warning and instructing Firsch had the right, and it was his duty, to consider and to act upon his own knowledge of Firsch's experience, or his want of the same, gained from the fact that Firsch during his whole employment at the plant, both in 1917 and 1918, had been employed solely under the immediate supervision and direction of Cooley.

"The court said:

"Adequate instruction and adequate warning is such instruction and such warning as a man of good common sense, with ordinary intelligence and prudence would deem necessary to give to the very man he was instructing or warning. It might require a much higher degree of instruction to some child or boy of immature mind than it would in the case of an adult experienced man.

"In this case it would be such warning as a man of ordinary prudence and intelligence would deem suitable to give to Mr. Firsch, having in view what experience or knowledge he knew Firsch possessed about the use of dynamite and its particular use in this place and for this purpose.

"His experience and knowledge or his want of experience and knowledge should be considered by the person who purposes to give and who does give this warning and instruction."

"This covers, in my opinion, the subject-matter of defendant's twelfth and thirteenth requests to charge and its seventeenth reason on this motion.

[3] "Again, some criticism, and an allegation of error is assigned upon that small part of the charge dealing with the subject of 'general,' or 'specific' warnings and instructions set forth in defendant's seventh reason, namely:

"But I charge you, gentlemen of the jury, that mere general warning as to the danger to be apprehended from the use of dynamite would not be sufficient.

"It must be some specific warning and instruction as to the exact use of the dynamite that was to be placed in these holes that would satisfy the requirements of the law as to the giving of notice or warning."

"I approve the above even standing alone. Taken in connection with the remainder of what was said by the court on the same subject and the illustration given, it is fair and correct in my judgment.

[4] "The jury was also charged that plaintiff had the burden of proving defendant's failure to adequately warn and instruct plaintiff in the use of explosives, and that his own 'willful' negligence would be a complete defense, but that as to proving the later element the burden was upon the defendant.

"The jury must have been impressed from the language of the court that they should not consider for any purpose the subject of the Workmen's Compensation Law [Comp. Laws, §§ 5423-5495] nor the question of an incompetent foreman, or 'quick' dynamite.

"In considering defendant's thirteenth reason it is well to remember that 'plug drilling' is not at all like the work of placing or 'pushing' these heavy charges of dynamite in the drill holes on the upper cliff.

"In defendant's fourteenth, fifteenth, and sixteenth reasons on this motion its position seems to be that, because the foreman's helper (Firsch) was not required to use the pole in pushing down a stick of dynamite until directed to do so by Cooley, the latter's instruction, or command 'Whenever the pole went down in the hole I asked it to go, asked him to let it down,' to 'use the tamping pole,' amounted to a sufficient instruction or direction as to how to use it. I do not agree with this contention.

"The remaining requests to charge set forth in defendant's motion were properly refused because they assume as established disputed questions of fact."

[5] There is always danger in the handling of dynamite, and workmen employed in using it, if not already aware of the danger, should be fully informed concerning it. This counsel for the defendant concede, but insist that the deceased knew all about it, and that the admonition of Cooley to "handle the pole careful" was all that the occasion required. While Firsch was familiar with the use of dynamite in blasting when but a small stick was used, we cannot say as a matter of law that he had such knowledge of the danger of tamping it in a deep hole with a large pole as relieved Cooley from the duty of giving him specific instructions as to the care to be used and the danger incident to a want of such care. No question of assumption of risk or contributory negligence is presented. While the case is a close one on the facts, we think it was for the jury, and that it was properly submitted to them.

The following authorities cited by counsel for the plaintiff are instructive as to the duty of a master to warn a servant of dangers incident to the employment: *Smith v. Peninsular Car Works*, 60, Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542; *Ribich v. Lake Superior Smelting Co.*, 123 Mich. 401, 82 N. W. 279, 48 L. R. A. 649, 81 Am. St. Rep. 215; *Adams v. Grand Rapids Refrigerator Co.*, 160 Mich. 590, 125 N. W. 724, 27 L. R. A. (N. S.) 953, 136 Am. St. Rep. 454, 19 Ann. Cas. 1152; *Hosking v. Cleveland Iron Mining Co.*, 163 Mich. 538, 128 N. W. 777; *Borkowski v. American Radiator Co.*, 185 Mich. 266, 130 N. W. 640; *Baldwin on Personal Injuries* (2d Ed.) § 347 et seq.; 28 Cyc. 1165, 1166; 18 R. C. L. 565-567.

The judgment is affirmed.

BROCKWAY v. MICHIGAN MUT. HAIL INS. CO. (No. 86.) *

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Insurance ~~§~~392(7)—Acts of insurer held not to constitute waiver of liability while policy was suspended.

The acceptance by a mutual hail insurance company of premiums for several years in arrears on a suspended policy and reinstating it, subsequently returning a premium for another year, held not to constitute a waiver of the provision of the contract, so as to render the defendant liable for loss incurred while the policy was suspended.

2. Insurance ~~§~~392(7)—Party paying up past-due installments on suspended policy held not entitled to collect loss during suspension.

Where insured paid premiums to a mutual hail insurance company for three years, and was notified by letter that premiums for succeeding years had been placed with a justice of the peace for collection, and he paid no attention thereto, but on the day following a loss, without informing insurer thereof, he paid his arrearage premiums and got the policy reinstated, held, that he could not recover in view of policy provision against liability during suspension.

Moore, Wiest, and Bird, JJ., dissenting.

Error to Circuit Court, Genesee County; Fred W. Brennan, Judge.

Action by Marion Brockway against the Michigan Mutual Hail Insurance Company. Directed verdict for plaintiff, and defendant brings error. Reversed, without new trial.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, OLARK, BIRD, and SHARPE, JJ.

Thomas F. Stockton, of Flint (Kinnane, Black & Leibrand, of Bay City, of counsel), for appellant.

Withey & Freeman, of Flint, for appellee.

MOORE, J. In this case plaintiff recovered a verdict for \$500 by direction of the judge, given to the jury.

The defendant is an insurance company organized under the laws of Michigan. The plaintiff is the owner of a farm in Genesee county, and a member of the defendant company. Plaintiff paid his assessments for 1912, 1913, and 1914, but did not pay them, except as hereinafter stated, for the years 1915, 1916, 1917, and 1918, claiming that he had no notice of these assessments. The four assessments for 1915, 1916, 1917, and 1918 were sent by the defendant to a justice of the peace at Flushing for collection, and defendant notified the plaintiff of its action, and that if they were not paid suit would be brought. The justice sent no notice to plaintiff and suit was not brought.

On July 14, 1919, plaintiff had a loss by hail. On July 15th he drove to Lansing, and went to defendant's office, and paid to Mrs. Ethel M. Gettle, defendant's clerk, the amount claimed against him for the years 1915, 1916, 1917, and 1918; total, \$13.80. When plaintiff called at defendant's office on July 15th, Mrs. Gettle informed him that Mr. Garber, the defendant's secretary, was out of the city. Mrs. Gettle and the defendant are not agreed as to what was said when the assessments were paid.

On February 25, 1920, plaintiff commenced this suit. The defendant pleaded the general issue, and gave notice that the policy had lapsed on account of the failure to pay assessments. When both parties rested, plaintiff moved for a directed verdict for \$500, for the reason that defendant had waived the suspension of the policy by accepting the assessments and not returning them. The court granted the motion. This ruling of the court is the only error assigned. The defendant retained the money paid to Mrs. Gettle, and still retains it.

In article 12 of the charter of defendant company is the following:

"Notice of assessment shall be mailed to the last known post office address of each member on or before November 1st of each year when an assessment is called. All assessments shall be a lien on the property insured until said assessments are paid."

The defendant claims he did not receive any notice of assessments which he did not pay promptly.

Section 2 of the by-laws reads:

"Sec. 2. The secretary may cancel or suspend a policy, or any part thereof, for the noncompliance of any of the laws of the company or for the nonpayment of an assessment after the expiration of 30 days from the date of the notice of the same: Provided, however, that before a policy can be canceled for aforesaid causes the insured shall be given 10 days' notice, in which to establish to the president and secretary the injustice of the cancellation."

We are unable to find any provision, either in the charter or the by-laws, as to what the effect will be of a suspension of a member for nonpayment of assessments. It is conceded that no formal entry was made upon the books of the company of an order of suspension. Counsel for appellant say:

"We claim that this judgment cannot be affirmed without overruling *Williams v. Albany City Insurance Co.*, 19 Mich. 461, 2 Am. Rep. 95, and *Hill v. Insurance Co.*, 129 Mich. 144, 88 N. W. 392, which are absolutely controlling of the instant case."

An examination of the first case will show that the policy involved was a marine insurance policy, and that the question of assessments and the effect of nonpayment thereof was not involved. The case of *Hill v. In-*

urance Co., 129 Mich. 144, 88 N. W. 392, is easily distinguishable from the instant case, in that the defendant did not retain the money which was paid to it after the loss occurred, but promptly returned it to the plaintiff.

The law is well settled that the courts do not favor forfeitures, and a provision for forfeiture will be strictly construed, and courts will find a waiver upon slight evidence, when the equity of the claim is in favor of the insured. *Lyon v. Travelers' Insurance Co.*, 55 Mich. 141, 20 N. W. 829, 54 Am. Rep. 354; *Jones v. Life Assurance Co.*, 120 Mich. 211, 79 N. W. 204; *Lord v. National Protective Society*, 129 Mich. 335, 88 N. W. 876; *Staffan v. Cigarmakers' Union*, 204 Mich. 1, 169 N. W. 876. The case before us, instead of being controlled by the cases cited by the appellant, is more like the cases of *Farmers' Mutual Fire Ins. Co. v. Bowen*, 40 Mich. 147; *Elmandorph v. Insurance Co.*, 91 Mich. 36, 51 N. W. 926; *Towle v. Insurance Co.*, 91 Mich. 219, 51 N. W. 987; *Dick v. General Assembly of Order of the Amaranth*, 150 Mich. 215, 113 N. W. 1125; *Reimold v. Fire Ins. Co.*, 162 Mich. at page 73, 127 N. W. 17; *Laxton v. Mutual Fire Ins. Co.*, 168 Mich. 448, 134 N. W. 467.

29 Cyc. 194, reads:

"It generally constitutes a waiver of the right to avoid the contract of insurance so as to declare a forfeiture, where the society, with knowledge of the existence of grounds of avoidance or forfeiture, unconditionally accepts dues or assessments from the member in question, at least where the society retains the money thus paid, even though it was received and retained after the death of the assured."

In the case of *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 25 N. E. 126, 9 L. R. A. 317, 21 Am. St. Rep. 203, the question arose concerning the payment of a loss which had occurred while the premium note was still due and unpaid. The policy contained this provision:

"In case the assured fails to pay the premium note, or order, at the time specified, then this policy shall cease to be in force, and remain null and void during the time said note, or order, remains unpaid after its maturity, and no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy and makes it good for the balance of its term."

The case shows that the premium note was paid after the loss, and the money accepted and retained by the company. Justice Elliott, in rendering the opinion, said in part:

"It is established law that the right to declare forfeiture of a policy for the nonpayment of premiums may be waived, and that the waiver may be manifested by conduct as well as by words. * * * This general rule is too

firmly settled to be shaken, so that the only question which is here open to controversy is whether the company did waive the right to forfeit the policy by an acceptance of the premium after the loss had occurred."

He then considers some cases cited by the insurance company and calls attention to the difference between the cases so cited and the one that is being construed, saying:

"For the reason that in those cases the premium notes were shown to be unpaid at the time of the loss, and it did not appear that the insurance company had subsequently accepted payment, while here there was an acceptance of the premium after the loss occurred. * * * We cannot perceive any solid ground upon which it can be held that an insurance company may accept payment of the entire premium after a loss has occurred, and yet escape payment of the loss. By accepting payment, it affirmed the validity of the policy and tacitly asserted that the policy was in force from the time it was executed. * * * It is a principle of wide sweep that forfeitures are not favored, and within the spirit of this principle such cases as this clearly fall. * * * For it is but just that the company, having accepted the entire premium after the occurrence of the loss, should yield the consideration for which the premium was paid. It is not just that the company should retain the premium and give no value in return. * * * We have studied with care the cases referred to by the appellant's counsel, and we cannot regard them as sustaining the position counsel assume, for we do not believe that in any of them is the doctrine asserted that under such a policy as that before us the insurance company may, with knowledge of the loss and notice that the assured is affirming the validity of the policy, accept and retain the entire premium and yet refuse to pay the loss."

In the case before us the insurance company has received and retained the full amount of money it would have received if the plaintiff had received notice of the assessments and paid them promptly.

Judgment is affirmed, with costs to the appellee.

WIEST and BIRD, JJ., concurred with MOORE, J.

SHARPE, J. I cannot concur in the foregoing opinion. A verdict was directed for plaintiff. The proofs must therefore be considered in the light most favorable to defendant. I find the following facts to be established, and note wherein there is any dispute:

(1) The defendant is a mutual company; its ability to pay claims being dependent upon its collection of assessments.

(2) On March 14, 1912, plaintiff applied for membership, and a certificate was issued, protecting him against damage by hail to the amount of \$700.

(3) By the terms of this certificate the

defendant reserved the right to cancel it "at any time upon good and sufficient reason." The by-laws, which it is conceded became a part of the contract, provided that:

"The secretary may cancel or suspend a policy or any part thereof * * * for the nonpayment of an assessment after the expiration of 30 days from the date of the notice of the same."

(4) Assessments are made as of November 1st in each year. Notice thereof is to be given the members by mail. The plaintiff paid his assessments for 1912, 1913, and 1914. Notice of assessment for 1915 was duly mailed to him. He claims he did not receive it. On May 1, 1916, the secretary suspended the policy of plaintiff for nonpayment. It was not canceled. While assessments were not made against him in 1916, 1917, and 1918, notices thereof were mailed to him. He claims he did not receive them. He had the right to have the suspension removed at any time by payment of the amount of the delinquent assessments. He admits receiving a letter in March, 1919, notifying him that a statement of the amounts owing by him had been sent to a justice of the peace at Flushing for collection. He paid no attention to it.

(5) On July 14, 1919, plaintiff sustained a loss by hail. The following day he went to the office of the secretary in Lansing and paid to Mrs. Gettle, the employee in charge thereof, the assessments for 1915, 1916, 1917, and 1918. The secretary was not present. Mrs. Gettle testified that plaintiff was on the list of suspended members; that he "said he wanted to be reinstated"; that after payment he said, "Now, if I had a loss, I would be paid," to which she replied, "No, but if you have a loss to-morrow, you notify us, and we will take care of you." She further testified:

"And then it dawned on me possibly that Mr. Brockway had a loss. I said to him, 'Have you had a loss by hail?' and he answered, 'We have not even had any rain.'"

The plaintiff admits that he did not inform Mrs. Gettle of his loss. He testified:

"I paid the \$13.30, because I wanted to get my insurance under my policy. I would not have paid, if I had not. I would have kept my money in my pocket."

(6) The plaintiff's name was again placed on the list of active members. A notice of the 1919 assessment was mailed to him. He remitted a post office order therefor. As suit by him was then threatened, the secretary, on his attention being called to it, returned the order to plaintiff, saying that he did—

"not think it quite right to take your assessment this year, when you had a bad loss and

could not recover, on account of being four years in arrears, when storm hit your crops."

[1] Under these facts, I do not think plaintiff was entitled to recover. We must not lose sight of the distinction between the suspension of a policy and its cancellation. If suspended, a member has the right to become reinstated at any time by paying all delinquent assessments. If his policy has been canceled, a new application must be made, and a new policy issued. The doctrine of waiver is based on something said or done by the insurer, or its failure to do some act which it was its duty to do to avoid a waiver, by reason of which the insured is led to believe that he is still recognized as a member and entitled to rights under his policy. *Staffan v. Cigarmakers' Union*, 204 Mich. 1, 7, 169 N. W. 876. What did the defendant say or do, or omit to say or do, on which this plaintiff relied to his disadvantage? It accepted payments of the assessments delinquent on his policy and reinstated it at his request. It sent him notice of the 1919 assessment. When he remitted therefor, the secretary returned it to him for the reason stated. How can it be said that these acts constitute such a waiver as renders the defendant liable for a loss incurred while the policy was suspended?

[2] Plaintiff's failure to pay rendered him subject to suspension. He was suspended in May, 1916. He had no rights after suspension until he became reinstated. *Edgerly v. Ladies of the Maccabees*, 185 Mich. 148, 162, 151 N. W. 692. He tendered payment, and asked to be and was reinstated. While he at that time concealed the fact that he had suffered a loss during the period of his suspension, it would have been incumbent on the defendant to accept such payment and reinstate him, notwithstanding such loss. He thereby became protected against future losses. It cannot be said that he relied on his reinstatement as entitling him to recover for a loss during the period of his suspension. He had no legal right to a recovery, and payment to him would have worked a hardship, if not a fraud, upon the members who would have been called upon to contribute thereto. The language of Mr. Justice Grant in *Hill v. Farmers' Mutual, etc., Co.*, 129 Mich. 141, 144, 88 N. W. 392, 394, is pertinent:

"It was the duty of the plaintiff to pay. He agreed that his policy and all rights under it should be suspended while he was in default. Under the ruling of the court, this right of suspension is valueless to the company, because any insured would pay his back premiums after a loss, if by so doing he could reinstate his insurance and collect his loss. This is not a reasonable construction of this contract of insurance."

The conclusion reached is in harmony with the rule laid down in *Williams v. Albany City Ins. Co.*, 19 Mich. 451, 2 Am. Rep. 95, and in the case just quoted from. I cannot but feel that the opinion of Mr. Justice MOORE squarely overrules these cases. I have examined with care the decisions on which he relies. They are easily distinguished, if we but bear in mind the distinction between the suspension of the policy of a member of a mutual company and an act of the officers by which a cancellation or forfeiture of the rights of the insured is claimed to have been effected.

The judgment should be reversed, with costs to defendant, and no new trial ordered.

STEERE, C. J., and STONE, FELLOWS, and CLARK, JJ., concurred with SHARPE, J.

EBERT v. PARLE et ux. (No. 57.)

(Supreme Court of Michigan. Oct. 3, 1921.)

Vendor and purchaser of 170—Vendor forfeiting contract held not entitled to proceeds of crops.

Where in a vendor's suit to forfeit the contract for vendee's default it was stipulated that the tenant should deposit the proceeds of crops, to be treated as a tender by the vendee on the debt, and judgment of forfeiture was entered giving vendee right to redeem within certain time by payment of a sum stated, otherwise giving vendor a judgment for the amount in default, the time for redemption having expired without vendor accepting the tender or vendee paying the clerk, the vendor was not entitled to the deposit by the tenant, notwithstanding a condition of the sales contract that crops should be subject to a lien in favor of the vendor.

Appeal from Circuit Court, Macomb County, in Chancery; James G. Tucker, Judge.

Suit by Edmund L. Ebert, assignee of Charles R. Clark and another, against Walter J. Parle and wife. Decree for plaintiff forfeiting contract selling land with right in defendants to redeem within 60 days, and from an order that rent money from crop sold by defendant's tenant and deposited under stipulation be paid to the defendants, the plaintiff appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Elmer H. Groefsema, of Detroit, for appellant.

Robert D. Heitsch, of Pontiac, for appellees.

MOORE, J. On the 15th day of October, 1918, defendants Parle purchased from plain-

tiff's assignors on land contract a farm consisting of about 210 acres. The consideration was \$19,000, of which sum \$4,925 was paid when the contract was executed. The contract calls for a \$500 payment on the principal on the 15th of November, 1919, and each year thereafter until fully paid, with 6 per cent. interest, payable semiannually. The usual tax, insurance, and repair clauses are included. On November 13, 1919, \$500 was paid on principal and \$128.23 interest. On January 27, 1920, \$139.75 was paid as interest. No further payments were made.

A notice of forfeiture of the land contract was served upon Mr. and Mrs. Parle, at what date does not appear, but presumably in June, 1920.

Mr. and Mrs. Parle had a tenant on the farm. July 1, 1920, the plaintiff commenced a proceeding before a circuit court commissioner to dispossess the tenant. Service was had upon him and his wife, but the record does not show that defendants were made parties to this proceeding.

We now quote from the record of the circuit court commissioner:

"Testimony offered by plaintiff that the amount of the installments overdue under land contract and owing by Walter J. Parle was \$695.73. Defendant O. Henry Graves stated that he would confess judgment upon the condition that plaintiff enter into an agreement whereby he might remain on the premises as tenant of the plaintiff. Plaintiff thereupon agreed to give defendants another lease, and with the consent of both plaintiff and defendants judgment was entered against the defendants."

On July 30, 1920, the bill of complaint in this case was filed, in which it was averred:

"And that no suit or proceeding at law has been had or taken for the recovery or collection of the amount due and owing to plaintiff on the said articles of agreement or any part thereof."

The prayer of the bill in substance was:

"First. The defendants be required to pay up the amount of money due on the contract.

"Second. In case of failure to make such payment, that the equity of the defendants be sold to satisfy such debt; that, in case such balance does not provide sufficient funds with which to pay up the amount owed by the defendants, then that plaintiff have a judgment for the balance and have execution for the collection thereof."

No copy of the land contract was attached to the bill of complaint. Later this was done, and in the contract is the following provision:

"It is further hereby mutually agreed by and between the parties hereto that any crops raised on said farm or shares thereof or rentals which second parties shall receive therefrom shall be subject to a lien in favor of first parties in the nature of a chattel mortgage, securing the payment of any amounts which

may become due on this contract during the year that said crops are raised or such rentals are earned, and if the said second parties become in arrears on this contract, any crop, shares, or rentals earned shall be subject to said chattel mortgage lien until such arrears are paid in full. First parties shall have the right to enforce said chattel mortgage lien in the same manner as is provided for the foreclosure of chattel mortgages on personal property."

The defendants answered to the bill of complaint.

The tenant on the farm was in doubt as to what he should do with the proceeds of the crop. A stipulation was filed reading in part:

"Now, therefore, it is hereby stipulated and agreed that as fast as the said Charles Graves, the tenant on said farm, shall reduce said crops to cash, that the money shall be deposited in the Citizens' National Bank at Romeo, Mich., in the name of Edmund L. Ebert, and shall be there kept abiding the order of this court in this case as to the disposition of same.

"It is further stipulated and agreed that any money so deposited shall be treated as a tender by the defendant Walter J. Parle to the plaintiff, Edmund L. Ebert, to apply upon indebtedness mentioned in the plaintiff's bill of complaint in this cause."

December 13, 1920, a decree was entered in the case by which the contract was declared null and void. We quote:

"And the court doth hereby further order, adjudge, and decree that the said defendants, Walter J. Parle and Anna Isabelle Parle, shall have the right and are hereby given the right to redeem from the forfeiture of said land contract by paying \$1,857.25, with interest at the rate of 6 per cent. per annum from and after December 10, 1920, to the clerk of the said court at any time within 60 days after the 10th day of December, A. D. 1920, and that upon default of such payment the plaintiff shall have and is hereby given the relief granted him in the above decree."

After the 60 days mentioned in the decree expired the defendants moved the court to award them the fund resulting from the sale of the crops. This motion was opposed because of the chattel mortgage provision of the contract, and for other reasons. February 18, 1921, the court made an order that \$869.50 of the fund be paid over to the defendants. Neither party has appealed from the decree of the court, but the plaintiff has appealed from the order of the court just mentioned. The effect of his contention upon the appeal, if granted is that after he has failed to accept the tender proffered by defendants and apply it upon the amount due, and has taken a decree for \$1,857.25, and after the time has expired in which defendants might redeem, he now asks that at least \$500 received from the personal property be given to him.

No authority directly in point is cited by

counsel. The language of Justice Montgomery in *Walker v. Archer*, 128 Mich. at p. 605, 87 N. W. 755, is illuminating. We quote:

"The plaintiff had, before bringing this proceeding, declared the contract forfeited, and was entitled, according to his contention, to proceed to obtain a recovery of the possession and the rental value of the property. The purpose of his suit could legitimately be for the latter object only. But payments were made from time to time. It is the contention of the plaintiff that these payments were made upon the contract. If so, the receipt of the payments amounted to a waiver of the right to proceed to recover possession, either in toto or pro tanto. If it be said that they were a waiver pro tanto only, and only operated to waive the right to insist upon his forfeiture previously declared until the termination of the time covered by the stipulation, yet it cannot be doubted that such waiver was to that extent binding upon the plaintiff, and that the payment by Wool was a sufficient consideration for it. As each succeeding payment was made, the plaintiff was in a position where he had elected to treat the contract as forfeited, and was entitled only to proceed against the land."

In the instant case there was no averment in the bill of complaint, nor was there a prayer to the effect that plaintiff was seeking any relief under the chattel mortgage provision of the contract. It certainly would be inequitable under the decree plaintiff saw fit to take to now apply to the benefit of the plaintiff any of the proceeds arising from the sale of the crops, and at the same time not give the defendants further time in which to remain in possession of the land, and to reduce to the extent of the fund the amount found to be due under the contract, and to extend the time in which to redeem.

The order is affirmed, with costs to the appellees.

BRINK et al. v. SHEPARD. (No. 27.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Nuisance $\Leftrightarrow$ 3(8)—Maintenance of tuberculosis sanatorium restrained.

Residents of a strictly residential district are entitled to restrain the erection and maintenance of a tuberculosis sanatorium in the vicinity, in view of Comp. Laws 1915, § 5090, declaring it to be a communicable disease.

2. Nuisance $\Leftrightarrow$ 29—Residents complaining of tuberculosis hospital held not guilty of laches.

Residents of a strictly residential district were not guilty of laches in failing to bring action to restrain the remodeling, repairing, and refitting of a house for use as a tuberculosis hospital until some time after defendant had commenced the remodeling of the house and spent considerable money, in view of the fact that he informed plaintiffs that he was not going to maintain a tuberculosis hospital, and

plaintiffs did not gain knowledge of his intention to do so until shortly before suit.

Appeal from Circuit Court, Kalamazoo County, in Chancery; Joseph Barton, Judge.

Suit by Jay Brink and others against Benjamin A. Shepard. Decree for plaintiffs, and defendant appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Weston & Fox, of Kalamazoo (Harry C. Howard, of Kalamazoo, of counsel), for appellant.

Marvin J. Schaberg, of Kalamazoo, for appellees.

FELLOWS, J. Defendant, a physician, is conducting a tuberculosis sanatorium in what is called the "Inkster homestead" in the city of Kalamazoo. The property is part of an addition known as "Inkster Park addition." Plaintiffs, 13 in number, are residents of the vicinity and were such prior to the establishment of the sanatorium, the home of one being within 70 feet of the sanatorium, of two others less than 150 feet, and of the others being of varying distances. The oral testimony and the photographs introduced in evidence establish beyond doubt that the locality is a strictly residential district, although doubtless not as thickly settled as some of the other parts of Kalamazoo. The relief sought and granted by the trial court was injunctive, restraining defendant from conducting a sanatorium for the treatment of tuberculosis in this residential district.

[1] Unless these plaintiffs have lost their rights by laches, we are persuaded that they are entitled to the relief prayed under the former holdings of this court. *Barth v. Hospital Association*, 196 Mich. 642, 163 N. W. 62; *Saier v. Joy*, 198 Mich. 295, 164 N. W. 507, L. R. A. 1918A, 825; *Birchard v. Lansing Board of Health*, 204 Mich. 284, 169 N. W. 901, 4 A. L. R. 990. In the *Barth* Case an injunction was decreed restraining the erection and maintenance of a psychopathic hospital in a strictly residential district. In the *Saier* Case a like decree was entered against the maintenance of an undertaking establishment, and in the *Birchard* Case a similar decree was entered against the maintenance of a detention hospital for infectious diseases. In the first of these cases the trial judge dismissed the bill without taking the testimony, but in the others the testimony was quite persuasive, as it is in the instant case, that the institution, if properly conducted, would cause no actual danger to nearby residents, that there was little or no danger of communicating disease such a distance as intervened between the plaintiffs' residences and the defendant's

institution, but, as in those cases, the fear of the disease being communicated is present. In each of these cases we recognized the claim that the institutions were not nuisances per se, but in each of these cases we held that they might become nuisances as to private individuals by their location in strictly residential districts, and in the Birchard Case, referring to the earlier cases, we said:

"We held in these cases that, while the institutions involved were not nuisances per se, they became such by reason of their location in a residential district. We recognized that there might be no actual danger if properly conducted, but that their maintenance in close proximity to the home would create such dread and fear in the mind of the normal person as 'would destroy the comfort, the well-being, and the property rights of the plaintiffs,' depressing the mind and lowering the vitality of the normal person, rendering one more susceptible to disease, and reducing the value of the property so situated; and in each of the cases this court decreed injunctive relief."

There is testimony in the record that property in this locality has increased in value, and one of defendant's witnesses who is interested in the sale of lots in this addition expresses the view that the establishment of the sanatorium has materially increased the value of surrounding property, but the undisputed testimony establishes that housing conditions in the city were abnormal at the time the case was heard, and that improved real estate commanded exceedingly high prices. The weight of the testimony clearly establishes that property values in this locality are at least 25 per cent. lower with the sanatorium there than they would be without it. The maintenance of the sanatorium would cause the plaintiffs a distinct, definite financial loss.

The record discloses that in this state tuberculosis stands at the head of diseases in the toll it annually collects. The record likewise discloses the herculean efforts of the medical profession and the antituberculosis societies to alleviate this condition. Circulars have been sent out, advice has been given, preventive measures have been advocated and adopted, and much has been accomplished. The public has been advised of its ravages and has a well-grounded fear of its effect. It is a communicable disease as matter of fact and is so declared to be by section 5099, C. L. 1915. The maintenance of a hospital for the treatment of this communicable disease in a strictly residential district cannot fail to deprive residents of nearby homes of the comfort, well-being, and enjoyment of their homes to which they are entitled, and this, coupled with their financial loss, justifies an appeal to a court of equity for relief. Upon principle the instant case is controlled by our former decisions above cited, and we need not consider the

sustaining authorities from other states, some of which are cited in the opinion in the Birchard Case.

[2] In the brief of defendant's counsel and upon the oral argument much stress was laid upon the fact that this proceeding was not launched until something like a year after the defendant had commenced the operation of the hospital, and the doctrine of laches is invoked to defeat the relief. Defendant claims to have invested considerable money in remodeling, repairing, and fitting the house for use for a tuberculosis hospital, and claims to have obligated himself for the payment of a very considerable additional sum, and he insists that all this was done with the full knowledge of the plaintiffs and their attorney that the premises were to be used for a tuberculosis hospital, and that it is therefore unconscionable and inequitable to now prevent such use of the property by injunction. This claim is met by the plaintiffs with testimony tending to show that not only were they without knowledge that the premises were to be used and were being used for a tuberculosis hospital, but that defendant specifically assured some of them and their attorney that he would not use the premises as a tuberculosis hospital, and that it was but a few days before this bill was filed that they had any definite proof that it was so used. Upon this disputed question of fact the trial judge made the following finding:

"The court finds as a fact that the doctor, when he made the investment, bought this property, had notice of the fact that it was in a residential district, that he made the investment with his eyes open to the fact, and that the institution he was about to establish was established as a tubercular hospital for the treatment of tubercular patients would be a detriment to the community. He gave the residents to understand that it was not what might technically be called a tubercular institution; and that impression remained until he made the formal statement February 24, 1920, at which time it became apparent that he could no longer dodge the issue that such was the purpose of the institution."

A reading of the somewhat conflicting testimony in this record is convincing that the trial judge, who heard and saw the witnesses, correctly disposed of this question of fact. We are satisfied that at the very inception of defendant's project he was informed by plaintiffs' attorney that, if he intended to maintain a tuberculosis hospital, plaintiffs would apply for an injunction, and that he assured the attorney he would not conduct a tuberculosis hospital; one plaintiff he assured he would treat only cases of slight chest ailments; to another he said he should not conduct a tuberculosis sanatorium; and in a carefully worded announcement in the press he gave the public and plaintiffs to understand that the institution would not be a

tuberculosis hospital as such an institution is generally understood to be. On February 24, 1920, he made application to the city commission for a sewer on the street, and therein stated that he was conducting a tuberculosis sanatorium. This was the first definite, positive proof plaintiffs had of the character of the institution. Shortly thereafter this bill was filed. Under these circumstances defendant cannot invoke the doctrine of an equitable estoppel.

The decree will be affirmed, with costs of this court to plaintiffs.

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BONE v. GRANGE MUT. FIRE INS. CO. OF MICHIGAN, Limited. (No. 111, April Term.)

(Supreme Court of Michigan. Oct. 3, 1921.)

Insurance §574(5)—Member of mutual fire association held bound by determination of adjustment board provided for in articles.

Where mutual fire association was incorporated under C. L. 1915, § 9586 et seq., and its articles, made a part of the fire policy, provided for adjustment of loss by adjustment board, and made such adjustment final on member's failure to appeal therefrom to executive committee within certain period, a member, having failed to appeal from the adjustment board's determination within a reasonable time and having neglected to co-operate in repeated efforts on the part of the association to hold another hearing, was bound by such determination.

Error to Circuit Court, Isabella County; Ray Hart, Judge.

Action by Pat Bone against the Grange Mutual Fire Insurance Company of Michigan, Limited. Judgment for defendant, and plaintiff brings error. Affirmed.

The defendant is a mutual fire insurance company, limited, incorporated under the provisions of Act 262, Public Acts 1895 (section 9586 et seq., C. L. 1915). January 26, 1914, plaintiff made written application to it for insurance, such application containing the following clause:

"I accept this insurance subject to the articles of association and the rules and regulations and by-laws of said company, now in force or that may hereafter be in force."

A few days later the policy was issued and delivered to plaintiff. It recited that the articles of association and by-laws together with the application are a part of the policy and agreement and contained the following: "Assessment is levied August 1, and made payable in October each year."

Article VI of the articles of association provides for filing proofs of loss and contains the following:

"Within ten days of receiving such notice of loss, in case the loser and secretary of the company shall fail to agree on the amount of the loss for which the company is liable, an adjusting board shall be appointed, one by the president and secretary of the company, one by the losing member, which two shall appoint a third, who shall be a member of some other grange in the county of which the losing member resides, and who shall act as chairman. No member of the adjusting board shall be an officer of the company. Said adjusting board shall meet within ten days of their appointment and adjust the loss, notice of such meeting having been given the loser.

"(c) The duties of said adjusting board shall be to investigate the standing of the losing member in his subordinate grange, his compliance with the policy contract, the justice of his claims, the validity of his policy, the cause of the loss and the liability of the company, and to fix the amounts and valuations of the property lost, and shall make a full report of their proceedings and findings to the secretary of the company."

Article VII provides for an appeal from the determination of the adjusting board to the executive committee of the state grange and contains the following:

"And no appeal to such board of appeals shall be taken by either the loser or the company after the expiration of thirty days from the date of the determination of the adjusting board; but in such case the determination of the adjusting board shall be final and conclusive as to both the loser and the company."

Article X contains the following:

"The secretary shall make the assessment rolls in which every member shall be assessed ratably to cover all losses, expenses and liabilities of the company in the class or classes in which he is insured, which assessment or assessments shall be due and payable forthwith to the secretary and treasurer, who shall collect the same. The assessment rolls of this company shall be evidence in all courts that the sums assessed are due this company and payable by the persons assessed."

Section 25 of the by-laws is as follows:

"All assessments made by the company shall be made payable within thirty days from date of assessment roll, and policies on which the assessments shall not be paid before the expiration of sixty days from the date of said assessment roll shall be suspended and the company shall not be liable for any loss or damage sustained, while such assessment remains unpaid."

The August 1, 1917, assessment was compiled by the secretary and about the 1st of September notices were sent to the members. About the 20th of October another notice was sent. Plaintiff claims to have received but one of these notices, and that about the 25th of October. He did not pay his assessment, and on November 16th the property insured was destroyed by fire. On November 19th

plaintiff notified the secretary of his loss and sent a draft for his assessment which was retained. The company denied its liability and the validity and enforceability of the policy because of the failure to pay the assessment within the time provided in the by-laws. It was, however, suggested that the matter be taken up before the board of directors, and this was done; plaintiff being represented by a member of his grange. The board reached the conclusion that the loss should not be paid. It was also suggested that it be submitted to an adjustment board provided for by the articles of association, and the company selected Mrs. Coon, wife of the secretary, as its representative. Plaintiff selected Mr. St. John, a member of his grange, as his representative, and at the request of plaintiff and Mr. St. John another member of plaintiff's grange, a Mr. Stevens, was agreed upon as the third member, and plaintiff in writing agreed upon Mr. Stevens as perfectly satisfactory to him. Plaintiff had employed an attorney who was spending the winter in Florida, and Mrs. Coon signed a paper stating that, if the third man was not satisfactory to the attorney, another meeting of the board would be held. She was not an officer of the company. A full hearing was had before the adjustment board without either party being represented by an attorney, and the board found that the company was not liable. Upon the return of the attorney from Florida, he signified his dissatisfaction with the third member and requested another hearing. There is some conflict in the testimony as to who was at fault for the failure to have another hearing. Mrs. Coon claims to have made three efforts to get the board together and places the blame upon plaintiff; other testimony on the part of defendant is to the effect that plaintiff's attorney stated he was not ready for the hearing. Testimony on behalf of plaintiff is in conflict with this. The trial judge who heard the case without a jury seemed to accept defendant's claim. He held that plaintiff had not exhausted the remedy provided by the articles of association and that his policy had lapsed by his failure to pay the assessment within the time required by the articles of association and the by-laws of the company, and entered judgment for the defendant.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

W. D. East, of Barryton, for appellant.
William T. Yeo, of West Branch, for appellee.

FELLOWS, J. (after stating the facts as above). We shall only consider one of the two grounds upon which the trial judge disposed of the case. By the articles of association which became a part of the policy, and therefore a part of the agreement between plaintiff and defendant, an adjustment board was provided for and agreed upon to settle the differences between the company and its members with a right of appeal to the executive committee of the state grange. Plaintiff in his application agreed to be bound by this provision, which is quite common in the articles of association of these mutual companies. This court has repeatedly held that such provisions are valid and that the insured cannot avail himself of his legal remedy until he has exhausted the remedy provided for by such reasonable rules and regulations of the mutual company to which he belongs. *Allen v. Patrons' Mutual Fire Ins. Co.*, 165 Mich. 18, 130 N. W. 196 (where a large number of the authorities are collected); *Patrons' Mutual Fire Ins. Co. v. Attorney General*, 166 Mich. 438, 131 N. W. 1119.

In the instant case there was a full hearing before the adjustment board and plaintiff's claim was disallowed. There was no appeal taken from this decision. Mrs. Coon, the arbitrator chosen by the company, assumed to act for the company and agreed that another hearing might be had if the third man who, as matter of fact, had been suggested by plaintiff, proved unsatisfactory to his attorney. Doubtless Mrs. Coon was without authority to bind the defendant by this agreement as its counsel now contend; but we think the record fairly discloses that the president of the company by his acts ratified her action and attempted to arrange for another hearing. Indeed, if defendant's testimony is to be believed, and the trial judge did believe it, there were repeated efforts on the part of defendant to have another hearing, and the failure to have it was due to plaintiff's neglect to co-operate in such efforts. Manifestly, under these circumstances the plaintiff had not exhausted his remedy within the association and provided for by the articles of association which were a part of the contract he entered into when he became a member of this mutual company and took out his policy. We are persuaded that the conclusion reached by the trial court on the disputed questions of fact involved is supported by the evidence and is not against its weight. As this disposes of the case and none of the other assignments of error are controlling of this question, it becomes unnecessary to discuss them.

ELLSWORTH v. MASSACAR. (No. 93.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Assault and battery $\S$ 42—Conspiracy $\S$ 21—Conflicting evidence as to whether plaintiff was injured held to make a jury case.

In an action for damages resulting from conspiracy and assault and battery, conflicting evidence as to whether or not plaintiff sustained the injuries claimed held to make a case for the jury.

2. Assault and battery $\S$ 24(3)—Question of loyalty held not an issue.

In an action for damages for personal injuries against one of a group of persons who enticed plaintiff from home at night, surrounded and mistreated him because of his alleged disloyalty, held, that the questions of loyalty and disloyalty, citizenship or noncitizenship, were not proper issues.

3. Appeal and error $\S$ 1060(1)—In action against one of a mob, reading to jury newspaper article on subject of mob law held error.

In an action for damages for personal injuries against one of a group who enticed plaintiff from home and mistreated him for his alleged disloyalty, action of plaintiff's counsel in reading a newspaper article to the jury in which the Attorney General and President were represented as condemning mob law held reversible error in view of the evidence and verdict, though court instructed that newspaper was not a matter of evidence.

4. Damages $\S$ 51—No recovery for mental shock and suffering caused plaintiff's wife by acts not directed toward her or committed in her presence.

In an action for personal injuries against one of a mob accused of mistreating plaintiff for his alleged disloyalty, plaintiff could not recover for injuries to his wife, resulting in loss of service, which were caused by mental shock and suffering, not accompanied by any physical injury from unlawful acts directed toward her or committed in her presence.

Error to Circuit Court, Sanilac County; Watson Beach, Judge.

Action in tort by Charles Ellsworth against Albert Massacar for damages for personal injuries. Judgment for plaintiff, and the defendant brings error. Reversed, and new trial granted.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Moore & Wilson, of Port Huron, for appellant.

Wilford Macklem, of Croswell (Thos. Wellman, of Port Huron, of counsel), for appellee.

STEERE, C. J. Plaintiff is a farmer 62 years old residing with his wife on a 40-acre

farm in the township of Fremont, Sanilac county. As a prelude, it may be noted that events out of which this action arose were contemporaneous with war activities in a Liberty Loan drive in the spring of 1918, touching which plaintiff relates that a neighbor named Doane, described by him as "the worst enemy I have in the world," called upon him accompanied by another neighbor about a week before May 5 and solicited him to subscribe for a Liberty bond, which he refused to do, telling Doane he would take none from him.

On May 5, 1918, shortly after midnight, while plaintiff and his wife were at home and retired for the night, he was aroused by some one who came to his bedroom window and called him, asking for help to get their automobile out of a ditch near by and for poles to pry it up, or a team. He responded, gave the parties some directions where to find poles and blocks, put on his clothing and overshoes, took his lantern and went out at his back door, where he met one of them who had a pole, and they went down the road some 12 or 14 rods to where the automobile was claimed to be in the ditch, but was not. Another automobile just then came down the road with people in, and he was suddenly seized by several men who pulled a bag over his head, put him into the bottom of an automobile, where he felt a rope under him, and drove to a piece of woods about a mile from his home, where he was received by a gathering of considerable size, some of them being masked, and subjected to a course of treatment with harrowing details as he relates them. It appears from his testimony, in the main undisputed, that he was there provided with an escort equipped with a rope and firmly led in the direction of a convenient tree, with accompanying intimations of the fate he was about to meet if he did not manifest a change of heart and recant on certain manifestations of disloyalty imputed to him, and, as he states, charging him with being pro-German, having found fault with the bread people were obliged to eat during these war times, failure to contribute his share for Red Cross, Liberty bonds, etc. He denied disloyalty, stated he had bought a Liberty bond, and made other protests, resulting in a proposition by some one that he be allowed to take the oath of allegiance and promise loyalty thereafter. He was then in a frame of mind to accept the proposition promptly, and an attorney from the nearby town of Croswell who happened to be there in the interest of good order, as suggested, was called upon to conduct the ceremony. He testified that "angle of the situation suited" him, as it appeared to be "a very favorable way of settling up the question," and he proceeded to administer the oath of allegiance with full

ceremony, plaintiff being required to kneel and repeat it after him. He took pains to elaborate the oath of allegiance beyond mere fidelity to the Constitution of the United States, and went down the line through varying governmental and other public activities, "right on down to the school board" and the "war board in particular," as he testified. At conclusion of the oath, to which plaintiff readily responded, he was required to and did kiss an American flag which was ready and put before him. The function being thus happily ended, plaintiff was returned in one of the automobiles to his own fireside.

As to the details of plaintiff's treatment by those who had him in charge, the testimony is in grave dispute. He claims serious injury resulted to him from the manner of his treatment, both mentally and physically; that he was cursed, kicked, and struck, violently thrown into the automobile, blinded by the bag over his head, and was roughly manhandled generally, sustaining various physical injuries, one being a severe and lasting wrench of his spine; that defendant, who was admittedly at the gathering, was in the car which kidnapped him, acted as a leader, cursed him, struck him with a piece of board, and at one time called to the others to "get the ropes." This action in tort is planted against him to recover damages for the injuries so claimed to have been inflicted.

The evidence of the defense, both by citizens who were present, but not shown to have taken an active part, as well as defendant and others accused of overt acts, is that plaintiff was not struck, roughly handled, or physically injured; that only sufficient force was used to safely, but firmly, convey him to the place of meeting and escort him through the ceremonies; that contemporaneous with the theatrical display, in which no actual violence was resorted to, plaintiff proclaimed his loyalty and promptly consented to manifest it in the manner proposed, after which he was considerably returned to his home, and he in fact suffered no injuries, unless to his feelings. Those issues were left to the jury. Plaintiff recovered a verdict and judgment against the defendant in the sum of \$3,000.

[1] Numerous errors are assigned, the principal ones being that the court erred in excluding offered testimony of defendant to show plaintiff's disloyalty, refusal to contribute to the Red Cross and other war funds, etc.; in refusing to direct a verdict for defendant; in permitting plaintiff's counsel to use a newspaper and read from it an article on the subject of mob law; in permitting testimony as to the loss by plaintiff of the services of his wife resulting from the shock she sustained by reason of the event; and in stating the measure of damages to the jury.

Not only was conspiracy charged in the declaration, but assault and battery. The

conflicting testimony clearly made a case for the jury under the charges contained in plaintiff's declaration.

[2] The questions of loyalty or disloyalty, citizenship or noncitizenship, were in no sense proper issues in the case. The court consistently so ruled during the trial, and very clearly instructed the jury upon the subject. It unavoidably crept into the case as *res gestæ* through the testimony as to what was done and said at the time of the alleged tortious acts, largely that of defendant. Aside from that, all offered evidence of either side on the subject was excluded by the court. Of this the court said to the jury in part:

"Now at the outset there crept into this case from the opening statement of plaintiff's counsel, and subsequently by efforts to combat that and the testimony of the plaintiff, question of loyalty or disloyalty. I say to you at the outset that that question cuts no figure in the law or in the disposition of this case so far as the law is concerned and so far as the court is concerned. The wrong claimed here is a trespass to the person of the plaintiff, an assault, the claim being that he was forcibly taken from his premises. * * * Now I say to you as a matter of law that whatever words may have been used or whatever language may have been used by Mr. Ellsworth previous to that time would not be an excuse for that act of these persons toward him, it can offer no excuse for personal violence. And on that same question there has been run into the case the question of Mr. Ellsworth's citizenship and the defendant's noncitizenship. That does not cut any figure. Nothing should be charged against either or given in favor of either because he is a citizen or noncitizen."

[3] In his argument to the jury plaintiff's counsel, when he was declaiming against lynch law and mob violence, referred to the recent lynching of a man in Indiana by a drunken mob for alleged seditious utterances and their indictment for murder, and was proceeding with a newspaper in his hand when defendant's counsel objected and the court said:

"The jury will understand that any illustration given by Mr. Macklem of what he called mob law is to be taken as his own statement, and not as evidence in the case. There is no evidence in this case."

Plaintiff's counsel then proceeded, called attention to what the "President and our Attorney General say about this mob law," saying in reply to an objecting question by defendant's counsel, "I am just going to read a comment upon what the Attorney General said; it is not law," to which the court said, "All right."

Counsel then read a very drastic newspaper article entitled "Stop Mob Law," discussing and quoting from an address by the Attorney General, in which his text was largely taken from the lynching of one Ho-

bart Preager, in Illinois, thought to have been guilty of no offense, and very severely condemning lynch law in scathing terms.

By pursuing this ingenious course counsel brought to his assistance the influence of the President and Attorney General of the United States with a powerful aiding argument of the latter which, though made of general application, dealt with a particularly infamous case of lynching an assumed innocent man by a drunken mob in the state of Illinois. This, we think, was prejudicial to the defense, and, considering the evidence in the case as a whole, is indicated to have been reflected in the verdict. The newspaper article was not in evidence or admissible. Its use by plaintiff's counsel in his closing argument was reversible error. *Grelissing v. Oakland Motor Co.*, 204 Mich. 116, 169 N. W. 842.

[4] Plaintiff made claim for loss of services by his wife, who, he claimed, was made ill by the shock and excitement to her from what occurred and exposure in going out to ascertain what became of him and to aid him if she could, as she testified she did. Of this the court instructed the jury—

"and determine whether his wife was shocked or excited, as claimed, to the extent that she was incapacitated for her usual work and determine for how long and what the value of her services was for that time."

No claim is made that defendant or any member of his party was in plaintiff's house or saw or did anything to her or any unlawful act on their premises. She testified that after the parties left the house she went out and saw some automobiles down the road and went back, got the gun, loaded it, and started to a neighbor's. Of her proximity to the disturbances complained of she said:

"When I got to the corner I listened. I heard him say, 'You ought to be ashamed, all of you men, to get an old man like me out here.' I did not stop to listen any more. I went on; I knew he was alive; I was afraid I would not have any show-down amongst those men if I followed them up with the gun. I was excited and scared, and when I got to Mr. Allen's house I rapped on the door. My hair was down and I was crying."

Of her condition when testifying she said:

"I am nervous and weak all the time and I don't sleep good at night; any little excitement I get awful nervous; all of which is caused by excitement and being scared on May 5, 1918."

It was in consequence of such condition that she and her husband testified to her inability to work as before. Certainly plaintiff could not recover for mental shock or suffering to his wife. *Hyatt v. Adams*, 16 Mich. 180.

None of the unlawful acts complained of were directed towards her or committed in

her presence. It is a general rule of law that there can be no recovery for injuries resulting wholly from mental shock or fright not accompanied by any physical injury. *Baldwin on Personal Injuries* (2d Ed.) 431; *Nelson v. Crawford*, 122 Mich. 466, 81 N. W. 335, 80 Am. St. Rep. 577.

For the foregoing reasons, the judgment must be reversed, and a new trial granted, with costs to defendant.

PEOPLE v. SYBISLOO. (No. 124.)

(Supreme Court of Michigan. Oct. 3, 1920.)

1. Criminal law §1137(5,7)—Errors in admission and sufficiency of testimony on matters admitted not considered.

In a prosecution under the intoxicating liquor law, where defendant's counsel assented to the court's statement that it was not seriously controverted that defendant's wife had been violating such law, she having pleaded guilty, on appeal the court will not consider assignments of error in admission of testimony or sufficiency of proofs to establish that such illegal business was being conducted at defendant's home.

2. Intoxicating liquors §239(1)—Instruction as to husband's liability for wife's violation of statute on his premises approved.

In a prosecution for violation of the intoxicating liquor law, to which defendant's wife had already pleaded guilty, an instruction that defendant would be responsible if his wife's unlawful acts were committed with his knowledge, consent, or participation, but not if such acts were committed without his knowledge or consent, or against his wishes, and in spite of every reasonable, lawful, and practicable effort on his part exercised in good faith to prevent their commission, held proper.

3. Intoxicating liquors §170—Husband guilty for wife's acts in home, if not exercising his control to prevent crime.

In a prosecution of a husband, his wife already having pleaded guilty to violation of liquor law in their home, the act being *malum prohibitum*, and not *malum in se*, it is not necessary to prove his criminal intent; his liability, if not doing what he could to prevent her violating the law, resting, not on the presumption of his coercion of his wife, but on his authority to control the household affairs and use reasonable means to prevent violation of law.

Error to Circuit Court, Berrien County; Chas. E. White, Judge.

John Sybisloos was convicted and sentenced for violation of the intoxicating liquor statute, and he brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, WREST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

John J. Sterling, of Benton Harbor, for appellant.

Charles W. Gore, Proa. Atty., of Benton Harbor, for the People.

SHARPE, J. The defendant and his wife, Anna Sybislo, were jointly charged with a violation of section 2 of Act No. 338 of the Public Acts of 1917, as amended by Act No. 53 of the Public Acts of 1919. The wife pleaded guilty. The defendant was convicted and sentenced. He now seeks review of his conviction by writ of error.

It appears by the proofs that the sheriff, George C. Bridgman, being suspicious that the defendant and his wife were illegally manufacturing and disposing of intoxicants, procured one Robert Chandler to go to their home and get some liquor; that he marked the money which was paid therefor; that he then got a warrant to search the premises; that, accompanied by Deputy Sheriff Frank Glover, he made such search; that he found the two defendants and three men sitting around a table on which was a glass and bottle; that Glover found a still for the manufacture of whisky, a barrel of mash, and a considerable quantity of liquor in the basement; that Mrs. Sybislo, on request, produced her pocketbook, in which some of the marked bills were found.

[1] The trial court in his charge, after stating the facts claimed by the prosecution, said:

"So that there is no serious controversy in this case but what the wife was conducting business, this unlawful business that has been charged in this information, in that house. I don't understand Mr. Whitney makes any claim—

"Mr. Whitney (interposing): None whatever.

"The Court (continuing): To the contrary, so that the real question in this case for you to determine is whether or not, under the facts as they were developed by the evidence in this case, this respondent is liable for these unlawful acts which the evidence disclosed were being carried on in that house."

1. In view of the admission by counsel, we do not feel called upon to consider the assignments based on errors in the admission of testimony, or on the sufficiency of the proofs to establish the fact that a business in violation of the statute was being conducted at the home occupied by the defendant and his wife on the occasion charged.

[2] 2. The jury were instructed:

"If the house was owned by respondent's wife, but was used by respondent and his wife as their domicile or home, and if respondent's wife committed in said house any of the unlawful acts charged in the information filed in this case, the husband (that is, this respondent) would be responsible for such unlawful act or acts if committed with his knowledge or consent, or with his participation, or if he permitted and suffered the commission of such unlawful act or acts by the wife; but he would not be responsible for the commission of such unlawful act or acts by the wife, if committed

without his knowledge or consent or against his wishes and in spite of every reasonable, lawful, and practicable effort on his part, exercised in good faith, to prevent the commission of such act or acts by the wife. That is the rule of law that should aid you in determining whether or not, under the facts in this case, this respondent is liable for the illegal and unlawful acts committed in the house by the wife."

We think this instruction correctly stated the law applicable to the facts here presented. The house had been purchased under contract; the wife being named as the vendee therein. All of the payments had been made by the husband. The wife testified that a woman living in Chicago brought the still to her and taught her how to make whisky with it; that before she got it her husband worked steadily, but was then working but two days a week; that defendant was never in the cellar, and did not know that the still was there. A boarder, Henry Losinski, testified that he saw the still in the basement; that on two occasions he heard the husband and wife talking about it; that defendant said to his wife, "I don't like this business." Agnes Holtz, a neighbor, testified that when at their house the defendant said:

"She [his wife] shouldn't do it; he was afraid he would get in some trouble."

The defendant testified he knew that a woman brought the still to his home; that, while the house is heated with a furnace, he did not attend to it while the still was in the basement, though he did both before and after, as his wife "don't want me to go to the furnace, for fear I would throw that out."

In 21 Cyc. 1147, it is said:

"The husband is the head of the family, and as such has the general right at common law to regulate the household, its expenses, and its visitors, and to exercise the general control of the family management."

[3] The offense here charged is not malum in se. It does not involve an act which from its very nature is criminal, such as murder, theft, arson, and the like. It is this class of cases to which the authorities cited by counsel for the defendant apply. *People v. Knapp*, 26 Mich. 112; *People v. Chapman*, 62 Mich. 280, 28 N. W. 896, 4 Am. St. Rep. 857; *People v. Fay*, 70 Mich. 421, 38 N. W. 296. The charge against the defendant is malum prohibitum. It becomes a crime only because its commission is expressly forbidden by positive law. There is a well-recognized distinction between such acts. Under the latter, it seems settled that criminal intent is not a necessary element of the offense. In *People v. Werner*, 174 N. Y. 132, 66 N. E. 667, it was said:

"The law on that subject seems to be that an act malum prohibitum is not excused by ig-

norance, or a mistake of fact when a specific act is made by law indictable, irrespective of the defendant's motive or intent. * * * The general rule that the criminal intention is the essence of the crime does not apply to such prohibited acts."

In *People v. Roby*, 52 Mich. 577, 579, 18 N. W. 365, 366 (50 Am. Rep. 270), Cooley, C. J., said:

"Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible."

The rule applicable to the facts here presented is well stated in 21 Cyc. 1354:

"The husband is liable for his wife's criminal acts, committed by his bidding, or in his presence and under his coercion. Likewise where she, in his presence and with his knowledge, commits an act not *malum in se*, he may be found guilty, as where, with the husband's knowledge or consent, the wife sells intoxicating liquors contrary to statute. If such sales are made by her in his house, even in his absence, and even contrary to his wishes, he may be held guilty, since it is his duty to control or prevent the same."

In *Commonwealth v. Barry*, 115 Mass. 146, the facts were quite similar to those here presented. The trial court charged that the defendant was liable if the jury found that his wife kept the liquor in the presence of the defendant with intent to sell it, and the husband had knowledge thereof and did not use reasonable means to prevent her from doing so. The court said:

"The statute, which gives to a married woman the right to carry on any trade or business on her sole * * * account, does not deprive a husband of his common-law right to regulate and control his own household. He has the power to prevent his wife from using his house for an illegal business or purpose. If he permits her to use it for the illegal business of keeping * * * liquors for * * * sale, he becomes a participator in the misdemeanor, and is liable to an indictment or complaint for it, and the fact that she was carrying on the business on her own account, and has filed a certificate to that effect under the statute, does not release him from this liability."

See, also, *Commonwealth v. Walsh*, 165 Mass. 62, 42 N. E. 500; *State v. Rozum*, 8 N. D. 548, 80 N. W. 477; *Commissioners v. Keller*, 20 How. Prac. (N. Y.) 280.

The rule as stated rests, not on the presumption of coercion of the wife by the husband, but on the authority of the husband as the head of the household to control its affairs, and his duty to use all reasonable means to prevent his wife from using the home for a business or purpose prohibited by the statute.

The judgment is affirmed.

McNAIR et al. v. RAYMOND. (No. 122.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Covenants $\S$ 103(3)—Minor infraction of building restrictions held not to estop plaintiffs from enjoining a radical infraction.

In lot owner's suit to enjoin construction of a building too near the street line in violation of a building restriction, plaintiffs' infractions in encroaching on the line to an extent of from 1 to 18 inches held to be minor infractions, not estopping them from enjoining a gross infraction of the restriction.

2. Injunction $\S$ 113—Suit to enjoin violation of building restrictions held not barred by laches.

In lot owner's action to enjoin an infraction of a restriction as to building line, where plaintiffs repeatedly warned defendant after he had staked out his foundation, and did not begin suit until after he had proceeded with his construction in defiance of such warnings, held, that plaintiffs were not barred by laches.

Appeal from Circuit Court, Wayne County, in Chancery; Adolph F. Marschner, Judge.

Suit by John W. McNair and others against Vard S. Raymond, in which a restraining order was made permanent by decree, and the defendant appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, BIRD, and SHARPE, JJ.

Entenza & Gramer, of Detroit, for appellant.

Keena, Lightner, Oxtoby & Hanley, of Detroit, for appellees.

STONE, J. The parties are owners of lots in Freud's Fox Creek subdivision, on Ashland avenue, in Detroit, all subject by the deeds to certain building restrictions, among them—

"That nothing but one dwelling house and the necessary outbuildings shall be erected on each lot; said dwelling house * * * is to face Ashland avenue, and is to be placed not less than twenty (20) feet back from the front line. * * *

About April 1, 1920, defendant, with full knowledge of the building restrictions, began the building on his lot of a dwelling, the front line of which was to be 9 feet 9 inches from the front line of the lot. On that date, the stakes for the wall being set, one of the plaintiffs, Stevenson, owner of an adjacent lot in the subdivision, warned defendant of his proposed violation of the restriction, and advised him to move back and avoid trouble. Several times thereafter, defendant persisting in the violation, said plaintiff repeated his protests. The lot owners in the subdivision had formed the Ashland Avenue

Improvement Association, for the purpose stated in the name, or which McNair was president. Stevenson pretested to defendant again at the request of the president of the association, and the president, also a plaintiff, with Stevenson went to see defendant who walked away from them—did not talk with them.

Defendant claims to have submitted his plans for his dwelling to Freud, president of the Marshland Boulevard Land Company, which put on the Freud's Fox Creek subdivision, for approval, and that the same were approved. This claim, even if important, is not sustained by the record. A petition was circulated among the lot owners, and as a result this suit was commenced September 18, 1920, when defendant had made considerable progress in building the dwelling as staked. A restraining order was made. This was made permanent by the decree. Defendant by appeal presents three questions:

1. Fact.—The facts as here stated are in accord with the opinion of the trial judge and are sustained by the record.

[1] 2. Estoppel.—It is said that the plaintiffs, the lot owners in the subdivision, in building their dwellings, have ignored the said restriction as to the front line of the dwellings to the extent that such restriction has been abandoned, and plaintiffs are estopped to claim a breach by defendant. The record does not show an absolute observance of the restriction, but it shows a substantial observance. The trial judge, at the request of the parties, viewed the premises and the surrounding neighborhood and said of such view:

"It is strikingly apparent that the defendant's building as it now stands is violative of the building line restrictions. The construction is unusual in its character in comparison with other buildings or dwellings on the street, and the claim of the plaintiffs that its appearance is discordant with and deprecating to the uniformity and general harmony of the dwellings now constructed on Ashland avenue is justifiably advanced. The record is well fortified by the respective parties with photographs in substantiation of their claims. An examination of the survey offered in evidence by the defendant and the testimony of defendant's witness Kennedy indicates that a few of the plaintiffs are guilty of minor infractions of the restrictive covenants in question."

These "minor infractions," as found by a witness for defendant, were encroachments upon the said area of 20 feet to the extent of 6 inches in several instances, and the following: 11 inches, 18 inches, 7 inches, 12 inches, 4 inches, 3 inches, and, on Stevenson's lot, 8 inches. One dwelling is exact-

ly located. Some are back from the line. Of some temporary buildings on these lots the trial judge said:

"Violations of a few of the property owners, still maintaining boathouses or shacks in the rear of their lots, are only temporary. The owners of the temporary buildings are gradually constructing respectable homes."

The decree required defendant to fix the front line of his dwelling not less than 19 feet 4 inches from the front line of the lot. This will correspond with Stevenson's dwelling and be a substantial compliance with the restriction as followed by other lot owners. These slight breaches of the original plan do not accomplish a radical or material change in the general conditions and character of the subdivision—do not estop plaintiffs from asserting their rights against defendant, whose breach threatened to diminish materially the value and desirability of the property of plaintiffs. See *Davidson v. Taylor*, 196 Mich. 605, 162 N. W. 1033; *Misch v. Lehman*, 178 Mich. 225, 144 N. W. 556; *Hartwig v. Grace Hospital*, 198 Mich. 725, 165 N. W. 827; *Schadt v. Brill*, 173 Mich. 647, 139 N. W. 878, 45 L. R. A. (N. S.) 726; *Stewart v. Stark*, 181 Mich. 408, 148 N. W. 393.

[2] 3. Laches.—Defendant violated the restriction knowingly. He was warned repeatedly. As said by the trial judge, defendant may not claim that he continued his building of the dwelling upon the supposition or belief that plaintiffs had consented thereto and had waived their rights. He proceeded in defiance of them. It is said that plaintiffs were slow in bringing this suit. But it is said in *High on Injunctions* (4th Ed.) vol. 1, p. 12:

"Where, although the plaintiff has suffered a long time to elapse before finally seeking the aid of a court of equity, he has, during all this time, frequently protested to the defendant, and urged him to cease doing the acts sought to be enjoined, the doctrine of laches does not apply, and such does not constitute a bar to the interposition of the court by injunction."

See, also, 10 R. C. L. 397; *Walker v. Schultz*, 175 Mich. 280, 141 N. W. 543; *Kaiser v. Kaiser*, 213 Mich. 680, 181 N. W. 993; *Sheffield Car Co. v. Hydraulic Co.*, 171 Mich. 423, 137 N. W. 305, Ann. Cas. 1914B, 984; *Morrison v. Queen City Electric Light & Power Co.*, 181 Mich. 624, 148 N. W. 354; *Nickerson v. Nickerson*, 209 Mich. 134, 176 N. W. 456; *Linzee v. Mixer*, 101 Mass. 512; *Herrick v. Marshall*, 66 Me. 439; *Hansell v. Downing*, 17 Pa. Super. Ct. 285.

The decree is affirmed, with costs to plaintiffs.

**TITLE GUARANTY & SURETY CO. v.
ROEHM. (No. 29.)**

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Indemnity ⇐6—Rule of strictissimi juris not applied to indemnity contract.

One who signed contracts indemnifying a surety company going on a contractor's bonds, but not as surety with the contractor, was not entitled to have the rule of strictissimi juris applied to his contracts, the interpretation of such contracts being that which applies to contracts generally, that is, to ascertain the intention of the parties and give effect to that intention, if it can be done consistently with legal principles.

2. Indemnity ⇐8—Indemnitor held liable on contract to indemnify surety in contractor's bond.

Indemnitor was liable to a surety company under a contract to indemnify the latter for losses arising out of the furnishing of bonds executed by a public contractor and signed by the surety company as surety, although the indemnity contract purported to deal with reference to one bond for \$22,000 running to a township and the people of the state, whereas there were two bonds of \$11,000 each running respectively to the township and the people of the state, and although the description of the highway to be improved was different in the indemnity agreement from that found in the bonds; all the parties knowing what highway was referred to.

3. Indemnity ⇐14—Indemnitor of surety liable though bond was insufficient to justify recovery from surety.

One who indemnified a surety company against loss under a bond was liable to the surety for money recovered from it by materialmen, even though the bond was not full enough in its terms to justify recovery upon it by materialmen; the indemnitor having notice of the suits and an opportunity to make a defense and not choosing to embrace such opportunity.

4. Indemnity ⇐14—Recovery from indemnitor held proper though loss occurred to indemnified party on two bonds.

One who indemnified surety company against loss under several bonds covering a certain improvement was liable to the surety company for the amount of recovery from the surety company on the bonds jointly, without separating the amount of recovery as to each; such indemnitor not choosing to embrace opportunity given him to appear in the actions against the surety company.

Error to Circuit Court, Houghton County; Patrick H. O'Brien, Judge.

Action by the Title Guaranty & Surety Company against Paul P. Roehm. Judgment for plaintiff, and defendant brings error. Affirmed.

In September, 1912, one Thomas Drapeau was the successful bidder for the construction of a highway in Portage township,

Houghton county, known as the "New Otter Lake Road." He entered into a contract with the township for its construction. Mr. Drapeau was required to and did execute two bonds aggregating \$22,000, one for \$11,000 running to the township, and the other for a like amount running to the people of the state of Michigan (see Act 187 Public Acts 1905; section 14827 et seq., C. L. 1915). The present plaintiff signed both bonds as surety at the instance and request of this defendant. But before or contemporaneous with such signing defendant executed a writing to the surety company called an "indemnity bond." In this undertaking it was recited that—

The surety company "has signed and executed or is about to sign and execute * * * a certain bond or undertaking in the penal sum of twenty-two thousand (\$22,000.00) dollars, on behalf of Thomas Drapeau, in favor of Portage township, Houghton county, Mich., and the state of Michigan, and bearing date on or about the date hereof, reference to which said bond or undertaking is hereby made for the purpose of certainty, a copy of which instrument is or may be hereto attached."

And it was conditioned that—

Defendant "shall hold and keep harmless the company from and against any and all liability, loss, damages, suit or suits (whether such suit or suits be rightfully or wrongfully brought), costs, counsel fees, charges and expenses of whatever nature or kind which the company shall or may at any time incur, sustain or be put to, for, or by reason or in consequence of the company having given and executed the said bond or undertaking, then this obligation shall be void; otherwise to be and remain in full force and virtue."

It was further provided:

"This bond of indemnity shall be liberally construed so as to fully protect and indemnify the company."

In June, 1913, Drapeau entered into another contract for an extension of the highway beyond the work contemplated by the first contract, from which later contract it would appear that the township had the option of having such work done at the same average rate per unit. He executed two bonds in the sum of \$3,100, one to the township and one to the people of the state of Michigan. These bonds were likewise signed by plaintiff as surety, and defendant gave to it an undertaking called an "indemnity agreement," which recited that—

He had requested the company "to sign and execute a certain bond or undertaking which bond is given for the building of a portion of the highway from Superior City to Otter Lake in Houghton county, Mich., reference to which bond or undertaking is hereby made for the purpose of certainty and a copy of which instrument is or may be hereto attached."

This undertaking contained, among others, the following provision:

"That we will at all times indemnify and keep indemnified the company, and hold and save it harmless from and against any and all demands, liabilities, loss, damage or expense of whatsoever kind or nature, including counsel and attorneys' fees, which it shall at any time sustain or incur by reason or in consequence of having executed the said instrument; and that whenever any claim or claims shall have been made upon the company under the said instrument, if in judgment of the company it is determined that such claim or claims should be paid, we covenant, promise and agree to pay over in cash to the company upon its demand therefor, the amount or amounts of said claim or claims, and if the company deny liability concerning any claim or claims and suit or suits be brought against the company under said instrument to recover the amount of said claim or claims, or any other proceeding or proceedings be taken thereon involving the company, whether the suits and proceedings be against the principal named in the said instrument and the company jointly, or against the company alone, whether such suit or proceeding or proceedings be rightfully or wrongfully brought or instituted we covenant and agree to defend said suits and proceedings to a conclusion at our own expense or to permit the company, if it so elect, to place the defense of said suits and proceedings in the hands of its own attorneys or counsel, in which latter event we covenant, promise and agree to pay over to the company upon its demand such sum or sums of money as may be required to retain said attorneys or counsel and to defray the expenses of conducting the defense of said suits and proceedings and further, we covenant and agree to satisfy and discharge any and all judgments recovered against the company under said instrument as soon as the same shall be entered or docketed unless an appeal be taken and bond or bonds to secure or stay the collection of such judgment or judgments be procured by the undersigned and filed as required by law. * * *

Mr. Drapeau died in July, 1918, and the contracts were completed by his administrator. Defendant in three separate instruments, in which he describes himself as "indemnitor of the bond of Thomas Drapeau issued by the Title Guaranty & Surety Company," consented that the township pay to Mr. Drapeau's administrator an aggregate of \$2,550 to be used for the payment of labor debts. Three parties who had furnished material used in the construction of the highway brought suit against the surety company, counting on both bonds which run to the people of the state of Michigan. Mr. Roehm was given notice of these cases and of all the proceedings therein, and a copy of the declaration in each case was served on him. He made no defense to any of the actions. The surety company urged all defenses apparently thought available, but judgments were rendered in all the cases and were paid by the surety company. Thereupon this action was brought upon defendant's

undertakings. The case was tried by the court without a jury, and findings of fact and conclusions of law in accordance with plaintiff's contention were filed, and judgment was thereupon entered. Defendant properly excepted to the conclusions of law, but we do not understand him to question the findings of fact.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Rees, Robinson & Petermann, of Houghton, for appellant.

Galbraith & McCormack, of Calumet (Thomas, Shields & Silsbee, of Lansing, of counsel), for appellee.

FELLOWS, J. (after stating the facts as above). It is the claim of the defendant that he is only bound by "the letter of the bond"; that as to the first undertaking he obligated himself with reference to only one bond, a bond running to the township of Portage and the people of the state of Michigan in the sum of \$22,000, and that no such bond was signed by plaintiff, but that two bonds each in the sum of \$11,000, one running to the township and one to the people, were signed by plaintiff; that as to the second undertaking the language is indefinite, provided for only one bond, not two, that the description of the highway was different in the undertaking from that found in the bonds signed by the plaintiff, and that if he is in any way bound by the second undertaking it is only with reference to the bond running to the township and not the one running to the people; that as he saw none of the bonds signed by the plaintiff, he had no knowledge of their terms; and that he is not liable in this action. In short, it is his claim that he is a surety, and a gratuitous one, and is entitled to invoke the rule of *strictissimi juris*.

[1] Defendant did not sign as surety with Mr. Drapeau. Both of the undertakings signed by him were contracts of indemnity and he was an indemnitor and not a surety. These contracts of indemnity must be construed and liability determined by the rules applicable to such contracts, and not by rules applicable to contracts of suretyship. The rule of *strictissimi juris* may not be applied to such contracts.

"In the interpretation of indemnity contracts, the cardinal rule is that which applies to contracts generally, i. e., to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. Contracts of indemnity, therefore, must receive a reasonable construction so as to carry out, rather than defeat, the purpose for which they were executed. To this end they should neither, on the one hand, be so narrowly or technically interpreted as to frustrate their obvious design, nor, on the other hand, so loosely or inartificially as to relieve the

obligor from a liability within the scope or spirit of their terms. Where the general import of a contract is one of indemnity, it is the rule that all of the words used therein should be construed to be in harmony with, and subservient to, the general purpose of the bond." 14 R. C. L. 46.

"In construing contracts of indemnity the ordinary rules of construction employed in the interpretation of contracts generally are applicable. Indemnity contracts like other contracts are to be so expounded as to effectuate the intention of the parties. Thus in ascertaining the intention of the parties, the court must take into consideration not only the language of the contract but the situation of the parties and the circumstances surrounding them at the time the contract was made." 22 Cyc. 84.

"A contract of indemnity should be construed so as to cover all losses, damages, or liabilities to which it reasonably appears to have been the intention of the parties that it should apply, but not to extend to losses, damages, or liabilities which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract." 16 Am. & Eng. Enc. Law (2d Ed.) p. 173.

In *Fidelity & Deposit Co. v. Hibbler*, 177 Mich. 490, 143 N. W. 604, we quoted the above language from the *American & English Encyclopedia of Law* and then said, speaking through Mr. Justice Kuhn:

"Applying this rule of construction to this agreement, it seems to have been the intention of the parties to make an agreement which was to be an absolute undertaking by the defendants, the indemnitors, to reimburse the plaintiff, the indemnitee, for any loss sustained by it in connection with William H. Hibbler. There is no question but that the plaintiff acted in good faith. When its liability was established it paid its loss, and, under the agreement which the defendants made with it, it should now be reimbursed."

[2] What were the circumstances surrounding the parties when these undertakings were entered into? Mr. Drapeau had a contract for a public improvement. He was required to give the statutory bond and a bond to the township. All parties knew this, or were presumed to know it. The aggregate was \$22,000. From the fact that Mr. Drapeau did not leave an estate sufficient to pay his indebtedness we may infer that he was not forehanded. Plaintiff, if it signed his bond or bonds, would obligate itself for a large amount. Defendant agreed to indemnify it. To hold that he did not become liable and did not indemnify it because two bonds were given instead of one, because the two obligees were named in separate bonds instead of being joined in one bond, because the description of the work was not as definite as it might have been when every one knew what highway was referred to and what highway they were contracting with reference to, would not only be a narrow and strained con-

struction of the contract, but would absolutely frustrate the intention of the parties.

[3, 4] We need not consider whether the second bond to the people of the state of Michigan was full enough in its terms to justify recovery upon it by materialmen. Defendant had notice of the suits brought by them upon this bond and had an opportunity to then make such defense. He did not choose to embrace such opportunity and cannot now be heard to complain. *Knickerbocker v. Wilcox*, 83 Mich. 200, 210, 47 N. W. 123, 21 Am. St. Rep. 595; 22 Cyc. 106, and the authorities there cited. This is likewise true of the question of recovery on the two bonds jointly without separating the amount of the recovery as to each. Upon the latter question, however, see *Sullivan v. Fidelity & Casualty Co.*, 208 Mich. 63, 175 N. W. 397; *Id.*, 210 Mich. 625, 178 N. W. 39.

The judgment is affirmed.

HORN v. PARKE, DAVIS & CO. (No. 85.)

(Supreme Court of Michigan. Oct. 8, 1921.)

1. Master and servant $\S$ 96(1)—Negligence must be proximate cause of injury.

While under Comp. Laws 1915, § 5423, the common-law defenses of contributory negligence, unless willful, assumed risk, and negligence of a fellow servant are no longer available, a servant cannot recover unless the master is guilty of negligence constituting the proximate cause of the injury.

2. Master and servant $\S$ 101, 102(2)—Master not insurer of servant's safety.

Though the master must furnish a reasonably safe place to work, he is not the insurer of the servant's safety; his duty, in the absence of statute, being merely to exercise due care, the care that an ordinarily prudent man would exercise.

3. Master and servant $\S$ 97(2)—Injuries to employee slipping into vat held accidental.

Where a vat used for reducing animal carcasses was covered with planks, and when not in use for reduction purposes the room in which it was located was used as a passageway, and a permanent barrier around the vat would not only interfere with the passageway, but make it hazardous, the employer was not liable for injuries to an employee who slipped into the vat and was scalded after removing the cover during the reduction process; the injury being purely accidental, and not such as a prudent man would anticipate as probable.

Moore and Bird, JJ., dissenting.

Error to Circuit Court, Wayne County; Ormond F. Hunt, Judge.

Action by Frederick Horn, by next friend, against Parke, Davis & Co., a corporation.

Judgment for plaintiff, and defendant brings error. Reversed.

Defendant maintains in its business biological laboratories, having in connection therewith stables and buildings in which are kept animals, large and small. These animals are inoculated with germs of a particular disease which is being studied and its progress watched. Temperatures are taken from time to time, and if the animal dies a post mortem examination is held. To dispose of the carcasses after the post mortem defendant maintains in one of the rooms a vat or tank 3 feet 4 inches deep, 3 feet 5 inches wide, and 7 feet 5½ inches long. Fitting inside of this is a removable iron cage or basket perforated on the sides. The top of the vat is even with the floor and is covered with heavy planking, and when not in use in reducing carcasses the room is used by defendant as a passageway. Water and steam pipes are connected with the vat, and the outflow is through pipes into a manhole on the outside of the building where there are valves which may be opened and closed. Over the vat is a track conveyer used in moving the basket and the plank cover. If the animal is a large one, the carcass is cut up, put in the basket, conveyed to the vat, and the basket or cage is lowered into the vat. The method of reduction is this: After the basket containing the carcass has been put in the vat it is filled with water in which is placed disinfectant, the cover is placed in position, and the steam is turned on. This is done in the afternoon about 5 o'clock and left until the following morning, when the reduction is usually completed. In the morning the valve or valves in the manhole are opened, the hot water drawn off, and the remains of the carcass disposed of. Scrupulous cleanliness about the place is essential to prevent inoculation. The vat had been thus operated for over 15 years without accident of any kind.

Plaintiff entered the employ of defendant in its biological laboratories when he was about 17 years old. He was a little past 18 years of age at the time of the injury. He was at first given the care and observation of the smaller animals, but soon learned to assist the man in charge of the reduction of the carcasses, and when this man left he took his place. On July 2, 1917, a post mortem examination of a horse was held, and plaintiff cut up the carcass, put the pieces in the iron cage, lowered it into the vat, filled the vat with water, put in the disinfectant, put on the cover, and turned on the steam before quitting work. On the following morning plaintiff returned to work about 7:30. The floor was wet from condensed steam, as it always was when the reduction process was in operation. Plaintiff removed the cover of the vat and went out to open the valves in the

manhole. One of them stuck, and he went inside to get an iron bar used in such cases, slipped into the vat, and one of his legs was severely scalded. He brought this action and recovered a substantial verdict. The parties were not under the Workmen's Compensation Act (Comp. Laws, §§ 5423-5495).

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

George J. Haines, of Detroit (Horace W. Bigelow, and Campbell, Bulkley & Ledyard, all of Detroit, of counsel), for appellant.

Lodge & Brown, of Detroit, for appellee.

FELLOWS, J. (after stating the facts as above). But one question is presented on this record, and that is whether any negligence of defendant is shown. Defendant asked for a directed verdict on the grounds that there was no evidence of negligence on its part; that plaintiff's slipping into the vat was an accident pure and simple, a mishap, for which it is not responsible in this action.

[1] While the common-law defenses of contributory negligence, unless willful, assumed risk, and negligence of a fellow servant are no longer available to the master (section 5423, C. L. 1915), the servant cannot recover against the master unless the master is guilty of negligence (*Lydman v. De Haas*, 185 Mich. 128, 151 N. W. 718; *Wudlick v. Chicago & Northwestern Ry. Co.*, 203 Mich. 689, 169 N. W. 830; *Munn v. Michigan State Telephone Co.*, 206 Mich. 201, 172 N. W. 592; *Smith v. Hyne*, 208 Mich. 334, 175 N. W. 293). If the injury is the result of a mishap, an accident pure and simple, and there is no negligence of the master which constitutes the proximate cause of the injury, there can be no recovery against him.

[2, 3] Plaintiff invokes the doctrine of "safe place," and testified that the erection of a barrier around the vat consisting of an iron pipe would not interfere with the operation of the vat. But it is obvious that such a barrier, if permanent, would not only interfere with the place as a passageway, but make it absolutely hazardous for that use. Plaintiff's counsel unsuccessfully attempted to prove on cross-examination of defendant's witnesses that a temporary barrier was in any degree practical considering the uses to which the premises are devoted. While this court has in a long line of cases not necessary to cite sustained the doctrine that the master's duty required him to furnish a reasonably safe place for the servant in which to labor, we have as consistently held that the master is not the insurer of the safety of the servant, and that he discharges his duty in the absence of a statute when he exercises due care, the care that an ordinarily prudent man would exercise, in providing for the safety of the servant. It was said by Chief Justice

Cooley, speaking for the court in *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812:

"A similar accident, attended by equally serious consequences, might happen almost anywhere, in any machine shop or on a farm as well as in a mill, and after it had happened it could be readily seen how it might have been avoided. But the fact that it was avoidable does not prove that there was fault in not anticipating and providing against it. If a farm laborer falls from the haymow, the fall does not demonstrate that the farmer was culpable for not railing the mow in. A man stumbling in a blacksmith shop might have his hand or even his head thrown under the trip hammer, but it would not follow that there had been any neglect of duty on the part of the blacksmith in leaving the hammer exposed. So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers; and it does not go to the extent of requiring him to render accidental injuries impossible."

In *Baldwin on Personal Injuries*, p. 397, it is said:

"If the accident is one which an ordinarily prudent man would not have anticipated, it becomes immaterial that a very small expense would have prevented the accident in question, by providing a barrier or any other simple device. All machinery, but especially that operated by steam, is more or less dangerous under any circumstances. In a great many cases, however, injury results from some prior, improbable, antecedent accident, not anticipated by either the master or the servant, as where a servant accidentally trips and in falling his hand or foot is thrown into exposed machinery. The duty of the master only extends to guarding against probable dangers, but does not go to the extent of requiring him to render accidental injuries impossible."

See, also, *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785; *Schroeder v. Michigan Car Co.*, 56 Mich. 132, 22 N. W. 220; *Hewitt v. F. & P. M. R. Co.*, 67 Mich. 61, 34 N. W. 659; *Burke v. Parker Webb & Co.*, 107 Mich. 88, 64 N. W. 1065; *Palmer v. Harrison*, 57 Mich. 182, 23 N. W. 624; *Kaaro v. Ahmeek Mining Co.*, 178 Mich. 661, 146 N. W. 149.

In *Balle v. Detroit Leather Co.*, 73 Mich. 153, 41 N. W. 216, plaintiff's decedent was drowned in a vat in the tannery of defendant, by whom he was employed. There was no eyewitness to the accident. In the work the platform between the vats became slippery and there was a box standing there. Either the deceased slipped or tripped over the box and thus fell into the vat. We held that he assumed the risk, and that there was no evidence of negligence on the part of the defendant.

In *Buckley v. G. P. & R. M. Co.*, 113 N. Y. 540, 21 N. E. 717, plaintiff, a boy of 12, slipped and his hand was caught in cogs and injured. The doctrine of safe place and of want of instruction were there involved. The court said:

"It is impossible to perceive, from the evidence, what the defendant could have done to avoid the accident. The machine was not imminently dangerous. The hands of the plaintiff, in anything which he had to do or was doing about the machine, would not come within nine inches of the cogs where he was injured. It was not needful to instruct him that the cogs were dangerous, because that was obvious. He could see as well as anybody that if his fingers got into the cogs they would be crushed into pieces. He was not injured because he did not know that the cogs were dangerous, but the injury happened because he slipped and fell and instinctively threw out his hand to recover himself. His falling was a mere accident, and no amount of instruction or caution from the agents of the defendant would have prevented the accident and saved him from the injury. His injury did not come from any ignorance of the machines or of the danger to which he was exposed, but it came solely from the accident."

In *St. Louis S. W. Ry. Co. v. Freles* (Tex. Civ. App.) 106 S. W. 91, the employee was injured by his glove being caught in a bolt on a boiler he was assisting in moving. In denying liability, it was said by the court:

"In our opinion, appellee's injuries were received through inevitable accident, and that the facts as above stated fail, as a matter of law, to show negligence on the part of appellant, for which reason we sustain said assignment. By 'negligence' as is here used we mean culpable negligence. It is not the doing of every act which results in injury to another, or the failure to do everything that could have been done to avert such injury, that is negligence in a legal sense. To constitute negligence the act must be one which a person of ordinary prudence would not have done, or would not have omitted to do, as the case may be, and from which act or omission it ought reasonably to have been anticipated that injury would result. Ignorance of the master as to the probable danger is not necessarily an excuse, for it is his duty to know whatever he could have learned by the exercise of such diligence as the circumstances reasonably demanded of him. But when he does not know of the danger and could not reasonably have discovered the same by the exercise of such diligence, and an unforeseen injury occurs, it is not by his negligence, but upon pure accident."

We quote the syllabus in *Venbuur v. Lafayette Worsted Mills*, 75 Atl. 264, a Rhode Island case:

"A master maintaining a ventilating machine which could not injure any servant unless he inserted his hand within the blower was not liable for injury to a servant slipping on the floor and thrusting his hand into the blower, where a prudent man would not anticipate such an accident as within the bounds of probability."

This case does not fall within that class of cases where a servant or invitee falls into an unknown pitfall on the premises, and that class of cases is inapplicable. Numerous

cases will be found, however, where the injury was occasioned by a slip, or by tripping of the employee, where liability has been denied on the ground that no negligence of the master has been proved; that the injury was due to a mishap, an accident pure and simple. Some of the cases couple with these grounds the doctrine of assumed risk, not applicable here. Among these cases, see *American Tobacco Co. v. Adams*, 137 Ky. 414, 125 S. W. 1067; *Logan v. Sherill-King M. & L. Co.*, 160 Ky. 295, 169 S. W. 707; *West v. Packing Co.*, 86 Kan. 890, 122 Pac. 1024; *Wilson v. Southern Ry. Co.*, 108 Va. 822, 62 S. E. 972; *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98; *McRea v. Hood Rubber Co.*, 187 Mass. 326, 72 N. E. 1015; *Bessey v. Newichawanick Co.*, 94 Me. 61, 46 Atl. 806; *Kern v. Welz & Zerweck*, 151 App. Div. 432, 136 N. Y. Supp. 412. In the last-cited case it was said:

"But beyond this the floor and drain arrangements of this washroom were not a 'way' within the meaning of the statute; it was merely a place provided for the plaintiff to perform certain incidental services in connection with other employees who were engaged in washing out the beer kegs, and the place being constructed and equipped in a manner concededly well adapted to its main purpose, and not exposing the plaintiff to any undisclosed dangers in the performance of his incidental duties within the room, it is idle to contend that there was any liability on the part of the defendant. * * *

"The real truth is that the situation did not suggest to any one that it was dangerous. The room had been prepared for certain work, and it was well adapted to that work, and there was no reason to apprehend the accident which actually happened. It did not occur to the plaintiff, although he knew all about the situation, that the defendant could have known by the most rigid inspection, and the master is not liable because he has failed to anticipate an accident which reasonably prudent men, looking to the situation before the accident, would not have anticipated."

A consideration of the authorities, and we have by no means cited all that have been examined, is persuasive that defendant is correct in its contention, that no actionable negligence has been established, and that this unfortunate injury was due to a mishap, an accident pure and simple.

It follows that the judgment must be reversed without a new trial.

STEERE, C. J., and WIEST, STONE, CLARK, and SHARPE, JJ., concurred with FELLOWS, J.

MOORE, J. I think the question of negligence was for the jury, and that the judgment should be affirmed.

BIRD, J., concurred with MOORE, J.

DE SADDLER v. YELLOW TAXICAB CO. (No. 53.)

(Supreme Court of Michigan. Oct. 8, 1921.)

1. Evidence $\S$ 151(4)—On issue of intoxication of plaintiff when injured, testimony as to occurrences in hospital held admissible to explain attitude of mind.

On an issue as to whether plaintiff in a personal injury suit was intoxicated when injured, his testimony that a doctor in the hospital to which he was taken threatened to strike him, and that money was taken from him, held admissible as explaining his attitude of mind, though the doctor, who testified that he was intoxicated and disagreeable, denied making such threat, could not recall plaintiff's having complained that money was taken from him, and could not say that he had any trouble with him while he was in the hospital.

2. Appeal and error $\S$ 1060(2)—Repetition of questions ruled incompetent not reversible error, where not asked in bad faith.

Though counsel repeatedly, for the purpose of getting inadmissible facts before the jury, asked questions that the court had ruled incompetent, the judgment will not be reversed, where it is not shown that such questions were not asked in good faith.

3. Municipal corporations $\S$ 706(8) — Refusal of instruction to consider plaintiff's intoxication on issue of due care not erroneous.

In an action for injuries from being struck by an automobile, where the court instructed the jury to consider whether plaintiff was intoxicated, and, if so, whether to such degree that he could not exercise due care, and defendant's counsel did not suggest, in answer to the court's inquiry, that the subject had not been fully covered, the court did not err in refusing an instruction to consider plaintiff's intoxication in determining whether he exercised due care; no greater care being required of an intoxicated than of a sober person, though intoxication will not excuse want of due care.

Error to Circuit Court, Wayne County; Guy M. Chester, Judge.

Action by Serile De Saddler against the Yellow Taxicab Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Monaghan, Crowley, Reilley & Kellogg, of Detroit, for appellant.

Ralph S. Moore, of Detroit, for appellee.

MOORE, J. This action was brought because of an accident happening on November 22, 1917. Verdict was rendered for plaintiff, and upon such verdict judgment was entered. The case is brought here by writ of error.

Plaintiff's version of the accident is as follows:

"After I had taken my supper, I go on the street car, the Jefferson car. I got it at Jefferson Court and Jefferson avenue. I went down town. It was two cars together. I was on the back end or trailer. The doctor had been working on me. There was something in my bladder and he was working on my bladder. * * * I ring the bell; I went off. The car stopped, and as soon as the car stopped I got off, and an automobile got me. As soon as I got the first step off the car, an automobile hit me. The car was coming down town. I got off on the north side of the car at Rivard street. Automobile strike me on the right side and slipped me about 50 feet past. As I was alighting from the street car I was facing a northerly position, and the automobile struck me on the right side, broke my leg. When it struck me, I grabbed with my fingers over the wheels. He picked me up and took me. I was dragged 40 or 50 feet. Rivard street is a regular place for the street car to stop. I did not get any warning of its approach. I hear nothing. I was right in the safety line on the street. There is a white line. I was right in there when he got me. He picked me up and shoved me in the car. He put me in the car himself. He was alone and took me to the hospital."

The version of what happened given by the driver of the taxicab is as follows:

"I remember of colliding with this man on November 22, 1917. I was coming west on Jefferson avenue. An auto was parked on the northwest corner right in front of the Palms Apartments, near the sidewalk on Rivard. I was coming west on Jefferson avenue. When I noticed De Saddler I was right at the crossing. I had one wheel in the street car track and the other wheel outside. I was between the north-bound track and the north rail. I was right at the intersection of Rivard and Jefferson avenue. I was coming west on Jefferson avenue, on the east side of Rivard street, when I noticed De Saddler just up here, stepping off right in front of the Palms Apartments; going to step off in front of this machine. The machine was right in front of the Palms Apartments. He was stepping down the step to the curb there in front of the Palms Apartments, in front of the parked automobile. I tooted my horn to give him notice. I was then right in the intersection. At that time he had stepped to the curb. He came out in front of the car, looked up, and started to run across the street. When I saw him come out from behind the car I tooted my horn. This time he was within 10 feet of me. There was no possible chance to stop and he was running with his head down. I was driving between 15 and 18 miles an hour—not over that. He hit right near the fender on the cab door; ran right into it. It was the step broke his leg, and there was a slight dent in the car, I think. I am not sure about it. That is my recollection. There was no street car up or down the street at that time. This man could not have got off the street car on that side of the street. He was on the wrong side of the street to get

off of the street car. Reference to taking care of this man, I stopped my machine. I think we ran probably 8 or 10 feet. I stopped then dead. * * * I noticed the way he acted, the way he appeared and talked. He mumbled and fell around on the floor. They would not allow the attendant to pick him up. He appeared to be drunk."

[1] The assignments of error first discussed in the brief relate to the testimony of the plaintiff as to what occurred in the hospital. A doctor who was in the hospital gave testimony on the part of defendant to the effect that plaintiff was intoxicated. Plaintiff denied that he was intoxicated. The doctor's attention was called to what occurred in the hospital. His recollection did not seem to be very clear. We quote:

"I cannot positively say that I had any trouble with this man when he was in the hospital. Sometimes it takes longer to effect a cure; it might take six months. I have in mind that this man was disagreeable there. I never threatened to strike him. I do not recall of his having made a complaint of any money being taken from him. When he entered the hospital he may have."

The trial court was of the opinion that the testimony was admissible as explaining the attitude of mind of the witness. We think its admission was not error.

[2] Complaint is made of the conduct of counsel in asking questions of witnesses to which objections were sustained. It is the contention that this court uniformly reverses cases where counsel repeatedly, for the purpose of getting inadmissible facts before the jury, asks questions that the court has ruled incompetent, as shown by the authorities reviewed in *Thomas v. Township of Byron*, 168 Mich. 593, 134 N. W. 1021, 38 L. R. A. (N. S.) 1186, Ann. Cas. 1913C, 686. Other cases are cited. A careful reading of the record does not lead us to the conclusion that the counsel did not ask the questions in good faith, nor that what occurred in that respect was reversible error.

[3] Counsel for appellant prepared a written request upon the subject of intoxication. It was not given. The court gave a general charge, which covers 10 pages of the printed record, and then the following occurred:

"24. Gentlemen are there any other suggestions not contained in the request?

"Mr. Reilley: The instruction as to intoxication—we claim intoxication, and that the jury would have a right to consider it. It is the right of the jury to consider that, and to take it into consideration in determining as to whether he exercised due care and caution.

"Mr. Moore: I do not understand there is any competent testimony on that proposition.

"The Court: I will leave the question of that to the jury. The doctor testified from his own recollection.

"Mr. Reilley: Not only that, but the driver testified, and that is record the doctor testified to.

"The Court: The question of intoxication is for the jury to determine.

"25. The Court: The question of intoxication is for the jury to determine. Well, gentlemen, in determining the question as to whether or not the plaintiff did exercise due care and caution, you will take into consideration the question of whether he was intoxicated or not, and, if so, whether he was intoxicated to that degree that he could not exercise due care and caution.

"Is there anything else? The officer may take the jury."

It will be observed that counsel did not suggest, in answer to the inquiry of the court, that the subject had not been fully covered. In Baldwin's Personal Injuries (2d Ed.) p. 185, is the following:

"The intoxication of a pedestrian will not excuse due care on his part in traveling over a highway; but no greater care is required on the part of such a person than is required of one in his sober senses. If an intoxicated person exercises the same care that a sober person would, his intoxication becomes immaterial."

In Epelett v. City of Sault Ste. Marie, 144 Mich. 392, 108 N. W. 360, the court said:

"There was testimony tending to show that plaintiff was intoxicated at the time of the fall. Defendant's counsel asked the court to charge the jury that 'in case she was intoxicated she cannot recover, unless she was exercising greater care than would be required on her part if she were not intoxicated.' No error was committed in refusing this request. Kingston v. Railway Co., 112 Mich. 40, 40 L. R. A. 181. It would be a safe rule to assert that the intoxication of a pedestrian will not excuse due care on his part in traveling over a highway, but we are cited to no authority which sustains the proposition that a higher degree of care is required of an intoxicated person than of one in his sober senses. It would seem that if an intoxicated person is capable of exercising, and does exercise, the care which the law requires of a sober person, the fact of intoxication becomes immaterial."

So far as the record discloses, there were but two witnesses to this accident, the plaintiff and the driver of the taxicab. Their testimony was in conflict. The issues were simple. They were fairly presented to the jury.

The judgment is affirmed, with costs to the plaintiff.

APPS v. WALTERS. (No. 40.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Municipal corporations $\Leftrightarrow$ 705(10) — Nine year old boy, who ran into street in front of automobile, held contributorily negligent.

Nine year old, intelligent boy, raised in the city and familiar with street conditions, who

ran into street in front of automobile after a ball or marble, held contributorily negligent.

2. Municipal corporations $\Leftrightarrow$ 705(10) — Doctrine of subsequent negligence held inapplicable.

In action for injuries to nine year old boy struck by defendant's automobile after having run into street in front of the automobile, the doctrine of subsequent negligence held inapplicable in view of undisputed evidence showing the boy's active, contemporaneous negligence a concurring proximate cause.

Error to Circuit Court, Wayne County; Henry A. Mandell, Judge.

Action by David C. Apps, by next friend, William C. Apps, against Reuben Walters. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Wm. Henry Gallagher, of Detroit, for appellant.

Lau, Edwards, Nystrer & French, of Detroit, for appellee.

STEERE, C. J. Plaintiff brought this action to recover damages for personal injuries resulting from defendant's automobile striking him and breaking his leg while he was playing in the street. The declaration is in the usual form, the charged negligence being "wrongfully driving his automobile at an excessive rate of speed on the wrong side of the street."

The testimony shows that on April 23, 1921, David C. Apps was playing with a group of other boys on the west side of Garland avenue, in the city of Detroit, which runs north and south and is 26 feet in width from curb to curb. Defendant was driving his automobile south along the avenue near the center of the street, as the undisputed testimony shows. Plaintiff's evidence shows that it was to the east of the center of the street with "his right wheels about the center," and defendant's that it was on the right side of the street "about 10 feet from the curb." Plaintiff's evidence was that he was driving at the rate of 25 to 30 miles per hour, and defendant's that he was driving at about 15 miles per hour. As the car approached the point where the boys were playing (to within, as respectively stated by the two sides, from 20 to 100 feet), plaintiff suddenly started from the west curb running diagonally across the street after a ball or marble which one of his companions had thrown. Plaintiff introduced testimony to the effect that the defendant was turned towards and talking with a passenger on the seat beside him to his right and failed to observe the boy until he

was not over 4 feet from him, when some one cried out, and he then suddenly swerved his car to the left from the boy, mounting the easterly curb and across the grass plot some 50 feet before he stopped. The boy, who kept on running, was hit by the rear part of the car, either the fender or right rear wheel, as it was mounting the curb, and his leg was broken. He fell within 3 or 4 feet of the east curb.

There was no traffic upon the street in that vicinity. It was daylight; the boys playing on the curb and defendant's approaching car were in plain sight of each other. Defendant's testimony that he saw the boys when about 200 feet away from them is undisputed. He confirmed the testimony of one of plaintiff's witnesses that he was partly turned towards the right, or west side where the boys were, talking with the man who sat beside him, and said he saw plaintiff as he ran out in the street. That he acted promptly after he saw the boy in danger, and what he did, is practically undisputed. He claims the boy darted out upon the street when the car was about 20 feet away. Plaintiff's evidence is to the effect that the car was 100 feet away when the boy started across the street, and defendant apparently did not see him until some one shouted when the car was close upon him.

Plaintiff lived on Garland avenue, which his father testified was used as a speedway, and said in cross-examination:

"I always instructed my children to look before they cross a street. I told my children to be careful about stepping in the street, to look for automobiles when they were crossing, because they used to cross Garland avenue and Charlevoix to go to school."

Plaintiff was nine years old when the accident occurred, had been attending school some five years, was a bright, intelligent lad raised in the city and familiar with street conditions, possessed of sufficient experience and intelligence to understand and appreciate the danger of attempting to run across the street in front of an approaching automobile.

[1] The conclusion is unavoidable, under the facts shown here, that he was guilty of contributory negligence as a matter of law. *Henderson v. Citizens' Railway Co.*, 116 Mich. 368, 74 N. W. 525; *Trudell v. Grand Trunk Railroad Co.*, 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271; *Zoltovski v. Gzella*, 159 Mich. 620, 124 N. W. 527, 26 L. R. A. (N. S.) 435, 134 Am. St. Rep. 752; *Knickerbocker v. Railway*, 167 Mich. 596, 133 N. W. 504; *Mollica v. Michigan Central Railroad Co.*, 170 Mich. 96, 135 N. W. 927, L. R. A. 1917F, 118; *Henry v. Mich. Central Railroad Co.*, 189 Mich. 45, 155 N. W. 550.

At conclusion of plaintiff's testimony motion was made by his counsel and granted,

for leave to amend the declaration to include a charge of discovered or subsequent negligence, as to which it is insisted the testimony made a case for the jury.

The court directed a verdict for defendant, holding that under the undisputed testimony there was no room for the theory of subsequent negligence, saying in part:

"Taking the case of plaintiff at its best, because in determining a motion of this kind the court must so assume, the defendant was driving at the rate of 25 to 30 miles an hour on this street, he discovered at his right and standing at or near the curb three or four boys. He said that he had seen them for some little time prior to that, but it is shown when he got to that point, one of the boys started to cross the street without looking, chasing either a ball or a marble. Whatever happened after that, if the witnesses are correct in their estimates of speed, must have happened almost instantly, for the reason that if one is driving 25 miles an hour, he is making 36.75 feet per second; if driving 30 miles per hour, he is making 44 feet per second. It would not require, at the outside, more than two or three seconds for the whole thing to happen. Yet under the theory of the plaintiff, the driver was expected not only to realize the situation, but to act upon that realization and to have either brought the car to a standstill or have avoided the injury in some other way."

The testimony of the plaintiff's witnesses shows that it all happened "very quickly." A witness of plaintiff testified he heard "some one holler at the boy to look out shortly before the boy was hit," and his father, who was working near by with his back to the street, testified he "heard the yell" and turned around, and the automobile was then "passing between the grass plot" which was east of the east curb of the street.

It is evident that plaintiff's contributory negligence prevents recovery unless defendant was guilty of subsequent negligence in failing, after he saw or with ordinary care should have seen, the boy in a position of danger, to act promptly and make all reasonable effort to avoid injuring him.

In *Fike v. Railroad Co.*, 174 Mich. 167, 140 N. W. 592, gross or subsequent negligence, as claimed here, is said to consist of "failure to exercise ordinary care to prevent injury to another, after his peril is, or should have been, discovered in the exercise of ordinary care. Such failure to exercise ordinary care to prevent injury is so reckless that the law presumes it to be willful." The complaint here is failure to sooner see the boy's peril, for it is undisputed that defendant acted promptly after he discovered the boy running across the street. He hastily swung his car sharply to the left away from the boy, over the curb and entirely off the pavement. Had the boy not kept running, defendant would have entirely avoided him. The man who was riding with defendant said, in de-

scribing the sudden turn and trip over the curb:

"The boy was running so fast he struck his hind wheel. The automobile didn't strike him at all. He ran into the hind wheel."

Plaintiff's main witness said:

"The boy was three or four feet from the curb when the car hit him; one wheel would hit the curb and the right wheel hit the boy. Am sure the front wheel did not hit him, but the right-hand fender. * * * The fender hit the boy as the car was mounting the curb. * * * I said I thought the rear wheel—the rear wheel hit his foot."

[2] While the authorities are not always clear in discussing the elements of gross, discovered, or subsequent negligence, a recognized element is that plaintiff's negligence is antecedent and at most but remotely a cause, while that of the defendant who thereafter does plaintiff an injury is direct and proximate. The facts in this case do not fairly line up with such a situation. Conceding defendant was guilty of negligence, we find the contributory negligence of plaintiff was not only antecedent but continuing and actively concurrent until the accident happened, being both a remote cause and as efficient a proximate cause as any negligence of defendant. In the Fike Case, which was affirmed, the charge quoted contained this pertinent instruction:

"Even though you may believe from the evidence that the plaintiff or Charles Fike was guilty of negligence, yet if you further believe that such negligence of both the plaintiff and Charles Fike ceased before the negligence of the defendant began, and did not again occur before or at the time of the collision, then the jury should find for the plaintiff."

In other words, if plaintiff's active contemporaneous negligence was a concurring proximate cause, the doctrine of gross or subsequent negligence did not apply.

Under the most favorable view of plaintiff's testimony, the efficient proximate cause of the accident which befell him was the combined concurrent negligence of himself and defendant with no efficient intervening or supervening cause.

The rule is applied and instructively reasoned in the recent case of Krouse v. South. Mich. Ry. Co., 183 N. W. 768, filed July 19, 1921.

We find no occasion to disturb the conclusion of the trial court that plaintiff was guilty of contributory negligence as a matter of law, and there is no room for the doctrine of subsequent negligence under the undisputed facts.

The judgment is affirmed.

PEOPLE v. ALLIE. (No. 129.)

(Supreme Court of Michigan. Oct. 7, 1921.)

1. Indictment and information $\S$ 190, 191(9)—Defendant accused of robbery may be convicted of attempted robbery or assault and battery.

In a prosecution for robbery under Comp. Laws 1915, $\S$ 15616, providing that upon an indictment for any offense consisting of different degrees the jury may convict of any degree inferior to that charged, or of an attempt to commit such offense, defendant had a right to have the jury instructed that he could be convicted of an attempt to commit robbery or of assault and battery.

2. Criminal law $\S$ 795(1), 824(3)—In prosecution for robbery, charge that accused could be convicted for attempted robbery or assault and battery must be requested.

In a prosecution for robbery, the accused has a right to have the jury charged that he could be convicted of an attempt at robbery or of assault and battery, but the failure to give such charge when not called to the attention of the court is not ground for reversal.

Clark, Fellows, and Moore, JJ., dissenting.

Error to Recorder's Court of Detroit; Harry B. Keldan, Judge.

Base Allie was convicted of robbery, and brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

G. Sweetman Smith, of Detroit, for appellant.

Merlin L. Wiley, Atty. Gen., and Paul W. Voorhies, Pros. Atty., and W. McKay Skillman, Asst. Pros. Atty., both of Detroit, for the People.

BIRD, J. [1] Defendant was charged under section 15208, C. L. 1915, with having committed a robbery in the city of Detroit. A trial resulted in his conviction. Error has been assigned on the charge of the trial court.

By way of instruction the trial court said to the jury they could find one of three verdicts. They could find defendant guilty as charged; they could find him guilty of larceny from the person; or they could find him not guilty. Defendant's counsel agrees with this, but insists that it does not go far enough; that there were two other verdicts which could have been found, namely, "an attempt to commit a robbery and assault and battery." He further insists that the failure to so instruct the jury was reversible error, and he argues that this view is sustained by the recent statutory rape cases in which we have held that the trial court must, upon his own initiative, instruct the jury as to

the lesser offenses included in the offense charged. The cases referred to are *People v. Garner*, 211 Mich. 44, 178 N. W. 75, and *People v. Harvey*, 212 Mich. 393, 180 N. W. 372.

The prosecutor replies, in substance, that if defendant is correct in his position as to the two additional verdicts, he should have called the trial court's attention to the omission at the time. Not having done so, he cannot be heard to say that the omission was reversible error, and cites the following cases in support thereof: *People v. Brott*, 163 Mich. 150, 128 N. W. 236; *Driscoll v. People*, 47 Mich. 414, 11 N. W. 221; *People v. Waller*, 70 Mich. 239, 38 N. W. 261; *People v. Raher*, 92 Mich. 167, 52 N. W. 625; *People v. Warner*, 104 Mich. 337, 62 N. W. 405; 31 Am. St. Rep. 575; *People v. Smith*, 106 Mich. 437, 64 N. W. 200.

Both counsel appear to be well fortified in their respective contentions. It therefore devolves upon the court to point the way to a single and consistent rule in such cases. The statute appears to support defendant's contention as to the number of verdicts which could have been rendered. Section 15616, C. L. 1915, provides that:

"Upon an indictment for any offense, consisting of different degrees, as prescribed in this title, the jury may find the accused not guilty of the offense in the degree charged in the indictment, and may find such accused person guilty of any degree of such offense, inferior to that charged in the indictment, or of an attempt to commit such offense."

This statute would clearly give a defendant in a criminal case the right to have the jury instructed that he could be convicted of any of the included offenses. This court has held specifically that one charged with robbery may be convicted of an assault with intent to rob. *People v. Blanchard*, 136 Mich. 148, 98 N. W. 983. And the rule elsewhere appears to be that he may be convicted of assault and battery. *McClain's Criminal Law*, vol. 1, p. 463; 23 R. C. L. 1162; 22 Cyc. 481.

We think it clear under the terms of the statute that the defendant was entitled to have an instruction that he could be found guilty of an attempt to commit the crime of robbery or of assault and battery. The question then arises whether it was reversible error for the trial court to neglect to give this instruction upon his own initiative.

[2] As will be seen by an examination of the cases cited by the prosecutor, it has not been the general rule of this court to reverse verdicts in criminal trials for omissions to charge specific things where the trial court's attention was not called to them, nor any request proffered covering them. A similar question is discussed at considerable length in *People v. Brott*, 163 Mich. 150, 128 N. W. 236. In that case Brott was charged with breaking and entering, in the nighttime, a store not adjoining to or occupied

with a dwelling house, with intent to commit larceny. The trial court, in stating to the jury the essential elements they would have to find in order to convict, omitted to tell them that they would have to find the store was not adjoining to or occupied with a dwelling house. The court's attention was not called to the omission, and no request was made covering it. The omission was insisted upon in this court as error. After an exhaustive review of the authorities it was said:

"We adhere to the general rule that questions will not be reviewed unless raised in the court below, and brought here in accordance with the general practice, for to hold otherwise would enable defendants to raise most any question without exception. There is much good sense in the strictest rule upon this subject, and certainly to extend it beyond the exception mentioned, as intimated in *People v. Farrell*, 146 Mich. 291, 109 N. W. 440, where advantage was sought upon technical grounds, would be to put a premium upon a practice of treating a point as inconsequential, or conceded, and thereafter asking a reversal, upon the ground that it has been overlooked, thus allowing a defendant to have an 'anchor to windward' in case he shall fall of acquittal on the merits."

The question was again raised in *People v. Page*, 198 Mich. 524, 165 N. W. 755, that the trial court erred because he failed to charge the jury that they could find defendant guilty of manslaughter instead of murder, as charged. In disposing of the point, the court said:

"We find no occasion, under the circumstances shown here, to reverse this conviction for a claimed omission to charge the jury upon a point not then recognized by either side as tenable, not presented by any request, and not brought to the attention of the trial court by exception"—citing the case of *People v. Brott*, supra.

In *People v. Luce*, 210 Mich. 621, 178 N. W. 54, the point was made that the court was in error in failing to instruct the jury as to the weight to be given to the proof of good reputation offered by defendant. Mr. Justice Sharpe, in disposing of this point, said:

"The trial judge omitted to instruct the jury as to the weight to be given to the proof of good reputation offered by defendant. No request therefor was given. We think the rule stated in 16 C. J. p. 980 is a safe one to follow: 'Where defendant has given evidence of good character, he is entitled to appropriate instructions on request, although the neglect to give such an instruction in the absence of a proper request therefor is not erroneous.'"

See, also, *People v. Maczulski*, 194 Mich. 193, 160 N. W. 576.

These and many other cases illustrate the attitude of this court in refusing to reverse verdicts for failure to charge specifically

on some question where it was not requested. It is true, however, as defendant's counsel points out, that we have not followed this rule in several rape cases which have recently been decided. Among those cases are *People v. Lupu*, 208 Mich. 44, 175 N. W. 165, and *People v. Harvey*, 212 Mich. 393, 180 N. W. 372.

It is quite true in those cases we held that it was error for the court to neglect to advise the jury that they could convict of the lesser included offenses. These cases followed the case of *People v. Abbott*, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360, which case appears to have been the first departure from the general rule theretofore followed. The statute heretofore quoted, which entitles respondent to have the jury charged that they may convict of the included offenses, applies to other criminal cases as well as to rape cases, and we see no reason for any different rule to be followed in rape cases than in other criminal cases. We are satisfied that the holdings in the rape cases have gone too far, and that they are out of line with the general rule which has been followed in other criminal cases. For this reason the holdings in those cases must be modified to conform with the general rule.

In the present case the court did not advise the jury that they could convict the respondent of an attempt to commit the crime of robbery nor of assault and battery. Its attention was not challenged to it in any way. No request to that effect was proffered, and we are of the opinion that after counsel has neglected to call it to the attention of the trial court at the time he should not now be permitted to come before the appellate court and have the case reversed on that ground.

This being the only question that calls for our consideration, the judgment of conviction will be affirmed.

STEERE, C. J., and STONE, WIEST, and SHARPE, JJ., concurred with BIRD, J.

CLARK, J. (dissenting). If an instruction respecting the included offenses as provided by the statute quoted by Mr. Justice BIRD may be omitted and excused on the ground of the failure of counsel to prefer a request upon the subject, why may not a failure to instruct upon any subject be likewise excused, or indeed a failure to charge the jury at all. The correct rule was announced in *People v. Garner*, 211 Mich. 44, 178 N. W. 75, and in *People v. Harvey*, 212 Mich. 393, 180 N. W. 372.

Reversed. Defendant remanded to the custody of the sheriff of Wayne county. New trial ordered.

FELLOWS and MOORE, JJ., concurred with CLARK, J.

WARNER v. KERR et al. (No. 39.)

(Supreme Court of Michigan. Oct. 7, 1921.)

1. Deeds ⇨211(1) — Evidence held not to prove father incompetent at time of execution of deed to son.

In daughter's action to set aside deceased father's deed to son, evidence held insufficient to prove her claim that paralytic stroke had rendered the father mentally incompetent prior to execution of the deed.

2. Deeds ⇨211(4)—Undue influence must be established by something more than mere opportunity.

Undue influence as ground for cancellation of deed must be established by something more than proof of mere opportunity.

3. Deeds ⇨211(4)—Evidence held not to show undue influence in father's execution of deed to son.

In daughter's action to set aside deed of deceased father to son in which the father had conveyed to the son the same share of his property that he had given him by will, subsequently declared void for improper execution, and by which he made an equitable distribution of his property as between the son and the daughter, evidence held not to show that the son had obtained the deed by undue influence.

4. Witnesses ⇨202 — Conversation between attorney who drew deed and father admissible in action between son and daughter as to validity of father's deed.

In daughter's action to set aside deed of deceased father to son on the ground of mental incompetency and undue influence, testimony by attorney who drafted the deed and other attorney who had been in such attorney's office as to the conversation between such attorney and the father as to the drafting of the deed held competent; the rule of privilege between attorney and client not being applicable.

Appeal from Circuit Court, Calhoun County, in Chancery; Walter H. North, Judge.

Action by Mary Warner against John Henry Kerr and another. Decree for defendants, and plaintiff appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Henry F. Jacobs and Howard W. Cavanagh, both of Battle Creek, for appellant.

James M. Powers, of Battle Creek, for appellees.

BIRD, J. This is a contest between brother and sister over the estate left by their father. John Kerr, the father, was the owner of a farm of 140 acres in the vicinity of Battle Creek for many years. He was a successful farmer, and at the time of his decease, in May, 1918, his farm was worth about \$16,000, and his other property was worth upwards of \$10,000. He had two chil-

dren, Mary, the plaintiff, and John Henry Kerr, one of the defendants.

In May, 1915, the father made a will giving John Henry Kerr a life estate in the farm with the remainder to his children. To Mary he gave a life use of all the rest of his property, with remainder to her children, with a provision that in the event she had no children the remainder was to go to the children of John Henry. In November, 1917, he conveyed by warranty deed to John Henry Kerr the farm, reserving therein a life estate to himself. After his death John Henry Kerr filed the will for probate. Mary Warner, the plaintiff, appeared and objected to its allowance. The will was finally denied probate on the ground that it was not executed in accordance with the statute. An administrator was then appointed to administer the estate. Soon after, this bill was filed by plaintiff to set aside the deed of the farm on the ground that her father was unduly influenced by her brother to execute the deed, and upon the further ground that he was not mentally competent to make it.

[1] 1. Was John Kerr mentally incompetent in November, 1917? Plaintiff's contention that her father was incompetent is based upon certain proofs made by her that in May, 1917, he suffered a stroke of paralysis which materially affected his left side and his mind. Proof was admitted tending to show that after this so-called stroke the left side of his face was drawn and his gait was unsteady; that he had dizzy spells and at times he would cry; that he was forgetful; that his speech was affected, and that his mind was impaired, it being difficult for him to understand what was said to him, and also difficult to make himself understood; in short, that after the stroke there was such a weakening of both body and mind that he did not have the mental capacity to execute the deed in question. Upon this proof expert medical testimony was taken tending to show that he was mentally incompetent at the time the deed was executed.

On the other hand, it was denied that he had suffered a stroke of paralysis. It was shown that he had a short sick spell in May, 1917, and that it was caused by stomach trouble. It was shown that after this sick spell he went about as usual, and many witnesses and friends who had known him for many years and lived as neighbors and who had seen him often testified that they saw no material change in his mental or physical condition after his sick spell. After the sick spell, in the summer of 1917, he went from Battle Creek to the farm as usual, and it was shown that he had shoveled and hauled gravel; that he assisted in laying a cement feeding floor for the hogs; that he drove a mowing machine, hayrake, and the wagon while loading hay; that he stacked the grain, making three large stacks about 20 feet high;

that he assisted in taking out the wooden floor from the cow barn and substituting a cement one; that he assisted in cleaning wheat and taking it to market; that he sowed clover seed and assisted in threshing the grain, besides doing much other work. In addition to this, he was appointed a trustee to disburse a fund raised to help in rebuilding a neighbor's house that had been destroyed by a cyclone. In this capacity he disbursed about \$900 in various sums. Besides this, he negotiated a lease and the terms of sale of his farm to the United States government. The farm was on the edge of Camp Custer. When Camp Custer was enlarged, Mr. Kerr's farm was taken in and made a part of it. Mr. Kerr regretted this. He consulted two lawyers to see if he could avoid letting the government have it. When he learned resistance was useless, he gave up and made the best bargain he could. The negotiations were carried on by him. If Mr. Kerr could and did do these things after his so-called stroke, it is evident he was not in the precarious condition in which some of the witnesses for plaintiff attempted to picture him. Dr. Gething, who was in attendance after he had the so-called stroke, would not say upon the witness stand that he had had a stroke of paralysis. He said Mr. Kerr "had had high blood pressure, arteriosclerosis," but he did not think this had anything to do with that particular sickness. He called at his house only once when he had this sick spell, and he then prescribed for him for gastric ulcers of the stomach. The testimony bearing on the question of mental competency is very voluminous. We cannot hope to discuss all of it. All we can do is to give our conclusions after reading it. We are very much impressed with Mr. Kerr's physical and mental competency down to his last sickness in 1918. The record shows him to have been a strong, rugged Irishman, a good farmer, and possessing a better knowledge of business generally than the average farmer, and we think the picture of him as made by the record shows him to have had more mental strength down to his last sickness than either one of his children.

But, even if we concede that he had weakened in mind and body, as plaintiff says he had, after his sickness, it is not very important as bearing upon his act in deeding his farm to the boy. In May, 1915, his competency is not questioned. In that year he made the will and gave the boy a life use of the farm, and to the plaintiff a life use of the balance of his property. This was a division of his estate in the proportion of about three-fifths to the boy and two-fifths to the daughter. What he did in 1917 was simply carrying out a part of what he had provided for in his will in 1915. If he gave the farm to the boy by his will in 1915, when he was concededly competent, what evidence of in-

competency was it to deed it to him two years later, reserving a life use of it for himself? It was the natural thing for him to do to give the farm to the boy. He was much attached to the farm and wanted to keep it in the family. The boy had been raised on the farm and had remained there and worked the farm on shares for several years, but the record shows that it was the strong hand of the father that controlled it. Had the plaintiff acquiesced in the will when John Henry offered it for probate he would have, undoubtedly, allowed her to have the share her father gave her. It was not the father's fault that only about one-quarter of the estate goes to the daughter. He went to an experienced attorney and had him draw and look after the execution of the will. When the will was offered for probate the attorney was dead, and the other witness testified that he did not sign it in Mr. Kerr's presence. For this reason the probate court was obliged to refuse it probate. After the execution of the will in 1915 there was no change made by the father in the share that he wanted each child to have. We are persuaded that John Kerr was mentally competent when he made the deed and the chancellor was right in so holding.

[2, 3] 2. Was Mr. Kerr unduly influenced to make the deed to John Henry? Not much time need be taken with this question. If there were any competent evidence offered tending to show that such influence was attempted, we are not convinced that it had that effect. There is no proof that his condition, mentally or physically, was such in May, 1915, that he could be unduly influenced. Indeed, there is no proof that he was unduly influenced by any one. In 1917, by a conveyance of the farm to John Henry, he did just what he had provided for in his will in 1915. Both parties had an opportunity to influence their father, but undue influence must be established by something more than mere opportunity. *Severance v. Severance*, 90 Mich. 417, 52 N. W. 292; *Blackman v. Andrews*, 150 Mich. 322, 114 N. W. 218. Mr. Kerr lived in Battle Creek when his wife died in 1914. After her death plaintiff and her husband came to the father's house and lived with him. Mr. Kerr attended to his business matters in the city and went to the farm frequently with his horse and buggy. While the son was working the farm on shares Mr. Kerr appears to have kept in touch with the management of the farm. He assisted at times in the work and made and superintended repairs. After plaintiff went to live with her father the children were not cordial to each other. The ill feeling was obviously engendered by a feeling that each was trying to get the advantage of the other in the distribution of the father's property. If any attempt were made along this line, the tes-

timony does not show that it succeeded. Mr. Kerr made a very equitable distribution of his property. He undoubtedly died in the belief that he had given the farm to John Henry and the balance of his property to Mary. It was no fault of his that Mary will not get as much as he intended her to have. It is due in part to her own greed and bad management. We are impressed that the conclusions reached by the chancellor on both of the questions involved are the proper ones.

[4] 3. Exception was taken to the testimony of Mr. Winkler and Mr. Powers. Mr. Powers was the attorney who drew the deed, and Mr. Winkler was an attorney who had desk room in Mr. Powers' office, and by reason of this heard the conversation between Mr. Kerr and Mr. Powers with reference to the drafting of the deed. The testimony given by Mr. Powers was not within the statute. Neither party to the litigation was a stranger to the estate. Both parties were claiming under the client. Under these circumstances the rule of privilege between attorney and client does not apply. In *re Loree's Estate*, 158 Mich. 377, 122 N. W. 623. The rule is also stated in 40 Cyc. 2380.

We are of the opinion that the decree made by the lower court should be affirmed, with costs to the defendants.

CORD v. PLESS. (No. 10.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Municipal corporations $\S$ 706(6) — Negligence of automobilist colliding with buggy held for jury.

In an action for personal injuries received when defendant's automobile struck a buggy from the rear, negligence of the driver of the automobile held for the jury.

2. Municipal corporations $\S$ 706(1) — Allegation as to negligence held sufficient.

A complaint in an action for injuries received when defendant's automobile struck a buggy from the rear held sufficient, though the word "negligence" was nowhere made use of, in view of Comp. Laws 1915, $\S$ 12454.

3. Municipal corporations $\S$ 706(8) — Charge held to present issues within scope of declaration in negligence case.

In an action for personal injuries received when defendant's automobile struck a buggy from the rear in a village street, charge of the court concerning negligence held to plainly present the issues for the jury within the scope of the declaration.

4. Appeal and error $\S$ 1052(5) — Admission of evidence as to family of injured person held not prejudicial in view of determination.

In an action by a married woman for personal injuries, permitting plaintiff to testify that

her family consisted of her husband and four children held not prejudicial error; it appearing from the amount of the recovery that it did not arouse sympathy and magnify the damages.

5. Evidence §506—Expert should not testify to fact to be answered by jury.

In action for personal injuries, it was error to permit physician to testify concerning plaintiff's nervous ailments, "I believe it was produced by the accident," in answer to the question, "In your judgment, was it?" the question calling for a fact to be found by the jury.

6. Appeal and error §1052(5)—Admission of expert evidence held not prejudicial in view of determination.

It was not prejudicial error in a personal injury case to permit physician to testify as a fact that the accident permanently shattered plaintiff's nervous organization, where the damages awarded could not be regarded as excessive for the immediate injuries.

Error to Circuit Court, Livingston County; Joseph H. Collins, Judge.

Action by Nina Cord against Fred Pless. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

W. P. Van Winkle & Son and Louis E. Howlett, all of Howell, for appellant.

Francis J. Shields, of Howell, and Edmund C. Shields, of Lansing, for appellee.

STEERE, J. Plaintiff recovered a judgment of \$1,000 in the circuit court of Livingston county against defendant for personal injuries resulting from his son Harlow, a young man under 21 years of age, running defendant's automobile which he was driving with his father's permission, into a buggy in which she was sitting, throwing her out, breaking her arm and otherwise seriously injuring her, to just what extent is a matter in dispute.

The accident occurred in the village of Brighton at about 10 o'clock in the evening of April 27, 1918, on Main street, which extends easterly and westerly through the business section of said village.

Plaintiff was a married woman over 47 years of age living with her husband, John Cord, and family on a farm in the township of Genoa about 1½ miles east of the village. Defendant was also a farmer, living some 2 miles further east.

About 7 o'clock on the evening of the accident plaintiff and her husband started to the village of Brighton with a horse and open, single-seated buggy. Their daughter Caroline, a girl about 18 years old, also went to the village that evening on horseback. Their horses were tied at separate places on Main street. They spent the evening

there making purchases, attending a movie picture show, etc.

Defendant owned a Reo touring car, and on the same evening his son Harlow drove in it to the village of Brighton, parked the car on Main street, and attended a picture show in company with a young man by the name of Shippey, who arranged to go home with him that night.

Towards 10 o'clock plaintiff and her husband started home, traveling east on the right side of Main street, and met their daughter, who was also about to go home, and they went on to where her horse was hitched in front of a shop further east. Plaintiff's husband stopped their rig 7 or 8 feet from the right curb of the street, which was 50 feet or more wide, and got out to assist his daughter in mounting her horse.

In the meantime, after attending the show, Harlow, with his friend Shippey, rode west down Main street in defendant's car and stopped on the north side of the street opposite a hardware store, where they left the car for a short time and went into a store near by. They met two girls in that locality with whom they visited for a time, and eventually went back east down Main street in defendant's car, taking with them one of the girls who lived east of the village and got in with them to ride to her home. How often Harlow had driven up and down Main street before this is a matter in dispute, but when plaintiff's husband stopped and got out of the buggy to help his daughter mount her horse he was driving east on Main street behind the buggy faster than the buggy was going, and as plaintiff sat in it after it stopped, facing east, waiting for her husband, defendant's automobile driven by Harlow ran into the rear of the buggy with such force as to tip it up or over, throwing her, with the buggy seat, blankets, and groceries, out into the street. She fell on her head and shoulders and back, bruising them and breaking her arm, with other injuries the extent of which is in dispute. The accident occurred at a point in the street where there were no other vehicles, crowd or confusion of traffic in the vicinity, and plenty of room to pass the standing rig on the left.

Plaintiff charged that defendant's son, Harlow, negligently operated his automobile in traveling at an excessive and illegal rate of speed, without lights, with the auto brakes rusty, defective, and not in good working order, and the auto ran 2 or 3 rods after it hit the buggy before it came to a stop.

For defendant it was claimed that the auto was lighted and in good condition. Harlow was following plaintiff's buggy at a slow rate of speed, but as he came up to about 10 or 12 feet behind it to pass on the left the buggy suddenly stopped without any warning directly ahead of him in the traveled por-

tion of the street, and he immediately did everything possible to avoid a collision, but was unable to stop before he reached the buggy, and in turning aside to clear it he just struck its left hind wheel with the right-hand corner of the auto bumper, tipping it up so that plaintiff fell out, the auto coming to a standstill immediately thereafter.

The jury in returning its verdict apparently accepted plaintiff's version of conditions when the accident occurred, and accordingly found that the buggy in which plaintiff sat was standing still in a proper place on the highway convenient for others to pass, while defendant's automobile negligently driven by his son coming rapidly from the rear struck and tipped it over, causing the injuries shown.

[1] There was abundant testimony to carry the question of Harlow's negligence to the jury. Certain of his own testimony tended in that direction, as the following excerpts indicate. On direct examination he said in part:

"The buggy was directly in front of me, and I was traveling a little faster than the buggy. When I was about 10 or 12 feet from the buggy, it stopped suddenly without any warning that it was going to stop. * * * As soon as the buggy stopped in front of me I got to the left as far as I could swing. * * * I was unable to stop the car before I struck the buggy and was unable to pull the car to the left. * * * The right-hand corner of the bumper struck the left hind wheel of the buggy. * * * After striking the buggy my car came to a standstill."

On cross-examination he first set his speed at "6 to 10 miles an hour," which he subsequently changed to "6 or 7 miles per hour," when he was 25 feet away, and further said:

"I did not see any one get out of the rig. * * * There was plenty of room to pass on the left-hand side, and there was nothing between the rig and the curb on the left-hand side in the shape of rigs. * * * I had 25 feet in the clear to swing my car to the left. * * * I did start to turn to the left. If I had turned my car right short off then, I would have missed the rig. * * * I started to turn out, but I traveled along a bit further in turning out. I started to turn out gradually. Within that 25 feet I could have easily stopped the car with the brake going 6 miles an hour. * * * When I was 10 or 15 feet from the buggy, I was going 8 miles an hour, and I saw the buggy stop. I was still trying to turn out and had started to turn out when I was 15 feet back of them. * * * When I was about 10 feet back of the rig it came to a standstill and some one stepped out. * * * The car stopped as soon as I hit the rig."

Other witnesses who saw and heard the accident testify to seeing the rig standing still as the car coming up behind struck it with a "crash," and that the car ran 2 or 3 rods after it hit the rig before it stopped in front of a livery barn.

Harlow was a minor about 19 years of age, and defendant's liability for his negligence under the circumstances shown here is fixed by section 4825, Comp. Laws 1915.

Defendant's 44 assignments of error are grouped by his counsel to the contentions that there was:

"(1) Error in the charge of the court as given and in refusal to give defendant's requests to charge; (2) error in admission and rejection of evidence."

Under the first, defendant's counsel urge and argue in their brief that against their request the court submitted the case to the jury on a broader and different theory than that compassed by plaintiff's declaration, and as a basis for such contention quote an excerpt from page 6 of the declaration averring that:

"The cause of said accident and the injury hereinafter described was the fact that the lights were not turned on on defendant's car and the excessive speed of the driver, Harlow Pless, in making the turn aforesaid with his said automobile and the fact that he was driving the car with a defective and impaired brake, and plaintiff avers that the said defendant's son, Harlow Pless, stated at the time of the accident that his brake was defective and rusty, and that his lights were not much good, anyway."

From this quotation it is claimed plaintiff's only grounds of negligence permissible for the jury to consider were absence of lights, excessive speed, and defective brakes, there being no allegation in the declaration that "defendant failed to exercise due care or that he was negligent in running into and upon the rear of plaintiff's buggy." The substance of defendant's rather technical argument against the court's charge and plaintiff's declaration, considered together, is, as we understand it, that the court did not clearly limit the deliberations of the jury to consideration of the three lamely stated grounds of negligence charged in the declaration, and various authorities are cited to the undoubted rule that matters of negligence to which the injurious consequence is referred must be properly averred.

[2] In considering this complaint the singular fact must be admitted that in plaintiff's elaborate declaration in tort for damages resulting from negligence on the first eight pages of this record the very appropriate word "negligence" is nowhere made use of; but we are persuaded that by elaborate circumlocution its import is fairly sounded in the story told and charges made. The declaration is prolific in details of the accident, fully advising the reader of plaintiff's version of just what took place and fairly informing defendant of the nature of her case, with averments of duty and failure of duty on the part of the driver of the auto which struck the buggy in which she was sitting.

By the judicature act (section 12454, Comp. Laws 1915) it is provided:

"In the actions which are in this act retained, the forms of declaration now in common use may be employed; but no declaration shall be deemed insufficient which shall contain such information as shall reasonably inform the defendant of the nature of the case he is called upon to defend."

This provision is incorporated in substance in circuit court rule 22, dealing with the form and contents of declarations.

Preceding defendant's excerpt from page 6 of the declaration is an averment that it was the duty of defendant's son "to use every reasonable precaution to insure the safety of said plaintiff and to prevent his automobile from running into the buggy occupied by said plaintiff," and also the charge that he "failed to drive his car on said occasion in a reasonably proper and safe manner as required by the laws of the state of Michigan." Our automobile law imposes on a driver the duty to "use every reasonable precaution to insure safety." This language is in the following charged duty and failure of duty in the declaration:

"And the plaintiff avers that it thereupon became the duty of the said Harlow Pless to slow down the said automobile to a speed not exceeding 10 miles an hour, and to have control of said car and the control of the brake of said car, and to give reasonable warning of his approach, and to have proper lights for his automobile, and to use every reasonable precaution to insure the safety of said plaintiff and to prevent his automobile from running into the buggy occupied by said plaintiff; * * * that because of the failure of said Harlow Pless to perform his duty as above set forth he ran the front end of defendant's automobile into the rear end of the buggy in which plaintiff was seated," etc.

Defendant presented 19 requests to charge, eight of which appear to have been given verbatim with much of the others in substance. Counsel's claim that the court submitted the issues of fact to the jury on broader grounds than those laid in the declaration is mainly based on fragmentary excerpts therefrom which, if standing alone, might give color to the contention, but, when considered with their context and in connection with the charge, taken as a whole, are not misleading.

Referring to the statutory violations charged in the declaration, the court instructed the jury that the law required the car when driven to be equipped with adequate brakes to control it, lighted with at least one lighted lamp visible from at least 200 feet in the direction it was going, explained the statutory provisions as to permissible rates of speed, and as applied to the situation at the time and place of the accident said:

"And it was further his (Harlow's) duty as he approached the buggy upon this night to

slow his motor vehicle down to a speed not exceeding 10 miles an hour, and to give reasonable warning of its approach and use every reasonable precaution to insure the safety of the horse, the buggy, and its occupants."

[3] Having in a general way explained the law applicable to the charges in plaintiff's declaration, the court then, as applied to the case made for the jury by the evidence, narrowed those charges by elimination as follows:

"Now, I charge you that there is no evidence in this case that Harlow Pless was driving in excess of 10 miles an hour upon that occasion or that he did not slow down his car to a speed not exceeding 10 miles an hour as he approached the buggy; nor is there any evidence that the car Harlow Pless was driving was not equipped with adequate brakes sufficient to control the car at all times. So you are not to find the defendant's son was guilty of any negligence on that occasion in those respects. And I charge you that, if defendant's son, the driver of the car, failed in the performance of any of the other duties that I have stated he owed to the plaintiff under the law, then such violation constitutes negligence in itself. * * *

"I further charge you that, even though you should find defendant's son guilty of negligence in failing to avoid plaintiff's rig, and should further find that either plaintiff or plaintiff's husband was guilty of negligence in stopping their rig where they did, which stopping contributed in some degree to the accident, then plaintiff cannot recover in this suit. * * *

"I further charge you as to whether or not lights were burning on the automobile is a disputed fact under the evidence, and I further charge you that there is no evidence that the said Harlow Pless gave any warning of his approach. I therefore charge you that unless you find from the evidence that Harlow Pless did not have lights burning on the front of his car, or that he failed to give reasonable warning of his approach, and unless you further find that failure to have lights on his car or to give warning of his approach was the proximate cause of the injury, then plaintiff cannot recover for violation of the statutes of the state by the defendant in those respects."

The issues of this accident are not complicated in the law or facts involved. We think the charge plainly presented the issues for the jury within the scope of the declaration and find no reversible error in the charge as given, or the rejection of requests.

[4] Many errors are assigned on the admission and rejection of testimony. They have all been examined with care, and but two impress us as beyond the discretion of the court or bordering on an invasion of the technical rules of evidence. When plaintiff was called as a witness, she was allowed in her preliminary or introductory examination as to age, residence, family relations, etc., to state that her family consisted of her husband and four children. Objection was made at the time to any testimony in regard to her having children. On her counsel stating it was merely preliminary,

to get the "surrounding scenery," with no relation to damages, it was allowed to stand and passed over by the court with the remark that no question of recovery for injuries was involved except as to her. The subject was not thereafter referred to by plaintiff's counsel, except it was shown an 18 year old daughter was at the scene of the accident, as related, but on her cross-examination defendant's counsel interrogatively claimed against her denial that following her injuries she had asked defendant to take her two little girls to town in the same automobile, and questioned her as to their ages, to which she replied they were respectively 9 and 14 years of age. While this court has held it error in certain cases to show and emphasize that plaintiff had dependent children, because tending to prejudicially arouse sympathy and magnify damages, the damages awarded here are persuasive that such was not the result.

[8] Dr. Mellis, of Brighton, gave testimony tending to show that plaintiff's injuries had resulted in shattering her nervous organization, the particulars of which he described, when her counsel asked and was answered as follows:

"Q. Could those conditions which you discovered both physical and as to her nervous system be caused by the blow she received from the automobile accident? A. It could have been. Q. In your judgment was it?"

To which defendant's counsel objected as incompetent, and the witness was allowed to answer, "I believe it was produced by the accident." This is insisted upon as reversible error, since, as said in *People v. Hare*, 57 Mich. 505, 24 N. W. 843, "the question calls for the fact which was to be found by the jury." To the same point counsel also cite *Hitchcock v. Burgett*, 38 Mich. 501; *Van Deusen v. Newcomer*, 40 Mich. 90.

Dr. Mellis cared for plaintiff immediately after the accident and regularly attended her professionally thereafter because of her injuries until July 31, 1918. He testified that her physical examination after the accident disclosed "a laceration, bruises, and contusions of the shoulder, upper arm, upper fore arm and back, over the hip, extreme tenderness over the whole back, neck, and lower portion of the back"; also that he found "a fracture of the radius, upper third of the left arm. The left fore arm showed marked swelling, discoloration, pain, and crepitus on motion," and was "broken all the way through." The testimony was undisputed that she suffered extreme and protracted pain from these injuries. There was also testimony, both lay and medical, that the accident resulted in an apparently permanent nervous affection, called by Dr. Mellis "cervical and bronchial neuritis." He was describing that condition when he

was asked and answered the question objected to.

Heavy increased damages were contended for by reason of this claimed permanent affliction, which was disputed. While it has been held that the proper question as to cause of conditions found by a physician was what might have caused them rather than what did cause them, because the latter was a question of fact for the jury, that distinction was held in *People v. MacGregor*, 178 Mich. 436, 144 N. W. 869, to be in many cases of doubtful significance. The court quoted with approval from *Rogers on Expert Testimony* in part as follows:

"Neither do we appreciate the fine distinction sometimes said to be drawn between asking the expert whether, in his opinion, certain causes might produce certain results, and asking him whether, in his opinion, they did produce certain results."

[9] Whatever view is taken of this distinction, we consider it of scant importance here, inasmuch as the damages awarded could not be regarded as excessive for the immediate injuries and result undisputably shown, and it cannot be said the error, if any, was reflected in the verdict.

We find no reversible error in this case, and the judgment will stand.

C. A. S. ENGINEERING CO. v. H. J. WALKER CO. (No. 31.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Principal and agent $\S$ 47—Contract held to give exclusive selling privileges.

A contract between plaintiff and defendant concerning the sale of defendant's automobile parts held to give to plaintiff exclusive selling privileges of all parts manufactured and machined by defendant, with one exception, and plaintiff was entitled to a commission on sales made by the defendant.

2. Appeal and error $\S$ 1046(5)—Remark of judge held not shown to be harmful.

A remark of judge that it was strange that bookkeepers could not agree, and that maybe it was that fact that has given rise to the statement that bookkeeping sometimes is an art, held not shown to have been harmful, so as to require reversal.

3. Principal and agent $\S$ 89(9)—Whether agent proved expense incurred held for jury.

In an action on an account growing out of a commission agreement, whether or not plaintiff sales agent proved an expense incurred on account of a certain type of motor manufactured by defendant manufacturer held for the jury.

4. Appeal and error $\S$ 1033(5)—Instruction on fraud held favorable to appellant.

In an action by sales agent against manufacturer of automobile parts to recover com-

missions, *held*, that court did not err in charging on the question of fraud, as far as defendant was concerned, in view of the evidence; defendant objecting that fraud was not an issue.

Error to Circuit Court, Wayne County; Henry A. Mandell, Judge.

Action by the C. A. S. Engineering Company against the H. J. Walker Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Lodge & Brown, of Detroit (Isador Grossman, of Cleveland, Ohio, of counsel), for appellant.

Clark, Emmons, Bryant, Klein & Brown, of Detroit, for appellee.

MOORE, J. Plaintiff was engaged in the business of soliciting orders for automobile parts. Defendant is an Ohio corporation, with office and factory in Cleveland, and was engaged in the machining and manufacturing of automobile parts. This litigation arises out of a contract entered into between the parties on the 13th day of July, 1917. A large amount of business was done under this contract. Controversies arose between the parties, resulting in this litigation. A verdict and judgment were entered in favor of the plaintiff in the sum of \$52,371.91. The plaintiff concedes there was improperly included in the verdict an item of \$1,035.13, and voluntarily remits that amount, leaving the judgment to remain at the sum of \$51,336.78.

Upon the oral argument counsel for appellant admitted plaintiff ought to have a judgment for \$15,000 to \$30,000, but a brief filed subsequently modifies that concession, and now fixes the amount at the sum of \$11,870.33, besides interest. The essential portions of the contract which are involved read:

"Detroit, Michigan, July 13, 1917.

"Memorandum of agreement made by and between the H. J. Walker Company, an Ohio corporation, with headquarters at Cleveland, Ohio, hereinafter known as the party of the first part, and the C. A. S. Sales Company, a corporation organized and existing by virtue of the laws of the state of Michigan, with headquarters at Detroit and Jackson, Michigan, hereinafter known as the party of the second part, to wit:

"Whereas, the party of the first part is desirous of making such arrangements as may be necessary to successfully handle the selling of its products and machine work throughout the United States of America, and the party of the second part being desirous of obtaining such parts for sale throughout the United States of America as manufactured by party of the first part:

"Now, therefore, the parties have agreed as follows:

"(1) The party of the first part does hereby grant the party of the second part the exclusive selling privileges of all parts manufactured or machined by party of the first part in the United States of America during the life of this contract, with the exception of any parts that the party of the first part may manufacture and sell to, or any parts that the party of the first part may machine for, Chandler Motor Company, of Cleveland, Ohio.

"(2) It is agreed by and between both parties to this contract that on all basic prices for machine work or parts which the party of the first part may quote on that they will add a commission of five (5) per cent. on the gross amount of each sale made by party of the second part for party of the first part in the United States of America, with the exception as noted in paragraph 1, such commission to be paid only on such orders as shall have been accepted and approved, and actually shipped by party of the first part and paid for by the purchaser.

"It is further understood that, should it become necessary at any time to quote a lower figure than the basic price originally given by party of the first part on any articles manufactured or machined by them, then and in that event both parties shall share equally in such reduction of price, the party of the second part accepting less than five per cent. in order to obtain a desirable contract. However, in no case will the party of the first part ask party of the second part to accept less than two per cent.

"(4) Party of the second part agrees to obtain contracts for the sale of articles manufactured by party of the first part in the United States of America, to individuals, firms, or corporations, or who shall have been approved as to credit by party of the first part, a total of not less than \$2,000,000 between the date of the contract herewith, and one year from such date.

"(6) Party of the second part does hereby agree that they will not make any contract or sign any agreement with any individual, firm, or corporation on behalf of the party of the first part, unless authorized in writing by party of the first part so to do.

"(7) Party of the second part does hereby agree to devote a sufficient amount of time to properly and successfully place the articles manufactured or machined by party of the first part before prospective purchasers in the territory allotted to party of the second part.

"(8) Party of the first part does hereby agree to refer all correspondence and inquiries for articles or machine work as manufactured by party of the first part from territory allotted to party of the second part.

"(9) All commissions that shall have been earned by party of the second part hereunder, in accordance with the terms of this contract, shall become due and payable ten days after collection by party of the first part, on all sales made by party of the second part.

"(11) It is further agreed and understood by and between both parties to this contract that the expense of producing what will be known as Type A truck motor, jigs, dies, and tools

shall be borne equally by both parties to this contract."

"It is further understood and agreed, by and between both parties hereto, that at all times party of the second part shall have the right and privilege to ask co-operation and engineering service from the party of the first part for the production of samples on various matters, where necessary in order to obtain sales for material manufactured by party of the first part."

We quote from the brief of appellant's counsel as follows:

"(1) The court erred in charging the jury that plaintiff was entitled to commission upon all sales, not only of parts actually sold by it, but also those sold by defendant during the life of the contract and in refusing to give the jury defendant's fourth request.

"(2) The court erred in not charging the jury, as requested by defendant's fifth request, that plaintiff was entitled to no commission, except upon sales of automobile parts manufactured or machined by defendant.

"(3) The court erred in commenting unfavorably upon the testimony of accountants, and upon referring to bookkeeping as an art, rather than an exact science of mathematics.

"(4) The court erred in not charging the jury, as requested by defendant's third request, that plaintiff, having proven no expense incurred by it on account of producing Type A motor, was not entitled to recover any sum on that account.

"(5) The court erred in charging the jury upon the subject of fraud."

Groups 1 and 2 may be considered together. It is the contention of counsel that under the contract plaintiff was only entitled to commission upon the sales actually made by it, and was not entitled to any commission upon sales made by defendant; that the "exclusive selling privileges" does not prohibit the defendant itself from selling its goods, and does not entitle plaintiff to commissions on such sales. Counsel cite authorities which they think sustain their contention. An examination of them shows them easily distinguishable from the instant case.

[1] The pivotal question is: What does the contract mean, when read in its entirety? Its language is not ambiguous. It in specific terms grants to the party of the second part the exclusive selling privileges of all parts manufactured and machined by the party of the first part, with one exception. There is nothing in the contract anywhere inconsistent with this grant. See *Whorley v. Exposition Co.* (Tenn. Ch. App.) 62 S. W. 846, and *Garfield v. Peerless Motor Co.*, 189 Mass. 395, 75 N. E. 695.

[2] Was there reversible error in what the court said to the jury about the testimony of accountants in which he used the following language:

"I can simply say that it does seem strange, perhaps as strange to you as to me, that the persons who are versed and learned in the art

of bookkeeping do not agree as to what the books actually show. May be that is the fact that has given rise to the statement that bookkeeping sometimes is an art, rather than an exact science of mathematics."

Counsel say:

"Is it any wonder that, after the court had so clearly expressed his lack of confidence in the testimony, the jury concluded to follow his suggestion, and, believing that plaintiff was entitled to a verdict for some amount, made no attempt whatever to reconcile the apparent discrepancy, and rendered a verdict for the full amount of the claim? We respectfully submit that there was no reason whatever for the court to so encroach upon the province of the jury, and that his action in so doing is reversible error."

In this connection counsel for both sides call attention to a statement found at the foot of page 89 of the record, at the bottom of the certificate of the auditor of the plaintiff, reading:

"We agreed with the representatives of the Walker Company for present purposes as to all figures except those relating to the Ford and Trego Companies."

This statement may suggest that what was said by the trial judge was unnecessary, but there is nothing in the record to indicate that what was said was harmful error.

[3] 4. Did the court err in not charging the jury that plaintiff had not proven any expense incurred on account of Type A motor, and therefore could not recover for that item? There was testimony upon that subject as follows:

"I had a talk with Mr. Walker and Mr. Carey as to the disposition of that truck motor over in Cleveland. We told them that we could not use the motor, because we had no way to manufacture it, and we could not take it, and they, of course, were very willing to take it, because they were manufacturers and wanted it. Mr. Armstrong, Mr. Tobin, and myself were all there at this meeting. Mr. H. J. Walker and Mr. Carey were there on behalf of the Walker Company. They said, if we would turn over the original drawings, which were in our office at the time, the tracings, they would pay us for all the expenses that we had been put to, and take the motor themselves. On my return to Detroit, I forwarded a letter and invoice in accordance with our conversation. Exhibits 9 and 10 are the letter and the invoice to which I refer. It is a letter from the C. A. S. Engineering Company, dated July 28, 1918, to the H. J. Walker Company, Cleveland, attention of Mr. Carey:

"Gentlemen: As per our meeting of yesterday, we herein inclose invoice covering the expense of this company on the Walker motor.

"Yours very truly,

C. A. S. Engineering Company,

"Per [I presume that that is Mr. C. D. Cutting]."

"Now attached to that is an invoice, Exhibit 10, C. A. S. Engineering Company, 790 Woodward avenue, Detroit, Michigan, dated August

7, 1918. Sold to the H. J. Walker Company at Cleveland, amount paid to Thomas & Thomas for services in connection with design \$4,212.19. I forwarded the tracings to the Walker Company. I have never ever had the motor or the tracings, or anything in connection with it, since."

We think there was testimony to go to the jury upon that question.

[4] 5. Did the court err in what he said to the jury upon the subject of fraud? Counsel complain of the following:

"If, however, you find, through false representations or fraud, that plaintiff was induced—and that is the claim here—to change from 5 to 2 per cent., then, of course, that fraud could not be permitted to work any injury to the plaintiff, and 5 per cent. would be the proper amount under the contract. In that connection I charge and instruct you as a matter of law that the rule where fraud is charged is a different rule from the rule that I shall give you with regard to the burden of proof. Where fraud is charged, there should be strong, positive proof of fraud, before a jury is justified in finding that fraud did actually bring about a change or such a change as is claimed here. I will speak to you more particularly on the burden of proof in a few minutes."

Counsel say there was no question of fraud in the case. It was not only the claim of the defendant that plaintiff was not entitled to any commission on the Ford contracts, but it was its further claim that in any event it was entitled to but 2 per cent. commission. Its claim was stated in a letter to the plaintiff under date of June 21, 1918, from defendant:

"Notwithstanding the fact that the business from the Ford Motor Company is entirely due to the personal efforts of our Mr. H. J. Walker, we are planning on paying you a commission of 2 per cent. of the price per set, less the amount agreed upon to cover machinery, jigs, fixtures, and special equipment. This business was figured on the basis of a net profit of 15 per cent., and from present indications the actual profit will run considerably under this."

The plaintiff's version of that matter is as follows:

"When I was on the stand before, you started to ask me about an interview between me and Mr. Walker about the amount of the Ford commission. I remember such a talk as that in our office in Detroit. At the time he stated to me that he did not believe that they would make 15 per cent. profit, and in view of that fact he asked me if we would accept 2 per cent., instead of 5 per cent. I told him that I would be very glad to do that, if they could show me that they did not make 15 per cent. * * * He said he would let it go until later

on, which was done also. I said that I would let that matter of commission run a little further. I would take his word for it until they could show us what they had done. The price per crank case was \$209.33 each from the Walker Company to the Ford Company for machining operations. There was \$10 apiece, as I remember, from the figures to me at a later conversation; that is, these tools, jigs, and fixtures. Deductions on each invoice. The Ford Company advanced the Walker Company \$275,000 in order to make preparations to carry out this contract, and the price was to be placed on the machining operation so as to cover this \$275,000, and would be paid back pro rata on each invoice for cases shipped. The amount as I remember was \$10.08 apiece per crank case. The machining price of the case would have been \$10.08 more, had the Ford Company not given them \$275,000 to begin the operations with. Afterwards Mr. Walker did not furnish me with any figures, referring to the profit. I got those from Mr. Carey. Mr. Carey wrote us a letter. Exhibit 8 is the letter. I went over there to talk with them, and I told them that I was going to reinstate the charge of 5 per cent. against the contract unless they could show me that they had made less than 15 per cent. I got the actual figures on the pistons at the time. They were furnishing pistons to the Ford Motor Company, as well as crank cases. It was all in one contract. We received—as I remember, we had two prices on pistons. There was a little difference in the airplane and the other type of piston. One was 75, and the other was 85. The actual labor cost in going over their records at the plant was 22 cents each. That was what we did. I saw their cost cards. I think that part should be in evidence. Mr. Carey told me that their labor piece work, was 22 cents each, for each piston, in their plant. They were entitled to the scrap coming off each piston, which netted the Walker Company 15½ cents each, making a total cost of machining operations to the Walker Company of 6½ cents each. Their overhead, which covered oils, all overhead, freight, express charges, superintendence, foreman, was figured at 200 per cent. on top of this 6½ cents, making a net cost of pistons to the Walker Company of approximately 18½ cents, for which they received 75 cents each, or over 300 per cent. The crank cases, as I say, we didn't go into. Only to the effect that Mr. Carey told me that they were making upwards of 25 per cent. on them. It was after that that we reinstated the charge of 5 per cent."

If any one has a basis of complaint because of what the trial judge said upon the subject of fraud, it is not the defendant. The amount involved in this litigation is large, but the questions involved are not complicated. The case was carefully and fairly tried.

The judgment is affirmed, with costs to the plaintiff.

RANDALL v. PORT HURON, ST. C. & M. C. RY. CO. et al. (No. 89.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Release ¶24(2)—Settlement not set aside for fraud, in absence of rescission by repudiation and tender back of money paid.

Street railway company's settlement with injured passenger will not be set aside on the ground of fraud, in action for death of passenger, where settlement has not been rescinded by repudiation and tender back of amount paid; commencement of action not being a sufficient repudiation of settlement.

2. Release ¶24(2)—Settlement cannot be repudiated until after tender back of money paid.

A settlement for injuries received cannot be repudiated until the money received has been tendered back.

3. Release ¶25—Settlements favored.

The law favors settlements made by parties, and when made they are binding until rescinded for cause.

4. Release ¶24(2)—Tender necessary to rescind contract of settlement, though apparent it would not be accepted.

A tender back of an amount paid in settlement for injuries is necessary to rescind a contract of settlement for fraud, though it is apparent that tender would not be accepted.

5. Release ¶24(2)—Settlement cannot be repudiated by tender back of amount paid 2¼ years after date of settlement.

Settlement for injuries could not be repudiated for fraud by tender back of amount paid 2¼ years after date of settlement, in absence of excuse or explanation of delay; such repudiation not being made within a reasonable time.

Error to Circuit Court, Wayne County; Clyde I. Webster, Judge.

Action by Nellie M. Randall, administratrix of the estate of Frank Hayner, deceased, against the Port Huron, St. Clair & Marine City Railway Company and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Monaghan, Monaghan, O'Brien & Crowley, of Detroit, for appellant.

Frederic T. Harward and Corliss, Leete & Moody, all of Detroit, for appellees.

STONE, J. The plaintiff has brought error to review a judgment in the Wayne circuit court, where, on motion, at the conclusion of plaintiff's case, the court directed a verdict for defendants.

The action was for damages for personal injuries sustained by Frank Hayner, deceased, while he was a passenger riding on

one of defendants' south-bound interurban cars, operating between Port Huron and Detroit. The injury occurred on June 9, 1917, and was a consequence of a head-on collision between two of defendants' interurban cars. It occurred about 1½ miles north of St. Clair, the home of Mr. Hayner. The suit was commenced February 25, 1918, and was originally in the name of Frank Hayner, as plaintiff; but upon his death, which occurred on May 14, 1919, suggestion of death of plaintiff was filed, and the suit was continued in the name of Nellie M. Randall, administratrix. The trial of the case began on September 24, 1919. At the conclusion of plaintiff's case on September 29, 1919, defendants moved for a directed verdict, on the ground that deceased and defendants had settled and adjusted plaintiff's claim for the injuries resulting from this wreck by accepting \$250 in full settlement of his claim on June 29, 1917, "and on the ground that this settlement should stand because, under the authorities of this state, there is laches shown in the rescission of the settlement, a tender 27 months—nearly 27 months has expired since the settlement was made; and, second, that the settlement is a legal one. There is no fraud or overreaching shown here for a jury to speculate on."

Before concluding plaintiff's case, the claim agent of defendants was called by plaintiff as an adverse witness for cross-examination. Upon his testifying that he was the claim agent who had secured the releases in question, a tender was made to him, for and in behalf of plaintiff, of the sum of \$250 and interest thereon for 27 months (\$278.35), as a return of the money paid to deceased on June 29, 1917. This tender was refused, and the witness testified that he considered the release a final and definite one; that he so considered it at the time it was given; and that his opinion as to its finality and definiteness had not changed since the time it was given. Upon his refusal, and upon the refusal of defendants' counsel, to accept the money, it was deposited with the court. The plaintiff, at the conclusion of the case, amended the declaration, by permission of the court, and against the objection of defendants' counsel, by adding the following:

"That on or about the 29th day of June, 1917, the said defendants, through their servants and agents, and while the plaintiff was in a weakened and highly nervous condition, falsely and fraudulently represented to said plaintiff that he, the said plaintiff, was not injured, and falsely represented and guaranteed that the said plaintiff would recover from his injury within one month.

"That said plaintiff, relying upon these false and fraudulent statements, and induced by the duress of said agents, and without knowing that he was signing a release for damages for injuries not known to him at the time, signed

said release. That at the time he signed said alleged release he did not read the same, nor was it fully read to him, and that plaintiff at the time did not know, nor was he informed, that it was a full release."

The statement, receipt, and release, being Exhibits 2 and 3, signed by deceased, are as follows:

Exhibit 2.

"Port Huron, St. Clair & Marine City Railway
"To Frank Hayner, Dr., Detroit, Michigan.

For damages arising from the injury to the said Frank Hayner, who was injured by reason of a collision between said company's cars on which he was a passenger on or about June 9, 1917, at or near Yankee street, two miles north of St. Clair, Michigan, being in compromise and settlement of all liability whatsoever of said company to the said Frank Hayner, arising or to arise out of said accident; release to benefit all companies and persons chargeable with negligence or liability in the premises \$250.00

"O. K. \$250.00.

"G. A. Chapman, A. G. C. A.

"June 29, 1917.

"This account has not been previously vouchered.

"Correct: Irwin Fullerton, Auditor.

"A. F. Edwards, Treasurer.

"Received June 29, 1917, of the said company two hundred fifty (\$250.00) dollars in full of the above account.

"\$250.00

Frank Hayner."

Exhibit 3.

"Detroit United Lines.

"\$250.00. St. Clair, Michigan, June 29, 1917.

"I, the undersigned, Frank N. Hayner, of St. Clair, Mich., acknowledge the receipt from the Port Huron, St. Clair & Marine City Railway of the sum of two hundred fifty and ⁰⁰/₁₀₀ dollars, in consideration of the payment of which the said railway company is hereby released and discharged from all claims and demands on account of loss and personal injuries sustained by me by reason of a collision between said company's cars, on one of which I was a passenger on or about June 9, 1917, at or near Yankee street, two miles north of St. Clair, Michigan; the said payment being accepted by me in compromise and settlement of all liability whatever of the said company to me arising or to arise from the said accident, including liability on account of injuries unknown as well as on account of those known, and for consequences that may hereafter develop from injuries, as well as liability for consequences now developed; this release to benefit all companies and persons chargeable with negligence or liability in the premises.

Frank Hayner.

"Witness:

"A. A. LeFevre,

"A. E. Thompson."

The deposition of deceased was taken August 30, 1918, and was introduced in evidence

upon the trial. He testified that at the time of the collision he was sitting in the front seat of the smoker of the south-bound car, and that as the cars came together he was shoved under the ceiling or roof of the car, with his head wedged down between his knees. He was immediately taken from the scene of the wreck to the office of Dr. Thompson in St. Clair. Dr. Thompson had been the family physician of deceased and family, but it was the claim of plaintiff that in this case he was acting for defendants, and there was evidence tending to support that claim. There was evidence that this physician made only a cursory examination of the deceased, to ascertain, apparently, whether or not any bones were broken. It does not appear that there were any broken bones. Deceased testified that he at once complained of severe pains in his back which he suffered, but that the doctor made no examination of his back on that day; that Dr. Thompson and defendants' claim agent called on deceased the second day following the accident, and, although the doctor called on deceased four or five times between the date of the accident and the time of the claimed settlement, he gave him no treatments, nor did he prescribe any, except the use of liniment for his back; that on the first visit that the claim agent and the doctor made some suggestion about money was made by the former, the succeeding visit of the claim agent and the doctor resulting in the payment by the defendants to deceased of \$250 by check on June 29, 1917, and the signing by deceased of Exhibits 2 and 3. Up to this time deceased was confined to the house nearly all the time, and was sitting or lying down most of the time. He walked down town once during this period, but had to be helped home. Between the middle of July and the 1st of August, 1917, deceased resumed his work, that of an oiler on the boat on which he had formerly worked, and went to Chicago for that purpose. He gradually grew worse while on the boat, until he finally collapsed, and was taken off the boat on November 17, 1917, and taken to his home in St. Clair. He was on November 26, 1917, taken to the United States Marine Hospital in Detroit, and remained there substantially all of the time until his death on May 14, 1919.

There was evidence that deceased, prior to this accident, was strong and robust; that he was 43 years old at the time, and the only prior illness or disability was an attack of pneumonia 12 years prior. He had sailed on the Great Lakes since he was 18 years old. The defendants offered no evidence, and so far as this appeal is concerned there is no dispute that this injury was the cause of death.

The trial court, in its charge to the jury directing a verdict for the defendants, stated certain controlling facts as appearing in evidence; the principal one being that de-

ceased knew, when he signed Exhibits 2 and 3, that he was settling his claim for damages, and that he was making a settlement with the companies for \$250. A careful reading of the record has convinced us that the court was fully justified in its statement of facts, and that it reached the correct conclusion in the case. We shall quote somewhat at length from the charge, as follows:

"Gentlemen of the Jury: I believe that it is my duty, under the law of Michigan, as I see it, to direct a verdict in this case. As you have seen, or heard, on June 29, 1917, defendant paid the plaintiff \$250, and he signed Exhibits 2 and 3, which are releases of all further liability. In the case of *Niederhauser v. Detroit Citizens' Street Railway*, 131 Mich. 550, 91 N. W. 1028, the court decided that one who seeks to rescind a settlement for fraud or mistake must first place the other party in statu quo. In other words, our Supreme Court held in this case that, if one seeks to rescind a settlement on the ground of fraud, he must first tender back the money received in the settlement. In the case of *Crawley v. Studebaker Corporation*, 183 Mich. 462, 149 N. W. 1019, the plaintiff accepted \$42.50 from his employer and gave a receipt in full for personal injuries and damages sustained, the amount of the payment representing the time which plaintiff had lost. He claimed that he did not read the release, or know what it contained; that he signed it in reliance upon the advice of the physician employed by defendant in such cases, who told him that his injuries were not permanent. The trial court directed a verdict for defendant, for the reason that the amount received had not been tendered back, and the court held that the receipt and the release was conclusive against the plaintiff's right of recovery. The court said on page 465 of 183 Mich. (149 N. W. 1020): 'With respect to the error specially assigned, it is contended by the appellant that he made a case relieving him from the duty of tendering to defendant the money it had paid to him in settlement [citing cases], in which cases the principle applied is that, as with respect to a disputed or unliquidated demand, an accord is matter of contract, preceding or accompanying satisfaction, if the contract is not made and the money paid and received pursuant thereto, but the money is paid and received on some other account, it need not be tendered back before bringing suit upon the demand.' * * * On page 468 of 183 Mich. (149 N. W. 1021) the court says: 'But there is no room for the application of the doctrine in the case at bar, because the evidence that plaintiff and defendant did reach an agreement with respect to compensation for plaintiff's injuries is very clear. [Here follows a further quotation from the *Crawley Case*.] In the case of *Burns v. Estate of Reading*, 188 Mich. 591, 155 N. W. 479, in proceedings against a decedent's estate to secure compensation for personal injuries, defendant estate claimed that the injured employe had accepted \$250 in full settlement and satisfaction, and had executed a release under seal, for his broken leg. The limb failing to knit, claimant attempted to repudiate the settlement and recover for his injury, which resulted in amputation, charging the physicians with fraudulently misrepresenting to claimant

his true condition. He made no complaint of the alleged fraud during upwards of 20 months after the date of the release. The court held that he had ratified the release by long acquiescence, and could not repudiate it for fraud after so long a period. In this case the court held that one who seeks to rescind a compromise for fraud must act promptly, after discovering the wrong, and must return the consideration received in full.

"While there is still some real conflict in the cases, as to whether or not there has to be a tender of the amount received when it is sought to set a release aside on the ground of fraud, by the weight of authority the cases divide themselves into two classes: First, where the fraud goes to inducing the injured party to sign a release, the effect of which he understands; and, second, where that fraud is in inducing him to sign a release under the belief that he was signing something else. I am satisfied that Michigan has recognized this distinction, and has held, in the cases already cited, that where the fraud goes to inducing the injured party to sign a release, tender of the amount received has to be made within a reasonable length of time after discovery of the fraud. In other words, if a party claims that he was induced through fraud to enter into the contract, in order to rescind that contract he must put the parties in statu quo; that is, he must return the money that he received, and ask to have the contract or agreement or release set aside on the ground that he entered into it through fraud. If that is the situation in the case at bar, if the deceased signed these releases through fraud, through the doctor and the claim agent telling him that he was not hurt, and that they would guarantee that he would be well within a month, and that was not true—in other words, if they fraudulently induced him to sign those releases upon those grounds, and it turned out they were not true—in order to set aside those releases that he had signed, he would have to tender back that \$250 within a reasonable length of time after he found that they had practiced fraud on him. Now, when did he find that out? The releases are dated on the 29th of June, 1917. He went to work on the boat a few weeks after that, was not well; was not well at any time after signing the releases. According to the testimony, he got worse after that, and finally collapsed on the boat, and had to come home, some time in November, 1917. You may say that he knew it then. He did not get well within a month, as the doctor had guaranteed he would, and it began to look as though he was seriously hurt; that they had practiced fraud upon him. It is now 27 months since he signed these releases; it is nearly 2 years since he came back from the boat, and found he was hurt. He went to the hospital in the fall, and again in the next spring. It is over a year and a half since he went into the hospital. Suit was started on February 25, 1918, a year ago last February, and still no tender back of this money was made until to-day, the 29th of September, 1919. I am not prepared to say just what day it was that he discovered this fraud that had been practiced upon him. It was some time between November, 1917, and February, 1918, and I believe that he had to return that money within a reasonable length of time after that, and it is impossible for me to hold that

this is a reasonable length of time after the discovery of the fraud."

The court then referred to *Porth v. Cadillac Motor Car Co.*, 198 Mich. 501, 165 N. W. 698, and distinguished it from the instant case. The court further said:

"So in this case, if the testimony showed that he signed one paper, signed this paper, thinking that it was a receipt simply for some money, and that what he was going to get at the end of the year, or some other time, was left open, then it would be a question for you gentlemen to decide whether or not that was the contract that he entered into, or whether he gave an out-and-out release. I am unable to find from the testimony in this case that he thought that. It seems to me that this is a case where the fraud was in inducing him to sign the release. He knew he was making a settlement with the company. He knew he was settling with them for \$250. He thought he would take a chance—he was advised that there was nothing the matter with him, and that he would be well within a month, and so, as he says himself, he took a chance and signed. There was nothing left open; there was not to be any further payment that I can find. It was not a part release. He simply was induced, through fraud, as they claim now, to sign a release. It turned out that he was not well in a month, and never did get well. It looks as though he was badly hurt, from the testimony; this injury to his spine caused him a great deal of suffering, and he finally died after many months. If there was fraud practiced, it seems to me from this testimony, as I say, it was in misrepresenting to him his condition at the time he signed the release, and getting him to sign for a small amount, like \$250, by covering up his real condition and falsely leading him to believe that he was not hurt, when he was. Under these circumstances, as I say, it seems to me that he would have to return the money paid before he could sue, and has to return it within a reasonable length of time after discovery of the fraud."

The court then quoted at length from the testimony, after which it directed a verdict for the defendants.

Appellant's counsel admit in this court that the trial court correctly distinguished between the two classes of fraud, the first being frequently referred to as fraud in the inducement, and, second, as fraud in the execution; but they contend that the court erred in its interpretation of the law respecting these two classes, and also in its finding and application of the facts to the law. The questions are discussed under appropriate assignments of error.

[1-4] It is urged that a tender of the money received is not a prerequisite to the beginning of suit, where settlement is induced by fraud. It is conceded that in the *Porth* Case language was used indicating that, if the alleged fraud had been in the inducement, a tender would have been necessary; but it is said that that language was unnecessary to a determination of the case, and they assume that the point has not been definitely decided

by this court. Counsel cite many cases from other jurisdictions in support of their claim. On the other hand, counsel for defendants claim that a tender was necessary, and that our reports are replete with authorities on this subject, and that it is not necessary to review cases in other jurisdictions, and the following cases are cited, in addition to those referred to by the trial court: *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *Pangborn v. Insurance Co.*, 67 Mich. 683, 35 N. W. 814; *Slater v. Health & Accident Co.*, 133 Mich. 347, 95 N. W. 89; *Wendt v. McGuire*, 194 Mich. 453, 160 N. W. 540; *Hubbard v. Oliver*, 173 Mich. 337, 139 N. W. 77; *Kimble v. Gillard*, 177 Mich. 250, 143 N. W. 79; *Ortmann v. Fletcher*, 117 Mich. 501, 76 N. W. 63.

In the *Slater* Case, Justice Carpenter, speaking for this court, said:

"He brought this suit without returning or tendering the money received by him when said adjustment was made. It is conceded that, under the decisions of this court (see *Pangborn v. Insurance Co.*, 67 Mich. 683, 35 N. W. 814), this he could not do, unless defendant had waived said tender."

See, also, the language of Justice Moore in the *Niederhauser* Case, cited by the trial court.

It is true that all of the above-cited cases were not personal injury cases; but we know of no reason why the principle there announced should not apply to personal injury cases. In our opinion, both upon reason and authority, it should be held that defendants could rely upon settlement, until rescission, by repudiation and tender. Tender back would bring before the court the question of right to repudiate; but repudiation or right to repudiate could not arise until after tender. The law favors settlements made by parties. When made, they are binding until rescinded for cause. Rescission is not completed without tender back of amount received. While binding, no suit in opposition or repudiation of a settlement can be brought. We do not agree with the claim of appellant that no tender is necessary at any time, if it is apparent that it would not be accepted. Such tender is necessary to rescind the contract of settlement. Neither do we agree with the contention that the starting of suit on the original claim was a sufficient repudiation of the settlement.

[8] We think it appears undisputed by this record that deceased knew what he was signing and what he was settling. It is finally contended by appellant that, if any tender was necessary, the tender made on the trial was sufficient. We think not, for the reasons stated, and for the further reason that the tender was not made within a reasonable time. The long period of delay, from the date of settlement to date of tender at the trial, of 2½ years, cannot be said to be a

reasonable time as matter of law. *Jewett v. Petit*, 4 Mich. 508; *Hubbardston Lbr. Co. v. Bates*, 31 Mich. 158-168. This delay was in no manner excused or explained. Upon this subject generally, see 8 Cyc. 531-533; 12 Corp. Juris, 345, 355-357.

The judgment of the circuit court is affirmed.

PEOPLE v. CORSI et al. (No. 111.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Criminal law §897(1)—Pleading to information waives misnomer of injured party in complaint, warrant, and return, and confers jurisdiction.

In view of Comp. Laws 1915, § 15767, requiring a preliminary examination unless respondent waives his right thereto, respondents, pleading not guilty to an information charging assault on a person correctly named at the examination and in the information when pleaded to, waived a misnomer of the injured party in the complaint, warrant, and return of the magistrate, and conferred jurisdiction on the court to proceed with the trial.

2. Indictment and information §14—No error in permitting filing of carbon copy of lost information.

Under Comp. Laws 1915, §§ 12264, 12267, relative to duplication of lost records, the court did not err in permitting the filing of a carbon copy of a lost original information.

Exceptions from Circuit Court, Dickinson County; Richard C. Flannigan, Judge.

Andrew Corsi was convicted of assault and battery, and Pasquale Sandrini of assault to do great bodily harm less than murder. Motion in arrest of judgment overruled, and respondents bring exceptions before sentence. Affirmed, and remanded for further proceedings.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

M. S. McDonough, of Iron River, for appellants.

J. C. Knight, Pros. Atty., of Iron Mountain, for the People.

MOORE, J. Upon a trial by jury respondent Corsi was convicted of assault and battery upon one Jess Jensen, and Sandrini was convicted of assault to do great bodily harm less than the crime of murder. Upon rendition of the verdict a written motion in arrest of judgment was filed by respondents. This motion was overruled. The case is here upon exceptions before sentence.

Upon denying the motion the court filed a written opinion which states the situation so fully that we quote from it:

"The respondents were arrested on a warrant charging them with the commission of an assault with intent to do great bodily harm less than the crime of murder, at the city of Iron Mountain, Mich., on May 23, 1920. Following an examination, which was had June 4, 1920, they were bound over for trial. Upon an information charging that offense, they were arraigned and pleaded not guilty at the July, 1920, term of court. The July term being non-jury, the case was continued until the September, 1920, term, when trial was had. A verdict of guilty of assault and battery against Corsi and of guilty of assault with intent to do great bodily harm less than the crime of murder against Sandrini was returned. Judgment on the verdict has not been entered.

"In the complaint and warrant under which the respondents were arrested and examined, and in the return of the magistrate, the name of the person assaulted is given as 'Lee Jensen.' The name of the person assaulted was not Lee Jensen, but Jess Jensen, a well-known deputy sheriff of Iron county, Mich. The complaint was sworn to by a police officer of the city of Iron Mountain, the day following the assault and while Jess Jensen was in a hospital at that place, under treatment for the wounds inflicted upon him in the affray. On the examination, Jensen, the person assaulted, was a witness for the people. He gave his name as Jess Jensen. By the witnesses who testified on the examination he was identified as the person assaulted and by the name of Jess Jensen. That he was also known by the name of 'Lee Jensen,' or that a person named 'Lee Jensen' had been assaulted by the respondents, there was no evidence and no claim before the magistrate. Nevertheless amendment of the complaint or warrant, correcting the name of the person alleged to have been assaulted, was not asked for or made at the examination.

"At the trial at the circuit, evidence was introduced by the people tending to show an assault on Jess Jensen by Corsi with rocks picked up from the roadway, and by Sandrini with a knife. There was ample evidence to support the verdict against each of the respondents as returned. There was no evidence introduced on the trial tending to show that Jensen was also known by the name of Lee Jensen, or of an assault by the defendants, or either of them, on a person named Lee Jensen, or that a person of that name existed. The information was present in court during the trial, and was on the judge's desk during the charge and when the jury retired. Thereafter it became lost or mislaid and has not been found.

"Claiming the information, as well as the complaint, warrant, and return of the magistrate, stated the name of the person assaulted as 'Lee Jensen,' the respondents, after conviction, moved in arrest of judgment on the grounds, in substance, that the verdict was against the constitutional rights of the respondents, and conferred no jurisdiction to sentence, because, first, there was no evidence tending to show the respondents, or either of them, guilty of assault on a person named Lee Jensen; and second, conceding there was evidence tending to show an assault by the respondents on Jess Jensen, there was no com-

plaint, warrant, or information charging an assault upon him.

"In support of the contention that the name of the person assaulted as it appeared in the information was Lee Jensen, the respondents filed the affidavit of M. S. McDonough, their attorney, who therein states he examined the information on the opening day of the trial and took notes thereon, and that it charged the respondents with having committed an assault with intent to do great bodily harm less than the crime of murder upon one Lee Jensen. In opposition are the affidavits of J. C. Knight, prosecuting attorney, and W. S. Cudlip, deputy county clerk. The prosecuting attorney deposes, in substance, that before the information was sworn to or filed, he placed it in the court files of the case; that when drafted and left in the file case, the name of the person the defendants were charged with assaulting read 'Lee Jensen'; that subsequently he learned the correct name was Jess Jessen, and not Lee Jensen; that he caused his office copy of the information to be so corrected; that thereupon he went to the county clerk's office, where at his request and in his presence the deputy clerk changed the information that had been left in the court file case to read 'Jess Jessen,' instead of 'Lee Jensen,' and that such correction was made by the deputy clerk before the information was filed or read to the respondents. Cudlip, the deputy clerk, deposes in substance that before the information was sworn to or filed, and before the opening of the July, 1920, term of the court, he, at the request of the prosecuting attorney, changed the information the prosecuting attorney had placed in the court file to read 'Jess Jessen' instead of 'Lee Jensen.'"

"Attached with the affidavits is the prosecuting attorney's office copy of the information, which, in his affidavit, he calls a carbon copy. To the naked eye, or under a glass, no erasure or change of the surname 'Jessen' is apparent in the carbon copy. That the first name 'Jess' was inserted by type striking on ribbon, and that the surname 'Jessen' and the remainder of the typewriting in the copy is carbon is evidence on inspection. That the surname 'Jessen' appeared in the information as first drafted, and that the name 'Lee' was changed to read 'Jess' before the information was sworn to or filed, and that, when the respondents pleaded to the information, the name of the person they were therein charged with assaulting was Jess Jessen, is the conclusion reached. The explanation of the affidavit of respondents' counsel is that, in going through the files, he must have confused the information with the complaint or warrant.

"The name of the injured party having been given at the examination and in the information as Jess Jessen, the misnomer of the injured party in the complaint, warrant, and return of the magistrate was, under repeated decisions of the Supreme Court, waived by the respondents by their plea of not guilty to the information. Of the effect on the verdict of a variance such as is claimed discussion is unnecessary, in view of the conclusion of the court that the variance did not exist. But if the variance existed as claimed, it would not be fatal, because, under the facts of this case, the right to assail the verdict on that ground

was waived by the respondents, and, if not, the alleged variance could now be cured by amendment of the information. * * *

"A variance in that particular may be cured by amendment of the information. C. L. 1915, § 15749. * * * Cases to the contrary will be found, but in states having statutes like ours (C. L. 1915, §§ 15746 and 15749) the weight of modern judicial thought will be found in sympathy with the proposition that, where it appears, notwithstanding the variance, the accused was given a full, fair, and impartial trial of the question of his guilt or innocence of committing the criminal act charged upon the person, and only person, named in the evidence and instructions to the jury, equally in every respect as he would have received, and been entitled to receive, had the name of the injured party disclosed by the evidence been inserted in the information, and where it further appears the respondent knew of the variance, and that it could and would be corrected, if mentioned, and without calling it to the attention of the court by motion, objection, or otherwise, elected to sit tight and 'play the game' (as the court said of the respondent in *Hock v. State*, 141 Wis. 846) with 'loaded dice,' he may be held to have waived his right to object after conviction."

[1] When the respondent pleaded to the information, he conferred jurisdiction upon the court to proceed with the trial. Section 15767, C. L. 1915; *Washburn v. People*, 10 Mich. 383; *People v. Jones*, 24 Mich. 218; *People v. Wright*, 89 Mich. 70, 50 N. W. 792.

[2] It was not error for the court to permit the filing of a carbon copy of the original information. Sections 12264, 12267, C. L. 1915. Upon this record it would be a travesty upon the administration of justice to permit the respondents to be discharged.

The verdict of the jury and the order of the court overruling the motion of the respondent are affirmed, and the case is remanded for further proceedings.

SUPERIOR STEEL SPRING CO. v. NEW ERA SPRING & SPECIALTY CO. (No. 11.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Damages ⇐79(4)—Stipulation relative to delay in delivery held enforceable as one for liquidated damages.

In wartime contract for manufacture and sale of 10,000 automobile springs at \$1.25 each, stipulation that the seller would pay the buyer 25 cents per spring for any that the seller failed to have ready for shipment at stipulated times held enforceable as one for stipulated damages, in view of the difficulty of determining damages.

2. Appeal and error ⇐173(6) — Question of mutuality of contract not considered where not raised below.

The question of mutuality of contract, not having been brought to the trial court's atten-

tion or made the basis of any motion or assignment of error, is not before the reviewing court.

3. Estoppel ¶119—Verdict not directed on conflicting testimony.

Verdict cannot be directed on the ground of estoppel and waiver where the testimony on those questions is conflicting.

4. Trial ¶177—Right to go to jury waived by both parties moving for directed verdict.

It cannot avail plaintiff that there was evidence to go to the jury on the questions of defendant being estopped to assert, or having waived, a defense; he not asking for submission to the jury, but like defendant having moved for a directed verdict, and defendant's motion having been granted.

Error to Circuit Court, Kent County; John S. McDonald, Judge.

Action by the Superior Steel Spring Company against the New Era Spring & Specialty Company. Judgment for defendant on a verdict directed for it, both parties having moved for directed verdict, and plaintiff brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Willis B. Perkins, Jr., of Grand Rapids, for appellant.

Smedley, Linsey & Shivel, of Grand Rapids, for appellee.

FELLOWS, J. Plaintiff, located at Mt. Clemens, manufactures automobile springs. Defendant, located at Grand Rapids, is a large dealer in them. In April, 1918, by a proposal and an acceptance of it they entered into a contract for 10,000 Ford springs. The price was \$1.25 each. The parties appear to have had previous business relations. At the time the contract was made, plaintiff had two carloads of steel on track at Mt. Clemens which it needed the money to pay for and got in touch with defendant. Defendant paid the entire contract price for the 10,000 springs in advance by its notes which were discounted by plaintiff at Mt. Clemens and which were paid by defendant when due. By the contract 2,500 springs were to be delivered each week for the weeks ending April 27th, May 4th, May 11th, and May 18th. The proposal which was accepted contained the following:

"We will thus pay in advance as per the terms on the order, for both the steel or material and profit on ten thousand springs. It is done with the distinct understanding that you are to produce the springs by the date specified and on any such orders you fail to have ready for shipment, you will pay us 25 cents per spring, as a portion of our lost profit, if we so elect."

On May 18th, the final day agreed upon for the completion of the contract, less than

2,000 springs had been delivered, and the full amount was not delivered until June 29th. About this time arrangements were made for 1,500 more springs at the same price, and soon thereafter for 400 more at \$1.45 each. On these later arrangements 1,903 springs were delivered. To recover the amount due for them this action is brought. It was met by the defendant by insisting that there was due to it from the plaintiff under the clause of the contract above quoted more than the amount of its indebtedness to the plaintiff, and the case in the court below turned quite largely on the question of whether the provision was one for stipulated damages or for a penalty. Other questions were raised to which we shall presently refer. Plaintiff does not deny that it failed to deliver the springs in accordance with the terms of the contract, and the testimony of its secretary fairly disclosed that such failure was due to its filling other contracts. Nor is it denied that defendant had numerous orders which it had obtained for springs canceled by reason of such failure.

Counsel for both parties have been most diligent in their research and have called to our attention a large number of our own cases together with numerous authorities from other jurisdictions. As this court has, we think, conclusively settled the question here involved, we shall confine our attention to our own cases.

[1] In the early case of Jaquith v. Hudson, 5 Mich. 123, Mr. Justice Christianity, who wrote for the court, in a masterly and exhaustive opinion fully considered the question and laid down the rule for the construction of contracts of this character which have been consistently adhered to by this court ever since. After pointing out the reasons and principles which justify the courts in holding that penalties as distinguished from stipulated damages may not be enforced, he says:

"But the court will apply this principle, and disregard the express stipulation of parties, only in those cases where it is obvious from the contract before them, and the whole subject-matter, that the principle of compensation has been disregarded, and that to carry out the express stipulation of the parties would violate this principle, which alone the court recognizes as the law of the contract."

And in considering the classes of cases he said:

"But, secondly, there are great numbers of cases, where from the nature of the contract and the subject-matter of the stipulation, for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties

themselves are more intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them. In all such cases, the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach. In permitting this the law does not lose sight of the principle of compensation, which is the law of the contract, but merely adopts the computation or estimate of the damages made by the parties, as being the best and most certain mode of ascertaining the actual damage, or what sum will amount to a just compensation. The reason, therefore, for allowing the parties to ascertain for themselves the damages in this class of cases, is the same which denies the right in the former class of cases, viz., the courts adopt the best and most practicable mode of ascertaining the sum which will produce just compensation."

After fully considering the question and taking up the case then before the court, he said:

"The damages to arise from the breach of this covenant, from the nature of the case, must be not only uncertain in their nature, but impossible to be exhibited in proof, with any reasonable degree of accuracy, by any evidence which could possibly be adduced. It is easy to see that while the damages might be very heavy, it would be very difficult clearly to prove any. Their nature and amount could be better estimated by the parties themselves, than by witnesses, courts, or juries. It is, then, precisely one of that class of cases in which it has always been recognized as peculiarly appropriate for the parties to fix and agree upon the damages for themselves."

In *Calbeck v. Ford*, 140 Mich. 48, 103 N. W. 516, Mr. Justice Blair, speaking for the court, quoted fully from the *Jaquith Case*, and said:

"This case has been frequently referred to with approval, and is a clear and authoritative statement of the rule as expounded by this court. Applying the principles above stated to the facts of this case, it appears to us that the case falls within the cases referred to in the second class, where, from the nature of the contract and the subject-matter of the stipulation, it is apparent that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty by reference to any pecuniary standard. The weight of authority is distinctly in favor of the proposition that cases like the one under consideration come within this classification."

And in *Rose v. Loescher*, 152 Mich. 386, 116 N. W. 193, 125 Am. St. Rep. 418, Mr. Justice Grant said:

"In cases where it is difficult to accurately determine the damages which one party may suffer by the failure of the other to perform his contract, the parties themselves may agree upon such sum as in their judgment will be ample compensation for the breach."

The following cases among others will be found to have consistently followed the rules announced in the *Jaquith Case*: *Western Gas Construction Co. v. Dowagiac Gas & Fuel Co.*, 146 Mich. 119, 100 N. W. 29, 10 Ann. Cas. 224; *City of Detroit v. Telephone Co.*, 135 Mich. 696, 98 N. W. 745; *Germain v. Union School District of City of Stanton*, 158 Mich. 214, 122 N. W. 524, 123 N. W. 798; *Axe v. Tolbert*, 179 Mich. 556, 565, 146 N. W. 418; *Randall v. Randall*, 87 Mich. 563; *Whiting v. Village of New Baltimore*, 127 Mich. 66, 86 N. W. 403; *Gelger v. Cawley*, 146 Mich. 550, 109 N. W. 1064; *Jones v. Stainton*, 200 Mich. 694, 166 N. W. 966.

In the instant case the parties were dealing in a period when abnormal conditions existed in the business world. Both were familiar with these conditions; both knew the rapid fluctuations in the price of steel and the difficulty of getting it at all; both knew that defendant was an extensive dealer with many customers in all parts of the country; both understood that prompt deliveries must be made by defendant to its customers or cancellation of orders was liable to follow, entailing not only loss of immediate profits and immediate business, but also loss of future business and loss of its trade which was then well established. (Some four pages of the record are taken in detailing canceled orders due to plaintiff's failure to make deliveries.) The amount of damage for loss by cancellations and loss of business would be difficult if not impossible to prove. While some of the elements of defendant's damages might be susceptible of proof, others were not. There is nothing in the record indicating that the sum agreed upon was in any way in excess of the actual damages suffered by defendant. Indeed, a quick rise in the price of steel compelled plaintiff to charge 20 cents more apiece for the last 400 springs than it had for the others. Under the facts disclosed upon this record and having in mind the rules laid down in the *Jaquith Case*, we are persuaded that it was permissible for the parties to agree in their contract upon the compensation to be paid upon the breach of this one important feature of it. The stipulated damages were not payable upon different breaches of the contract of varying degrees of importance, but were confined to the one important feature, that of prompt delivery. Under the facts of the case and the law applicable thereto this provision was not a penalty.

[2] Upon the argument the question of whether there was a want of mutuality in the contract was raised. But an examination of the record discloses that this question was not brought to the attention of the court below or made a basis of any motion or assignment of error. Under these circumstances the question is not before us.

[3, 4] Counsel for plaintiff asked for a directed verdict for the amount of its claim for the further reason that defendant was estopped from making this defense and had waived the provision of the contract under consideration. It is quite possible that plaintiff, had it so desired or requested, would have been entitled to take the verdict of the jury on these questions, but it was not entitled to a directed verdict on this ground, as defendant's testimony was in conflict with that offered by plaintiff on this subject. In the recent case of *Burton v. Ladd*, 211 Mich. 382, 178 N. W. 774, we said:

"In the court below both parties treated the case as presenting questions of law solely. Both asked for a directed verdict. Defendant's counsel made no suggestion that the case should be submitted to the jury. In this court it is suggested by him, however, that the case should have gone to the jury. It is now too late to insist that the case should have gone to the jury or that the questions were not questions of law only. *St. Mary's Power Co. v. Water-Power Co.*, 133 Mich. 470; *Wolverine Farms Co. v. De Young*, 182 Mich. 200."

With the conflict in the testimony on the questions of estoppel and waiver the court could not say as matter of law that defendant was estopped to make this defense or that he had waived it.

The judgment must be affirmed.

HENZE et ux. v. SAUNDERS et ux. (No. 79.)

(Supreme Court of Michigan. Oct. 3, 1921.)

Vendor and purchaser — Fraudulent representations as to race held not established.

Alleged fraudulent representations of purchasers of land, that they were not of colored blood, held not established by the evidence.

Appeal from Circuit Court, Wayne County, in Chancery; George W. Sample, Judge.

Suit by Joseph J. Henze and wife against Nelson M. Saunders and wife. Decree for defendants, and plaintiffs appeal. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Monaghan, Crowley, Reilly & Kogg, of Detroit, for appellants.

Barnes & Stowers, of Detroit, for appellees.

WIEST, J. The plaintiffs, Joseph J. Henze and Laura M. Henze, purchased certain property in the city of Detroit and erected thereon high-grade brick-veneer duplex houses for the purpose of sale. October 18, 1918,

they sold one of the houses to Mary Beechie, on land contract, for the sum of \$9,650, and received a \$2,000 payment. The land contract contained the usual provision against the vendee selling or assigning her interest without the written consent of the vendors.

Mary Beechie, wanting to sell her contract interest, listed the same with a real estate agent, and the Henzes consented, with the qualification that the transfer should not be to Jewish or colored persons. A purchaser was found in the person of defendant Nelson M. Saunders, and on July 8, 1919, an agreement was entered into between Mary Beechie and Mr. Saunders for the sale of her interest to Mr. Saunders, with a payment at that time of \$50 and \$5,000 on delivery to him of the contract, and \$900 when the abstract was approved, and the balance to be paid as per terms of the contract. The \$50 was paid, and on July 30, 1919, Mr. Saunders paid \$5,000 and was given a receipt, and upon this receipt Mr. Henze wrote his consent to the transfer.

The bill herein was filed to have the sale and the consent thereto rescinded on the ground of fraud; it being alleged that Mr. Saunders was informed that the Henzes would not consent to sell to a colored person or to a Jew, and falsely and fraudulently represented that he was not a colored person, and was white and an Irish-Canadian. Defendant denied that any such representation was made, and claimed that Mr. Saunders was asked if he was an American citizen, and was not informed that the Henzes would not consent to a sale to a colored person.

The learned circuit judge, at the close of the evidence, found that the alleged fraudulent representation had not been established and dismissed the bill. An examination of the record brings us to agreement with the trial judge.

In order to grant relief to plaintiffs, it was necessary to find that there was an agreement between the Henzes and Mary Beechie that she should not sell or assign her contract interest to a colored person, and that Mr. Saunders was informed of the fact that the Henzes would not consent to any sale or transfer by Mary Beechie to a colored person, and to obtain such consent Mr. Saunders falsely represented that he was not a colored person, and the Henzes relied upon such representation.

When Mr. Henze met Mr. Saunders during the negotiations for the sale, he was suspicious from his actions that he was a Jew, and called Mr. Murphy, the real estate broker handling the matter for Mary Beechie, to one side and informed him of his suspicion, and said:

"You know I cannot and I won't sell, neither will the Cook Farm Company let me sell, only

to clean, white Americans. It looks to me as though he was a Jew."

The question came up whether Mr. Murphy should ask Mr. Saunders about the matter, and Mr. Henze said:

"Yes; I want to know; let me know."

Mr. Henze saw Mr. Saunders three times during the negotiations and believed him a white person, but thought he had Jewish blood. He testified:

"I didn't tell Mr. Murphy to ask him if he had Jewish blood, not that question only. I did suggest to Mr. Murphy that I thought he had Jewish blood in him. That is not the question I thought Mr. Murphy was going to ask him. I didn't suggest that question only to Mr. Murphy. I suggested to Mr. Murphy that he was to get full information, who he was and where he came from. From this information I wanted to find out about Saunders, who he was, where he came from, and where he lived, and all I found out was that he was an Irish-Canadian. That was satisfactory to me. When I heard that, I knew I could not say anything else. Mr. Murphy left this word at my house."

Mr. Henze also testified:

"I took him for an Irish-Canadian, because it was told to me he said he was. I was deceived from my observation of Saunders. I became undeceived when I got the warning he might be colored. Then, of course, I opened my eyes."

Mr. Murphy testified:

"Mrs. Beechie called Mr. Henze over to see that everything would be all right, if he was satisfied with selling to Mr. Saunders, and Mr. Henze called me out when he started home—called me out in the vestibule and said: 'Now, are these people Jewish? I cannot sell to anybody that are Jewish or colored people.' I couldn't say as to whether this contract was signed at that time or not. I think not. We went back in the house, and there was something said in regard to nationality. What it was I cannot recall. It was said between us there. I could not say by whom. I don't recall much of that, I not being so much interested. If I had known this was coming up, I would have known. There was something said there about the race, but I cannot recall what it was."

"After that we started to take Mr. Saunders and his wife home. That was on the boulevard near Jefferson avenue. I said, 'Now, Mr. Henze called me out there, and said under the contract he cannot sell to Jewish or colored people, or anybody that would depreciate the value of the property.' Mr. Saunders said, 'You need not worry about that because we are Irish-Canadians.' Then, of course, we went on talking. When that conversation took place on the boulevard, I am sure I mentioned colored. I did not tell them that, if Henze or if Mrs. Beechie asked them if they were colored or Jewish, to tell them they were Irish-Canadians."

"When I saw him (Saunders), I took him for a white man, and never questioned it in my own mind. Mr. Henze suggested to me that Saunders was a Jew, and told me to ask him if he was a Jew. I said, 'Mr. Henze is under con-

tract not to sell to Jewish or colored or any people that would depreciate the value of the property.' He said, 'Don't worry about that, I am Irish-Canadian.' I believed him a white man. I didn't suggest to him that he was a colored man. I told him the instructions I was to sell the property under. I didn't believe that he was colored at that time. I didn't tell him he was a colored man. Mr. Henze called me to the door and asked if he was Jewish. I said, 'I think not; I will find out.'"

Mr. Gilbert, who worked with Mr. Murphy, testified:

"There was a discussion between Mr. Murphy and the Saunderses on the way down to Jefferson and the boulevard. Mr. Murphy said the reason why he asked so many questions regarding his nationality or race, that Mr. Henze was under contract when he bought that block of land to sell to nothing but good white people. I think—I don't know—Mr. Saunders said that his mother was born in Canada. It was discussed. He said he was—I don't know how it came out—he was an Irish-Canadian. Mr. Murphy didn't tell Saunders to tell Henze he was an Irish-Canadian. What he did say was, after the discussion was ended, the discussion about the people themselves was ended by saying, 'You tell Henze you are Japanese or Chinese or something of that kind.' I know we laughed about that, and there was nothing more said."

"I saw Saunders half a dozen times, and saw his wife twice. I thought them white. I didn't hear Mr. Henze make any remark to Mr. Murphy inquiring about the Saunderses. I don't know what Mr. Henze was inquiring about. I was up to Saunders' office I think the next day, up to the Fyfe Building. He gave me \$50 more. I don't know whether it was the next day, or the second day. I took that over to Mrs. Beechie and got a receipt for it. Then I went over to Mr. Henze's place, and his wife was there; and I told her to tell Mr. Henze that we have gone through the question what kind of people the Saunderses were, and we were satisfied they were good people. I made that report to Mrs. Henze and asked her to tell her husband. Mr. Saunders said in the automobile his mother was born in Canada. I don't remember his saying that his mother was of Irish descent, but he said she was born in Canada. In this automobile conversation Mr. Murphy said to Mr. Saunders, 'The thing that Henze is bothered about, he imagines you are a Jew.' He asked whether Saunders was Jewish or colored. I couldn't say that was the only question asked. It was all put together. I don't remember Saunders' answer, 'Not a drop.' I think Mr. Murphy told him, or said to him, 'If he asks you anything, tell him you are a Canadian, or a Chinese, or a Japanese, or anything.' Then the question was dropped. The last thing said regarding the race or nationality, what kind of people they were, was that he should tell him he was a Jap or something of that kind. That was a joke. It was supposed to be a joke; we laughed about it anyway."

Mary Beechie testified:

"When I bought from Mr. Henze he told me, if I ever intended to sell, that I could not sell

(184 N.W.)

to undesirables or to a certain class of people. He mentioned Jews, but I couldn't say whether he mentioned colored people or not. When I was ready to sell, I sent for Mr. Henze to see these people, and he only stayed a few minutes, because he was late coming from his business, and his wife was waiting for him for supper. He excused himself and went off, but he called Mr. Murphy out in the hall. What they said I don't know, but Mr. Henze didn't come back. Mr. Murphy came back, and he said something to Mr. Saunders, but I could not say what he said. I heard Mr. Saunders say, 'Tell him I am an Irish-Canadian.' I couldn't tell whether that was before or after this was signed."

She also said she saw Mr. Saunders four times and thought he was a white man.

The defendant Nelson M. Saunders testified:

That he was born in Detroit in 1887, and that he has been employed by the Fyfe Shoe Company for approximately 20 years; that he was confirmed in Christ Episcopal Church and sang in the Christ Church choir; that at the time the parties met at the home of Mary Beechie "what they have termed as the preliminary contract, Exhibit 8, was signed at that time in the home, when the people I mentioned were present, Mr. Henze, Mr. Murphy, Miss Beechie, Mrs. Beechie, Mr. Gilbert, my wife, and myself. Up to the time this was signed there was not a word said about our nationality. The first word of nationality was broached after a short conference with Mr. Henze and Mr. Murphy and Miss Beechie. The first question as to race was raised when the parties went out for their conference. After the parties returned, Mr. Henze did not remain. When Mr. Murphy and Miss Beechie returned to the room after their talk with Mr. Henze, Miss Beechie says, 'Are you an American?' That was the first question asked. I said, 'Yes.' I was born in Detroit, Mich. The next question was when we were all on the East Grand boulevard, just opposite the Science Church, in the automobile. Mr. Murphy turned to me and said, 'Are you Jewish?' I said, 'No, not a drop.' We rode on, and he said that Mr. Henze—He did make a statement that Mr. Henze is quite strict about that. I said, 'My wife's nose gets me into all this trouble, Mr. Murphy, but you need not worry about that.' He says, 'Even if you are, tell them you are Japanese or Irish. You can tell them you are Irish anything.' During the whole of the transaction, I did not at any time make any representations than those I have given you here as to race. I answered all the questions directly and as I have stated.

"The only thing asked me directly was whether or not I was Jewish. The question was put to me directly, 'Are you Jewish?' I deny the accusation that I stated in the presence of Mrs. Beechie that I was Irish-Canadian. When Mr. Murphy asked me—turned around and asked me if I was Jewish, I told him, 'Not

a drop.' I said, 'My wife's nose gets me into all that trouble.' When I said that trouble, I referred to thinking we were Jewish."

The defendant Marjorie Saunders testified that she was a school-teacher; that when she left Mary Beechie's house in the automobile with her husband and Mr. Murphy and Mr. Gilbert, they rode as far as the boulevard with Mr. Murphy, and that Mr. Murphy said:

"Mr. Henze was afraid you are Jewish,' and Mr. Saunders said, 'Not a drop.' Mr. Murphy said, 'Well, if Mr. Henze asks you what you are, tell him you are Irish-Canadian, or anything like that.' * * * At Mrs. Beechie's home Mr. Henze was asked to come and see if the transfer would be all right, and he called out Mr. Murphy. Then they called out Mrs. Beechie, and they had a lengthy conversation. Finally Mrs. Beechie came in and said, 'Are you Americans?' We both said, 'Yes; we are.' Mr. Murphy didn't say, when he came back from talking with Mr. Henze before this contract was signed, 'Mr. Henze won't sell to a Jew, or to colored people, or to anybody but white Americans.' Mr. Murphy said they wouldn't sell to Jewish people, but colored was never brought up in the conversation. Nothing was said about our color in the house. Nothing was said about color in the automobile. It was simply whether we were Jewish. Color was not brought up at any time during this transaction. Mr. Murphy said Henze would not sell to Jewish. He didn't say he wouldn't sell to Jewish or anybody but white Americans. He didn't refer to white or Americans. My husband didn't tell Mr. Murphy he was an Irish-Canadian. Mr. Murphy asked if we were Jewish, and Mr. Saunders said, 'Not a drop.' The suggestion that we were Irish-Canadians was made by Mr. Murphy. He said, 'Tell Henze you are Irish-Canadians, or anything.'"

Mr. Henze, Mary Beechie, Mr. Murphy, and Mr. Gilbert all thought Mr. Saunders was a white person, but Mr. Henze suspected he was a Jew. Here we have some reason for the inquiry as to whether he had Jewish blood, but none whatever with reference to colored blood. Upon a consideration of this record we must find that the plaintiffs have not established, by a preponderance of the evidence, the fraudulent representations alleged.

It is contended that, Mrs. Henze never having given her consent in writing, the assignment by Mrs. Beechie to Mr. Saunders is void. We feel that, under the evidence relative to the management of the real estate by her husband, she is in no position to urge the necessity of her consent.

The decree entered in the circuit is affirmed, with costs to defendants.

HOUGHTON COUNTY v. MASSIE et al.
(No. 32.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Adverse possession §14—Property §7
—Owner deemed in possession of land; actual adverse possession necessary.

One having title of record to land is deemed in law to be in seisin and possession thereof, and such seisin is coextensive with the right and continues until the owner is ousted by the adverse possession of another.

2. Adverse possession §112—Burden on defendants to prove in ejectment.

In ejectment by record owner of land, where defendant claims title by adverse possession, the burden of proving adverse possession by clear and cogent evidence is upon the defendant.

3. Landlord and tenant §66(2)—Possession of lessee permissive until a repudiation.

In ejectment by a county, it was incumbent on defendants, claiming title by adverse possession, to show that a lease to the land given them was repudiated, and actual notice of such repudiation given in fact to the county, though defendants at all times believed that the instrument delivered to them was an absolute deed and not a lease.

4. Adverse possession §60(2) — Possession permissive where one of two joint occupants obtained permission.

The holding of two occupants of land is by permission, and not adverse, if either one of them has invoked and obtained permission from the owner for both.

5. Landlord and tenant §66(1) — Becoming lessee is a waiver of claim of adverse possession.

One who became a lessee with his partner waived thereby all claim of possession adverse to the lessor.

6. Landlord and tenant §66(2)—What constitutes notice to county of repudiation of permissive holding.

Where county leased land to defendants, notice of a hostile holding thereof by defendants could not be predicated upon claim of ownership by the defendants, or understanding to such effect by neighbors or assessing officers, or the building of fences, clearing of land, or payment of taxes; defendants being required to pay the taxes under their lease.

Error from Circuit Court, Gogebic County;
George O. Driscoll, Judge.

Action by Houghton County against Paul N. Massie and another. Judgment for defendants, and plaintiff brings error. Reversed, and new trial granted.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Rees, Robinson & Petermann, of Houghton, for appellant.

James A. O'Neill, of Ironwood, for appellees.

WIEST, J. This is a suit in ejectment by the county of Houghton and involves title to 80 acres of land in Gogebic county, supposed now to contain a valuable mineral deposit. The plaintiff is the owner of the title of record, and defendant Paul N. Massie, through Napoleon D. Massie, his father and immediate grantor, claims title thereto by adverse possession.

At the trial plaintiff moved for a directed verdict in its favor. The jury rendered a verdict for defendants, and plaintiff moved for a new trial, alleging error in the admission of testimony, and in refusal of requests to charge, and in the charge to the jury and improper argument by counsel for defendants, and that the verdict was against the great weight of the evidence.

[1] In disposing of the question of whether the verdict is against the great weight of the evidence we shall have occasion to pass upon most of the points raised by the motion for a new trial, and feel the application of the legal principles herein stated renders it unnecessary to extend the opinion to a consideration of each point by itself. The plaintiff, having title of record to the land, is deemed in law to be in seisin and possession thereof.

"Such seisin is coextensive with the right, and continues until the owner is ousted by the adverse possession of another." R. O. L. vol. 1, p. 685.

"Evidence of adverse possession must be strictly construed, and every presumption is in favor of the true owner." *Sheldon v. Michigan Central R. Co.*, 161 Mich. 503, 128 N. W. 1056.

"Possession, as a presumption of law, is intended only in favor of the true owner, and every presumption is in favor of possession in subordination to his title." *Licari et al. v. Carr*, 84 N. J. Law, 345, 86 Atl. 421.

[2] The burden of proving adverse possession by clear and cogent evidence was upon defendants. *Highstone v. Burdette*, 54 Mich. 329, 20 N. W. 64; *Jeffery v. Hursh*, 45 Mich. 59, 7 N. W. 221; *Conner v. Detroit Terminal R. Co.*, 183 Mich. 241, 150 N. W. 115.

The record fully establishes the fact that a partnership existed between Napoleon D. Massie and John W. Morse under the name of Massie & Morse from 1889 until Mr. Morse died in 1905, and that the partnership was engaged in handling cord wood and mining timber, buying standing timber, and cutting it for the trade they had, and also carrying on a livery business.

The defendants, to overcome the legal presumption of possession in subordination to plaintiff and to maintain the claimed right to

hold the property under title acquired by adverse possession, offered testimony that in 1889 the defendant Napoleon D. Massie heard that the plaintiff wanted to sell the land, and in October of that year he received a written instrument which he claims he understood was a deed from the First National Bank of Bessemer, and paid the bank therefor the sum of \$775, and took the instrument home and placed it in a drawer, but did not record it, and, although he made search for many years for it, he was unable to find it; that he is unable to read or write, except to sign his name; that in November, 1889, he started to cut the timber off the land, having an arrangement with one J. W. Morse, under which Morse furnished the teams and drivers and Mr. Massie his labor and the timber, and they divided the profits; that it took them about two years to remove the timber; that in 1891 Mr. Massie fenced some of the land, and in 1892 inclosed the whole 80, and that about 35 acres have been cleared and used for the raising of crops, and the rest for pasture; that in June, 1912, Napoleon D. Massie deeded the land to his son Paul; that the defendant Napoleon D. Massie claimed title to the land under the instrument obtained in 1889; that he caused the land to be assessed in his own name and paid the taxes for most of the years; that he never took a lease from plaintiff and never heard of a lease having been given to any one by the plaintiff before 1911; that he at all times claimed to own the property, and it was commonly understood in the vicinity that he was the owner.

Meeting this issue, the plaintiff clearly established the fact that the county of Houghton never gave Napoleon D. Massie a deed to the land, but did, on the 14th day of October, 1889, through Mr. R. R. Goodell, its duly authorized land agent, convey to Napoleon D. Massie and J. W. Morse, by timber deed (so called), the wood and timber on the land in suit for the sum of \$350, and authorized them to enter upon and occupy the land for the removal of such timber and for agricultural purposes for the period of five years, conditioned, however, that they pay the taxes, and on the 29th day of June, 1895, following negotiations by letters from Massie & Morse, the county executed a lease of the land to Massie & Morse for the consideration of \$25 then paid, and agreed that Massie & Morse might continue to occupy the premises on payment of \$25 per year and the payment of all taxes or assessments levied against the property, from and including the tax of 1897. This lease was signed by Mr. Goodell, agent for the county, and by "Massie & Morse," and witnessed as to the signature of Massie & Morse by William I. Prince.

During the trial counsel for plaintiff learned of a suit brought in the circuit court for the county of Gogebic in 1897 by Massie &

Morse, copartners, against the Chicago & Northwestern Railway Company, and subpoenaed Mr. Norris, the attorney who represented the plaintiffs in that case, to bring in his office files and records. This was done, and disclosed that that suit, according to the declaration filed therein, was brought by Napoleon D. Massie and John Morse, copartners, as Massie & Morse, as owners of a leasehold interest, and as such in possession of the premises in suit, for damages to their growing crops occasioned by cattle coming thereon from the railroad right of way. That case came on for trial in the Gogebic circuit in March, 1898, and both J. W. Morse and Napoleon D. Massie gave testimony. Their testimony was transcribed and introduced in evidence in this case. In the office files of Mr. Norris in that suit was found the timber deed (so called), and lease of the land in suit made in October, 1889, by plaintiff to Napoleon D. Massie and John W. Morse, and also the lease of June 25, 1895, by the county of Houghton to Massie & Morse, and the evidence fully established the authenticity of such papers.

Napoleon D. Massie testified that he went to Button & Norris, the attorneys in the case mentioned, and whatever papers they had about the suit against the railroad company he gave them, and all the information the attorneys got on which they brought suit for Massie & Morse against the railroad company he gave them, but later qualified this by saying that he did not give any papers to Mr. Norris or tell the attorney that he had a lease, and that he was present during the whole of the trial and gave testimony and heard the testimony given by Mr. Morse; also that he never saw the timber deed and lease found in the office files of his attorney and never signed "Massie & Morse" to the lease of 1895, and that no such lease was ever taken by Massie & Morse so far as he knows.

[3] It was incumbent upon defendants to show that the possession of Napoleon D. Massie was hostile in its inception, and not under lease, or, if under lease, that the same had been repudiated, and notice of such repudiation given in fact to the plaintiff. This issue was not met by the denial of Mr. Massie of knowledge of permission granted by the plaintiff to Massie & Morse to occupy the premises. If the jury may ignore a lease upon mere denial of defendant of knowledge thereof, then no one can rely upon even the most solemn instrument:

"And the older they would be the more they would be at the mercy of the recollection or the dishonesty of the party executing them; * * * and we are compelled to say that, if the judge had received the evidence and the jury had held the lease void, disregarding in doing so the evidence of subscribing witnesses, it would have been the plain duty of the judge to set the verdict aside as unwarranted." *Campau v. Lafferty*, 50 Mich. 114, 15 N. W. 40.

In that case the defendant sought to support his hostile holding by denying that he ever knowingly took a lease himself, and sought to show that the paper which was proved and which he admitted signing was represented to him at the time to be a paper representing some other lands.

The partnership between Massie & Morse made the lease of 1895, whether signed by Mr. Massie or by Mr. Morse for Massie & Morse, a permissive holding as to both Mr. Massie and Mr. Morse, and prevented the running of the statute of limitations against plaintiff and in favor of the possession of Massie & Morse or by Mr. Massie until such time as the possession under the lease was expressly repudiated and notice of such repudiation and of possession hostile to plaintiff was brought to the actual notice of plaintiff. Constructive notice is not enough under such circumstances; actual notice must be shown.

"To transform a permissive use into an adverse one, there must be a distinct and positive assertion of a right hostile to the rights of the owner, and such assertion must be brought to his attention." 14 Cyc. p. 1152; *Weber v. City of Detroit*, 159 Mich. 14, 123 N. W. 540, 38 L. R. A. (N. S.) 1056.

"It is settled law that a tenant or licensee cannot convert his occupancy under license into an adverse holding without actual notice to the holder of the legal title." *Standard v. Jewell*, 206 Mich. 61, 172 N. W. 407; *Robertson et al. v. Boylan et al.*, 214 Mich. 27, 181 N. W. 989.

[4] If Mr. Massie signed the lease of 1895, or if Mr. Morse signed it, and one or the other did sign for Massie & Morse, then the plaintiff was entitled to have the jury instructed that Mr. Massie's possession was permissive, and not hostile, unless and until such permissive possession was repudiated by Mr. Massie and actual notice of a hostile holding was given to plaintiff. Here was no sleeping upon its rights by the county. It had leased the land to Massie & Morse, and it will not do now to permit Mr. Massie, Morse being dead, to sweep away his own act or the act of his copartner by the general statement that he did not know about the lease. But suppose it be admitted that Mr. Massie did not know of the lease in the firm name obtained and executed by his partner? The plaintiff knew of it and had a right to rely thereon, and Mr. Massie's claim of adverse possession thereafter is met by the wholesome rule that, where two are in occupancy of land, their holding is by permission, and not adverse if either one of them has invoked and obtained permission from the owner for both.

[5] If Mr. Massie believed that he had a deed and claimed under a deed given in 1889, and in 1895 became a lessee with his partner, Morse, he waived thereby all claim of possession adversely to the lessor, *Campau v. Lafferty*, *supra*.

When suit was brought against the railroad company by Massie & Morse, and they planted their right to recover damages to growing crops under lease from plaintiff, such suit was a recognition of the character of their holding wholly inconsistent with claim of possession adverse to the lessor. It is true that a possession permissive in its inception may become adverse (*Ward v. Nestell*, 113 Mich. 185, 71 N. W. 593), and that, in order to give a hostile character to a possession permissive in its inception, it is not necessary that the land should have been first surrendered to the owner (2 C. J. 134); but where possession is originally taken and held under the true owner, a clear, positive, and continued disclaimer and disavowal of title and assertion of an adverse right brought home to the actual knowledge of the true owner are indispensable before any foundation can be laid for the operation of the statute of limitations (2 C. J. 134).

"A mere permissive possession, or one consistent with the title of another, however long continued, can never ripen into a title by adverse possession." *Township of Jasper v. Martin*, 161 Mich. 336, 126 N. W. 437, 137 Am. St. Rep. 508.

The understanding among the neighbors that the land was owned by defendants and that the defendant Napoleon D. Massie had repeatedly made claim of ownership, did not establish notice of a hostile possession brought home to the actual knowledge of the owner.

[6] With an outstanding lease from the county to Massie & Morse, the county had a right to rely upon their recognition of the relation of landlord and tenant and of a holding by both of them in subordination to its title. And this would hold good until actual notice from them to the contrary. Such required notice of hostile holding under a permissive entry could not be predicated upon claim of ownership by Mr. Massie or understanding to such effect by neighbors or assessing officers, or the building of fences, clearing of land, or payment of taxes; in fact, nothing short of actual notice of hostile holding coming to the owner; not by rumor or acts consistent or inconsistent with a tenancy, but by notice of clear and unequivocal repudiation of the continuance of the relation under which entry was made and an intent to hold against the consent of the owner.

The verdict rendered by the jury is so clearly against the weight of the evidence that the trial court should have granted the motion to set it aside.

In passing over the claimed error in the argument of counsel for defendants to the jury we are not to be understood as approving of the same.

The judgment below is reversed, and a new trial is granted, with costs of this court to the plaintiff.

TATRO v. BAKER-FISK-HUGILL CO.
(No. 4.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Evidence $\S$ 113(8)—Of price paid for automobile some evidence of its value.

Evidence as to what owner paid for an automobile is evidence of its value in connection with his other testimony as to condition of automobile, distance it had been operated, etc.

2. Evidence $\S$ 543(1)—Witness familiar with value of property of same character may testify as expert witness as to value of property in question.

A witness who is familiar with the value of property of the same character as property in question may testify as an expert witness as to the value of the property in question, though he has never seen it.

3. Evidence $\S$ 543(4)—Used car dealer properly permitted to testify as to market value of automobile.

In action for loss of plaintiff's automobile, stolen from defendant garage keeper, witness who had been engaged in the buying and selling of used automobiles for about six years and was familiar with the selling price of automobiles, and had heard the testimony as to the value of plaintiff's automobile, the distance it had been run, and the accessories with which it was equipped, was properly permitted to give his opinion as to its market value.

4. Customs and usages $\S$ 19(1)—Customs not proven where not shown to have been uniform, general, and notorious and known to party.

In action for loss of plaintiff's automobile stolen from defendant garage keeper, involving issue as to whether defendant was negligent, custom of other garages binding on defendant was not proven in the absence of a showing that the claimed custom was uniform, general, and notorious, and that it was brought to plaintiff's attention or that he had knowledge thereof.

5. Livery stable and garage keepers $\S$ 6—Proof of garage keeper's failure to deliver automobile established prima facie case of negligence.

In action for loss of plaintiff's automobile stolen from defendant garage keeper, plaintiff established a prima facie case of negligence by proof of defendant's failure to deliver automobile on demand, shifting upon defendant the burden of showing that he was not negligent.

6. Appeal and error $\S$ 1033(5)—Appellant cannot complain that charge placed too great a burden on appellee.

Defendant on writ of error to review judgment for plaintiff cannot complain that court's charge placed too great a burden of proof on the plaintiff.

7. Bailment $\S$ 31(1)—Proof of bailee's failure to deliver on demand establishes a prima facie case against bailee.

In case of a bailment for hire the demand for and the failure to deliver the goods constitutes a prima facie case against the bailee,

casting on plaintiff the burden of showing that he was not negligent.

Error to Circuit Court, Wayne County; Ira W. Jayne, Judge.

Action by William T. Tatro against the Baker-Fisk-Hugill Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Barbour, Field & Martin, of Detroit (Henry C. L. Forler, of Detroit, of counsel), for appellant.

Walters & Hicks, of Detroit, for appellee

STONE, J. This case is here upon writ of error sued out by the defendant to review a judgment for the plaintiff in the court below. The action is trespass on the case brought by the plaintiff for himself, and for the use and benefit of the New Jersey Insurance Company, claiming damages for the loss of an automobile alleged to have been stolen while in the possession of the defendant for repairs. The defendant conducted an automobile sales agency, and was located on the east side of Woodward avenue in the city of Detroit, a short distance from the southeast corner of Alexandrine avenue. Immediately adjoining the place of business of the defendant was the agency of the Overland Company, and next to it the Simons Sales Company, and next to it and on the corner the Buick Sales Company. In the rear of these places was a public alley running from Alexandrine avenue to Martin place, the next street south; and another public alley running from this alley to John R. street, the next street south. Just east of the north and south alley and abutting on it the defendant had a service station on Alexandrine avenue, with a used car showroom in the front. This station ran back to the east and west alley running to John R. street. The defendant also rented a yard in the rear of house No. 46 Alexandrine avenue east, and all repair work, except motor work and where cars had to be blocked up, was done outside in this yard in the rear of 46 Alexandrine east, and in the alley running to John R. street.

Upon the trial it was the claim of the defendant that the men in its employ worked on the cars during the day up to about 5:15 p. m., when all cars in the yard or alley were taken by the men and put in the service station; that no cars were left out after the men stopped working; that during the day there were from eight to ten men working in the alley and yard repairing cars; that no one was permitted to drive a car from the yard or alley without a release from the of-

five; and that every service station in the city had a similar practice of doing minor repairs on the outside of their service stations. Upon these subjects there was conflicting testimony. It was in evidence that there was no watchman, or no one whose duty it was to watch cars, and that there was no one in the yard when there was no repairing to be done there. There was also testimony that in the month of October, 1919, there were no workmen working on cars in the yard, but that there were cars there all of the time, placed there by the defendant, and that most of the days there was nobody there. In August, September, and October, 1919, over 1,000 cars were reported stolen in Detroit. Over 77 per cent., however, were recovered in 1919.

Prior to October, 1919, the plaintiff had purchased a Dort touring car from the defendant, and on or about October 6th he took it to the defendant for repairs. The work on the car was completed on October 10th, and about 4:30 o'clock in the afternoon the plaintiff called for it. He first went to the repair shop and obtained a bill for the repairs, and then went to the cashier and paid the bill and obtained a release. He then went with an employee of the defendant to the yard to get the car, but it was not there. At the time there were nine cars in the yard, four one side and five on the other. After checking up and ascertaining definitely that the car was gone, they returned to the office and at once notified the police that the car was missing. The car was never recovered, and the plaintiff brought this suit, charging the defendant with negligence in the care and handling of the car. The plaintiff recovered a verdict and judgment in the sum of \$850 damages.

It should be stated that the evidence does not show just where the car was repaired and left by the defendant, but the evidence was general as to the practice of defendant in handling cars left for repair. Upon the trial it appeared undisputed that the plaintiff paid for the car and certain extras \$990, and that he had had the car about three months, during which time he had had some small repairs made on it. Upon the subject of the value of the car and the extras one J. D. Montgomery testified on behalf of plaintiff that his business was dealing in, buying, and selling used automobiles, that he had been in the business about six years, and that he had been familiar with the selling price of automobiles. The following appears:

"Q. You have heard the testimony in this case. The plaintiff said he lost a Dort touring car 1919 model, run less than 1,000 miles, also certain accessories, spare tire, a lock, bumper, kit of tools, and chamois skin. Now, in view of your experience, what was the market value of that car in Detroit on October 10, 1919? A. Around \$900."

Counsel for defendant moved to strike out the testimony of this witness, "as he said he could not testify as to value unless he knew the condition it was in, and he did not know the condition of this car." The court did not rule at once, but later, referring to the motion, said:

"I shall deny the motion because the testimony seems to be based on a description of the condition of the car by the owner, which Mr. Montgomery testified he heard, and it seems to be the rule of law in this state that he may testify to a value based on a hypothetical question stating the various facts of the condition of the car, including its age. So the testimony may stand as in evidence."

The defendant requested the court to charge the jury as follows:

"(1) I charge you there is no presumption of negligence from the mere fact that the automobile was lost or stolen, and that the burden of proof is upon the plaintiff to show that the defendant failed to exercise ordinary care.

"(2) I charge you that, if you find that when the plaintiff requested the car the defendant showed that he was unable to deliver it, because it had been lost or stolen, that the defendant would not then be liable, unless the plaintiff showed by a preponderance of evidence that the theft or loss was due to a lack of ordinary care and diligence on the part of the defendant.

"(3) I charge you that, if you find that the car was lost or stolen, the defendant is not liable in the case unless you also find that the defendant failed to exercise ordinary care and diligence to prevent the loss or theft of the said car.

"(4) I charge you that the burden of proof is upon the plaintiff to show that the defendant failed to exercise ordinary care in the keeping of the said automobile.

"(5) I charge you that, if you find that the care exercised by the defendant in this case was equal to that to be expected from ordinarily prudent persons under similar conditions and circumstances, in such case the defendant is not liable, and your verdict must be, 'No cause of action.'"

None of the above requests was given, but the substance of the third and fifth was covered by the general charge.

The court charged the jury, among other things, as follows:

"In the first place, the burden is upon the plaintiff of showing that the defendant had his car and that when he demanded it he failed to deliver. Now, I may say that it is anticipated that the plaintiff assumed that burden, and the defendant admitted that he had the car and did not deliver it when it was demanded."

(1) "But the defendant comes and says the car was stolen through no fault of his. That relieves him of the duty and the responsibility of turning it over to the plaintiff. That would be an adequate defense, but the burden of proof is upon the defendant to show that the car was stolen and through no fault of his. If he shows you that, he has made out a de-

(184 N.W.)

fense, but the law says that in order for the defendant to be relieved of the responsibility of delivering this car, even though it is stolen, he must show that he used ordinary care, and the burden of convincing you that the defendant did not exercise ordinary care is upon the plaintiff."

(2) "So if you find that this car was stolen as a matter of fact, and that is the fact for you to consider if you find this car was stolen, from the testimony, then you would proceed to consider whether or not the defendant exercised ordinary care in taking care of this car while it was in his possession, and the burden of convincing you that he did not is upon the plaintiff."

The court then proceeded to define ordinary care, and called attention to the evidence as to whether there was great danger of theft at the place and time of the loss and the duty of defendant. Upon the subject of custom the court charged as follows:

(3) "In these instructions which I have just given you as to what an ordinarily prudent garageman would do, there is one item of his measure, the custom of the place or trade, and in that connection, since the matter has been prominently before you, I charge you that a custom which would govern the trade in its care of automobiles while they are in their custody and waiting for the owner, to be received, has not been established in the testimony here so that you can consider that a custom will determine the conduct of the defendant either for or against him."

The assignments of error will be considered in the connection with the several alleged errors relied upon.

[1-3] (1) Refusal of the court to strike out the testimony of the witness Montgomery as to the value of the car. The record shows that the plaintiff had already testified what he had paid for the car. This was some evidence of its value in connection with his other testimony. The law is well settled that a witness who is familiar with the value of property of the same character, although he has never seen the property in question, is competent as an expert witness. 22 Corpus Juris, 695, and cases there cited. We do not think it was reversible error to receive the testimony of Montgomery.

[4] (2) Ruling of the court as to the custom of other garages and service stations in doing repair work outside of the garage or service station and in the care and keep of the cars upon which work had been done. We have not set forth the testimony upon this subject, but we have examined it, and it is sufficient to say that in our opinion no trade custom or usage was shown. There was no uniformity shown. The claimed custom was not shown to be general and notorious, and, lastly, there was no evidence that any custom was brought to the attention of the plaintiff, or that he had any knowledge of any custom. This is particularly essen-

tial in the case of a usage or custom of the trade or business. 17 Corpus Juris, 454 et seq.; 27 R. C. L. 197; Runyan v. Central R. Co., 64 N. J. Law, 67, 44 Atl. 985, 48 L. R. A. 744-747; Stringfield v. Vivian, 63 Mich. 681, 30 N. W. 346; Lamb v. Henderson, 63 Mich. 302-305, 29 N. W. 732; Schurr v. Savigny, 85 Mich. 144, 48 N. W. 547; Pennell v. Transportation Co., 94 Mich. 247, 53 N. W. 1049; Eaton v. Gladwell, 108 Mich. 678, 66 N. W. 598. In the last-cited case it was said:

"There was nothing in the case to show that this was a custom so general in its application and recognition as to make it admissible, nor was there anything tending to show that the defendant knew of it, or could be presumed to have contracted with reference to it."

See, also, Tuttle v. Embury-Martin Lbr. Co., 192 Mich. 385, 158 N. W. 875, Ann. Cas. 1918C, 664.

We do not think that the trial court erred in holding and charging that no custom had been shown by the evidence.

[1-7] (3) The charge of the court in reference to the measure of defendant's liability and the burden of proof. Reference is here made to that part of the charge above quoted and marked 1 and 2 in the parentheses. The only infirmity in this portion of the charge was that it placed too great a burden upon the plaintiff; but of this the defendant cannot justly complain. It is doubtless the rule of law in case of a bailment for hire, such as this was, that the demand for and the failure to deliver the goods constitutes a prima facie case against the bailee. The law, we think, is well settled in this state upon this subject.

In Baehr v. Downey, 133 Mich. 163-169, 94 N. W. 750, 752 (103 Am. St. Rep. 444) Justice Grant, speaking for the court, said:

"My brethren do not agree with me that the strict liability of innkeeper attached to the defendants. They are of the opinion that that relation ceased to exist, and that the defendants were ordinary bailees of the property. Under the circumstances, plaintiffs made out a prima facie case by showing the property in the defendants' possession, and refusal or neglect to return on demand. ~~The onus of exoneration was then upon the defendants.~~ 3 Am. & Eng. Enc. Law (2d Ed.) 750. The rule as there stated is that, when the chattels are not returned at all, the law presumes negligence, and casts upon the bailee the onus of showing that he was not negligent. This undoubtedly is the more modern and reasonable rule. See, also, Knights v. Piella, 111 Mich. 9, 14, 69 N. W. 92, 66 Am. St. Rep. 875; Donlin v. McQuade, 61 Mich. 275, 28 N. W. 114."

To the same effect, see Fraam v. Grand Rapids, etc., R. Co., 161 Mich. 556-559, 128 N. W. 851, 29 L. R. A. (N. S.) 834, 21 Ann. Cas. 96; Smith v. Bailey, 195 Mich. 105-107, 161 N. W. 822; Canning Co. v. Pere Marquette R. Co., 211 Mich. 326-331, 178 N. W. 851.

(4) The failure of the court to charge as requested. The substance of requests numbered 3 and 5 was given. There was no error in refusing to give the others. The case was properly submitted to the jury upon the question of fact involved, with the exception above indicated, of which defendant cannot complain.

We find no prejudicial error in the record, and the judgment below is affirmed.

DANIELS V. PAGE STEEL & WIRE CO. (No. 66.)

(Supreme Court of Michigan. Oct. 8, 1921.)

1. Principal and agent §23(1)—Evidence insufficient to show contract relations.

In an action by salesman, who had been selling defendant's windshields under an agreement with a company which had the exclusive sale rights of defendant's articles, evidence held not to show any contract relation between plaintiff and defendant or the relation of creditor and debtor, though at request of company having the exclusive agency defendant had opened an account with plaintiff and had paid him commissions direct.

2. Novation §3—Agreement to pay commissions direct to third person held not novation.

An agreement between owner of exclusive right to sell defendant's goods and plaintiff salesman, whereby plaintiff was to receive his commissions direct from defendant, and assent thereto by the defendant, held not to amount to a novation; there being no extinction of the obligation defendant owed to the owner of the exclusive right.

Error to Circuit Court, Lenawee County; Burton Hart, Judge.

Action by William Smalley Daniels against the Page Steel & Wire Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, CLARK, and SHARPE, JJ.

Baldwin & Alexander, of Adrian, for appellant.

J. N. Sampson and Charles L. Robertson, both of Adrian, for appellee.

STONE, J. This action was brought to recover certain commissions claimed to be due the plaintiff, on the sale of windshields manufactured by the defendant. The case was tried before a jury, which returned a verdict for the plaintiff for upwards of \$6,000. The trial court, having reserved the right to do so, set aside the verdict and entered a judgment for defendant of no cause of action, upon the grounds that there was

no contract relation established by the evidence, or no relation of debtor and creditor between the plaintiff and the defendant, and also that if there was a promise to pay by this defendant, being the debt of another, it would have to be in writing, under the statute of frauds. The plaintiff has brought the case here by writ of error.

The plaintiff, on February 23, 1911, was a sales agent for manufacturers, and the defendant (then known as the Page Woven Wire Fence Company), with offices and factory located at Adrian, Mich., was engaged in the manufacture of windshields for automobiles and other specialties. On or about September 28, 1910, the defendant entered into a contract with Conover & Robinson, of New York City, giving them the exclusive sale rights of all windshields manufactured by the defendant, and agreed to pay Conover & Robinson certain commissions on all shields manufactured and sold by defendant.

Conover & Robinson, on February 23, 1911, entered into a contract with plaintiff, by the terms of which plaintiff was given the exclusive sale rights of all shields manufactured by defendant, his territory to be all of the United States, except the states of New Jersey and Connecticut, and that part of New York state defined as counties along the Hudson river, and including the cities of Albany and New York. This agreement between Conover & Robinson and the plaintiff also contained the provision that, if 10,000 shields were marketed during the first year, the agreement should automatically be extended for the second year, and if a minimum of 25,000 shields were marketed the second year it should remain in force for the third year.

Owing to the fact that the defendant was not able to manufacture and deliver shields, plaintiff was not given the opportunity to sell the number of shields mentioned in the contract, and this fact was recognized by Conover & Robinson and the defendant, and it was agreed that plaintiff should be given a contract for a second year, so that he might have the advantage of the work he had been doing during the first year. On the 14th day of December, 1911, plaintiff was given a new contract by Conover & Robinson, spoken of as "the rider" to the agreement of February 23, 1911. That contract was as follows:

"December 14, 1911.

"Rider to Agreement of February 23, 1911,
Signed by Signers of This.

"The term of this agreement shall be extended to December 1, 1912, and if a minimum of 2,500 shields have been shipped by Page Woven Wire Fence Company, either on direct orders or those sent them by Smalley Daniels' offices, or otherwise sold, then the exclusive selling arrangement with Smalley Daniels shall continue for one year additional,

from December, 1912, and if a minimum of 10,000 has been sold during 1913, the selling agreement shall remain in force during 1914.

"In consideration of Smalley Daniels maintaining an office in Detroit, Mich., after March 1, 1912, for the purpose of attending to the factory correspondence as pertains to the selling of shields, we agree that Smalley Daniels shall have full 10 per cent. commission on all shields sold or shipped by Page Woven Wire Fence Company under the terms of our contract with them, and to authorize them to so pay Smalley Daniels all such commissions direct.

Edwin K. Conover.

"Walter W. Robinson.

"Accepted: Smalley Daniels."

This last agreement was read over and discussed with C. M. Lamb, who was at that time general manager of the defendant (but just when is left uncertain by the testimony), and he assented to the arrangement. Pursuant to the agreement made, plaintiff moved his office from the city of Boston to Detroit, and in every way carried out the terms of his agreement, and during the first year sold more than 2,500 shields on orders accepted by defendant, so that the agreement was extended for the year 1913.

Immediately after plaintiff entered into the rider contract, he began the sale of shields, and on or about January 9, 1912, defendant opened an account with plaintiff, on which they credited him with commissions due on windshields sold, and charged him with cash paid to him by reason of said commissions. It appears, however, that this was done for convenience, and at the request of Conover & Robinson. An employé of defendant, called as an adverse witness, testified:

"In the years 1911, 1912, and 1913 I was occupying the same position with the Page Company that I do now, as head of the auditing department. During 1912 and 1913 checks for commissions were sent direct to Mr. Daniels as they became due. Checks were sent to Smalley Daniels direct at the request of Conover & Robinson, as a matter of convenience, to save them holding an office some place. If we sent the checks to them, they would have to turn around and send them to Mr. Daniels, or whoever they did business with, and they asked us to do their business in that respect."

Referring to the account the witness testified:

"Then this was closed by throwing it all to the proper account of Conover & Robinson. All debits and all credits were then transferred back to the parent account of Conover & Robinson, where it belonged."

Plaintiff continued to sell shields under his contract during the years 1912 and 1913, until defendant claimed that plaintiff's rights under the contract had expired, by reason of the fact that the contract between defendant and Conover & Robinson had been ended. During all of this time plaintiff had

been conducting all correspondence relating to the sale of shields with defendant, and had been receiving his pay for commissions from defendant, according to the terms of the rider contract.

In the summer of 1913 plaintiff was at the offices of defendant, and then attempted to adjust the balance due him on commissions, at which time defendant submitted to plaintiff a statement which showed a balance of \$148 due plaintiff on commission account. Plaintiff claimed a larger amount was due him, and therefore no settlement was made. In 1913 defendant, according to plaintiff's testimony, claimed that plaintiff's contract was not in effect after July, because Conover & Robinson could not make a contract with plaintiff for a longer period of time than defendant's contract was in effect with Conover & Robinson, and that "that relation was out at that time; that they had canceled it." The terms of the contract between defendant and Conover & Robinson, do not appear in the record.

On April 20, 1914, Conover & Robinson sent a letter to the defendant to the following effect:

"You are hereby notified that any and all authority ever given you by the undersigned, to pay direct to Mr. Smalley Daniels, any commissions earned, or claimed to be earned, by him on account of the sale of Boreas windshields is hereby expressly withdrawn, and you will please account to us for all commissions on sales, as per terms of contract between yourselves and the undersigned."

To this letter defendant, on April 23, 1914, replied as follows:

"We are in receipt of your formal withdrawal of authority to pay commissions claimed by Mr. Smalley Daniels on sales of Boreas windshields direct, and your instructions to deal with you personally in this matter, as contemplated in the contract between us. We recognize your entire right to take this action, and shall be governed accordingly, but wish to inform you that, inasmuch as there exists a considerable amount of shortages in the consignment accounts had by us with Mr. Daniels, which consignments were guaranteed by yourselves, and inasmuch as your withdrawal of right to deal direct with Mr. Daniels deprives us of any opportunity to recoup these charges from any commissions which might otherwise be owing Mr. Daniels on account of such commissions we shall hold you responsible for such shortages as guarantors of those accounts, and shall look to you for an adjustment of them."

At the trial it was the claim of the plaintiff that he was entitled to recover from defendant commissions on all shields sold by defendant during the years 1912 and 1913, and that defendant had agreed to pay these commissions to plaintiff. On the other hand, it was the claim of the defendant that the relation of debtor and creditor did not exist between plaintiff and defendant, and that

defendant had no contract relation whatever with plaintiff. Error is assigned on the action of the trial court in setting aside the verdict of the jury and entering a judgment for defendant, and in refusing to enter judgment for plaintiff on the verdict.

[1] The salient question in the case is whether or not there was a contract relation between plaintiff and defendant, or whether the relation of debtor and creditor existed between the parties. Under the contracts, the debt, if any, owing to plaintiff, was the debt of Conover & Robinson, the parties thereto. We have carefully read and considered the record, and have searched in vain to find any evidence showing contract relations between the plaintiff and defendant, or any promise or agreement on the part of defendant to pay the plaintiff any money. Giving the plaintiff's evidence full probative effect, it falls far short of showing any contract relations on his part with the defendant, by contract either express or implied, and we are unable to find that the relation of debtor and creditor existed between them.

The defendant was not a party to either contract, and conceding, what does not appear, that Mr. Lamb had authority to consent orally to the terms of the rider agreement, such consent did not create the relationship of debtor and creditor between the plaintiff and defendant. That agreement provided for the extending of the original agreement, that further extension should be made upon the making of certain specified sales, with an increase in the rate of commission, and a change in the manner of payment. (See last clause of rider contract.) All of these things were agreed to be done by the plaintiff and Conover & Robinson. Defendant had no part in the arrangement, other than to consent that it would pay the commissions which it owed under its contract with Conover & Robinson, direct to the plaintiff, instead of to Conover & Robinson, for convenience of the parties. As is said by counsel for defendant:

"It was a mere mechanical act, no benefit was to be derived by it one way or another, and its sole authority to pay commissions to plaintiff was to be derived from Conover & Robinson, created by them and terminable by them."

The defendant was not interested in the Conover & Robinson contract with the plaintiff. The defendant was interested in its own contract with Conover & Robinson. The burden was on Conover & Robinson to perform their contract with defendant, to its satisfaction, whether plaintiff carried out his contract with Conover & Robinson or not. The conduct of the parties negatives the claim of the plaintiff. Had plaintiff, at the time, intended to look to defendant for payment, he would have insisted on some-

thing more than a mere verbal assent, so careful was he to have his contracts in writing.

[2] It is the claim of the plaintiff that the rider agreement, and the assent, amounted to a novation. We do not agree with this claim. The essential elements of a novation are not present. The decisions of this court upon the subject of novation are numerous. Many of the earlier cases are cited in *Harrington-Wiard Co. v. Blomstrom Co.*, 166 Mich. 276-287, 131 N. W. 559. See, also, *Gillett v. Ivory*, 173 Mich. 444, 139 N. W. 53; *Stamp Service Co. v. Schermack*, 179 Mich. 266-274, 146 N. W. 144, Ann. Cas. 1915D, 287.

We find no evidence to show that defendant consented to be substituted as a debtor of plaintiff in the place and stead of Conover & Robinson, and there was no extinction of the obligation it owed to Conover & Robinson, under its contract with them, nor were their relations changed. There is no evidence that the plaintiff ever released Conover & Robinson from their contract relations with him. We repeat that the essential elements of a novation are wanting here. The subsequent conduct and correspondence of the parties and of Conover & Robinson are all inconsistent with a novation or a new contract. We are constrained to hold that the plaintiff has failed to make out a case of liability of defendant and that the court below made a proper disposition of the case.

The judgment of the circuit court is therefore affirmed.

KOSCNICKI v. PERE MARQUETTE RY. CO. (No. 78.)

(Supreme Court of Michigan. Oct. 8, 1921.)

1. Appeal and error $\S$ 1097(1)—Decision on former appeal law of case.

Matters of law determined on appeal are the law of the case on a subsequent appeal.

2. Appeal and error $\S$ 933(1)—Testimony to be considered most favorably to plaintiff in reviewing denial of new trial after verdict for plaintiff.

On review of denial of new trial on ground that verdict is against the great weight of the evidence, the testimony must be viewed in the light most favorable to the plaintiff.

Error to Circuit Court, Manistee County; Hal. L. Cutler, Judge.

Action by Frank Koscnicki against the Pere Marquette Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Parker, Shields & Seaton, of Detroit (Charles N. Belcher, of Manistee, of counsel), for appellant.

Howard L. Campbell and Thomas Smurthwaite, both of Manistee, for appellee.

MOORE, J. This is a personal injury case. It comes to this court for the second time. The opinion of the court will be found in 205 Mich. 387, 171 N. W. 354. Since then the case has been twice tried. One trial resulted in a disagreement of the jury; the other, a judgment in favor of the plaintiff for \$2,250. From this judgment defendant has brought the case here by writ of error.

Upon the first trial the circuit judge directed a verdict in favor of the defendant. This court reversed that case. A reading of the opinion in 205 Mich. 387, 171 N. W. 354, will show why this court reversed the case, and will also make a long statement of facts now unnecessary. Upon the last trial, at the close of all the testimony, the following occurred:

"Mr. Shields: If the court please, I move that the court direct a verdict in this case in favor of the defendant, on the grounds: First, under the pleadings and proofs in this case, the plaintiff has failed to make out a case which should be submitted to the jury; second, no actionable negligence has been proven; third, the plaintiff is guilty of contributory negligence as a matter of law; fourth, the plaintiff has not sustained the burden of proving the negligence alleged, and that the damages sustained by the plaintiff was the proximate result of the blowing of the whistle.

"The Court: I will take the motion under advisement.

"Mr. Shields: I request that the following special question be submitted to the jury, your honor: Q. Was the locomotive whistle sounded at the whistling post?

"The Court: What do you say about this, Mr. Smurthwaite?

"Mr. Smurthwaite: I object to it as immaterial.

"The Court: It will be denied, on the ground it does not call for a finding on a question of fact which is conclusive of the real issue involved in the case."

Later the trial judge gave the case to the jury in a carefully prepared written charge, which had been submitted to the counsel for both parties and had their approval. As already stated, a verdict for \$2,250 was rendered in favor of the plaintiff. A motion was made for a new trial upon substantially the same grounds stated in the motion for a directed verdict. The motion was overruled. Counsel for the appellant now present the same questions that were presented to the trial court in the motions for a directed verdict and a new trial.

The first question we will consider is: Did the plaintiff make the case alleged in the declaration? Counsel say in their brief:

"The declaration in this case alleges a cause of action against Paul King and Dudley Waters, as receivers of the Pere Marquette Railroad Company, and alleges further that the Pere Marquette Railway Company, the defendant in this case, assumed the liabilities and obligations of" said railroad company that caused the injury complained of on account of which this suit is instituted. "Not a single word of testimony was offered at the trial to prove that the Pere Marquette Railway Company, the defendant, assumed liability for this tort, committed while the properties of the Pere Marquette Railroad company were being operated by the receivers appointed by the United States court."

This question was first presented in the notice attached to the plea of the general issue. Counsel for the appellee say:

"On October 25, 1917, counsel for plaintiff served notice of the hearing of the motion for the determination, by the court, of the matters set forth in the defendant's plea and notice of want of jurisdiction of this court to hear and determine this cause. This motion came on to be heard on the first day of the next term of the circuit court for Manistee county, at which time the final decree of the District Court of the United States, within and for the Eastern District of Michigan, Southern Division, in the case of American Brake Shoe & Foundry Company, Plaintiff, v. Pere Marquette Railroad Company, in Equity, No. 5467, dated January 29, 1917, was introduced in evidence, from which it appeared that on said 29th day of January, 1917, the said final decree was made and entered in said federal court, and by its terms the purchaser of the said railroad properties, who were incorporated as the present defendant corporation, assumed all liabilities of said defendant corporation, which arose after the date of said decree.

"The circuit court for the county of Manistee, after hearing the motion and the arguments of counsel on both sides, overruled the special notice, which was in the nature of a plea in abatement under the former practice, held that the liability in this case, if any, was that of the defendant, and ordered the defendant to prepare for the trial of the cause. The proceedings and ruling of the court appear in the record at page 14. It was thus adjudicated and determined by the trial court in this case, as a question of law, that the cause of action set forth in the declaration occurred after the making and entering of said final decree, which expressly made the liability that of the defendant in this cause, and thus established as the law of this case."

[1] This action was taken before the case came here the first time. If the point was well taken, this court could not well reverse the case and direct a new trial, as it did in fact. Did the court err in overruling the motion for a new trial because the verdict was against the great weight of the evi-

dence. That question was not passed upon because of the condition of the record when the case was here before. It is properly presented now.

[2] In a motion of this character we must view the testimony in the light most favorable to the plaintiff. *Benjamin v. McGraw*, 208 Mich. 81, 175 N. W. 394. In giving his reasons for refusing a new trial the judge said in part:

"A new trial will be granted, where the verdict is plainly, manifestly, palpably, clearly, decidedly, or strongly against the evidence or the weight of evidence. Where the verdict is so strongly against the weight of the evidence as to shock the court's sense of justice, or indicate that the jury were influenced by passion, prejudice, or other improper motive, a new trial will presumably be granted in any jurisdiction. * * * Yet it is generally held an invasion of the province of the jury to set aside a verdict that is not clearly or decidedly against the evidence, or the weight of the evidence. It is usually held that a new trial should not be granted because the verdict appears to be against the mere preponderance of the evidence, or merely because the trial judge would probably have reached a conclusion different from that of the jury. Where the evidence was so conflicting that different persons might honestly and intelligently have formed different conclusions therefrom, the verdict should stand. * * * See *Cyc.* 820-930; *Rice v. Mich. Ry. Co.*, 208 Mich. 142, 175 N. W. 454; *In re McIntyre Estate*, 160 Mich. 117, 125 N. W. 51; *Fishleigh v. D. U. R.*, 205 Mich. 167, 171 N. W. 549; *O'Dell v. Straith*, 208 Mich. 509, 175 N. W. 441; *Druck v. Antrim Co.*, 177 Mich. 364-374, 143 N. W. 59; *Pachuczynski v. Ry. Co.*, 202 Mich. 594, 168 N. W. 418.

"The case of *Fishleigh v. D. U. R.*, 205 Mich. 161 [171 N. W. 549], will be found a very instructive case upon the questions as to whether the verdict was against the weight of the evidence or excessive. Mr. Justice Fellows, in a very well considered opinion, circumscribed the rights and limitations of courts to substitute their judgment for that of the jury, the triers of the facts. * * * After a very careful reading of the authorities above cited, I am unable to say that the verdict should be disturbed as being against the weight of the evidence or as being excessive."

The case has been tried three times. If because of the case then presented by the record we found it our duty to set aside a directed verdict, we think it should not be said upon this record that the judge erred in not directing a verdict for the defendant.

The other assignments of error have been examined, but will not be discussed. The case was carefully tried. It was submitted to the jury in a charge covering more than 16 printed pages in the record, which had the approval of counsel before it was given. We find no reversible error.

The judgment is affirmed, with costs to the plaintiff.

ANDREW C. SISMAN CO. v. MILLER et al.
(No. 40.)

(Supreme Court of Michigan. Oct. 8, 1921.)

Appeal and error $\S$ 1011(1)—Finding of fact by court on conflicting evidence not disturbed on appeal.

On conflicting evidence the finding of the trial court that the contract for repairs on defendant's building was made with plaintiff, seeking to enforce a mechanic's lien, and not with a third person, and that plaintiff duly perfected its lien, will not be disturbed on appeal.

Appeal from Circuit Court, Wayne County, in Chancery; Charles B. Collingwood, Judge.

Suit by the Andrew C. Sisman Company against W. H. Miller and others to enforce a mechanic's lien. From a decree for plaintiff, defendant Miller appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Denby, Kennedy & O'Brien, of Detroit, for appellant.

Percy W. Grose, of Detroit, for appellee.

STONE, J. This case is here upon the appeal of the defendant William H. Miller from a decree for plaintiff for \$2,100.25. The sworn bill of complaint was filed July 18, 1917, to enforce a mechanic's lien against the leasehold interest of defendant Miller in the premises described in the bill of complaint. The lien claim arises under the following circumstances:

The defendant Harriet E. Whitbeck is the owner, and defendant Miller has a leasehold interest in said premises, which interest commenced May 1, 1911, and expires May 1, 1931. The premises are generally known and described as the "Miller Building," Detroit, Mich. Plaintiff, a Michigan corporation, was for some years engaged in the general contracting and building business in Detroit, first under the name of Schmied-Sisman Company, and later under the name of Andrew C. Sisman Company. At the time the work commenced, for which a lien is claimed, plaintiff was operating under the name of Schmied-Sisman Company, and thereafter, and before the filing of the bill, its name was changed.

Owing to the irreconcilable conflict in the testimony, it is difficult to state more than the claim of the parties as to the facts in the case. It is the claim of the plaintiff, supported by testimony, that one Harry L. Hulbert, during the year 1916 and for years prior thereto, was employed as an outside superintendent for the plaintiff; and one George D. Hulbert, his brother, was at or about the same time an architect in Detroit, having had an office at one time in the Miller Building. Prior to and in 1916 defendant Miller had

employed George D. Hulbert as an architect. In June, 1916, George D. Hulbert, as architect for defendant Miller, ordered certain labor and materials from the plaintiff for the repair of the Miller Building, and such labor and materials were furnished by the plaintiff, under the supervision of George D. Hulbert, prior to July 6, 1916.

On July 6, 1916, a fire occurred in the said Miller Building, resulting in considerable damage thereto. The plaintiff at that time was engaged in making a specialty of fire losses, appraising the loss and repairing damages. Harry L. Hulbert, plaintiff's superintendent, was told by George D. Hulbert that defendant Miller wanted to see him, and accordingly Harry L. Hulbert met defendant Miller, and was requested by the latter to act as an appraiser for defendant Miller in determining the amount of the fire loss, and Harry L. Hulbert was asked by defendant Miller how much the plaintiff would charge for the services of Harry L. Hulbert in making an appraisal of the loss. He advised defendant Miller that plaintiff generally charged \$50 to \$100 to make an appraisal, but that, in the event that the work of repairing the building was done by the plaintiff, it would make no charge for his services as an appraiser. Following this, at the direction of defendant Miller, Harry L. Hulbert acted as an appraiser on behalf of defendant Miller without charge, and with the appraiser appointed on behalf of the insurance company, determined the amount which the insurance company should pay to Miller under the policies, which was \$3,936.52. Soon after defendant Miller requested plaintiff, through Harry L. Hulbert, to take a contract to repair the loss, for the same amount as was allowed by the appraisers; but Miller was then informed that, because parties in making repairs often wanted extra things done, plaintiff would not take a contract on a fire loss at a definite amount, but that plaintiff would take the job on a time and material basis, plus 10 and 10. Defendant Miller, in reply, told Harry L. Hulbert that he would like to have the plaintiff do the work, and also said that he (Miller) would have George D. Hulbert prepare certain drawings for partitions and changes, and later plaintiff was furnished with such drawings, and George D. Hulbert advised Harry L. Hulbert that Miller had instructed him to let plaintiff have the work. It may be well to say here that defendant Miller denies this claimed arrangement. He claims that he said to Harry L. Hulbert that he (Miller) had made up his mind to have the plaintiff do the work, and gave as a reason that, while he did not know the firm, he knew them as large contractors, but that Harry L. Hulbert said to him that the plaintiff was pretty busy; that it was their busy time, and they were short of workmen and foremen; and that he (Miller) should give the contract to George D. Hulbert, and plaintiff would as-

sist George D. Hulbert with workmen and materials, thereby giving George D. Hulbert an opportunity "to get on his feet."

It appears in evidence that the appraisal was completed July 7th, and on the same day George D. Hulbert wrote a letter to the plaintiff, and sent a copy of the same to defendant Miller:

"Phones: Maine 4123,

"Res. East 1182-M.

"George D. Hulbert, Architect and Engineer,
820 Broadway Market Bldg., Detroit,
Michigan.

"July 7, 1916.

"Schmied-Sisman Co., 285 Beaufait, Detroit, Michigan—Gentlemen: You will please proceed to furnish all labor and material required to make the necessary repairs and alterations, etc., required in a six-story brick building located on the corner of State and Shelby streets, and held under lease by Wm. H. Miller, all to be done on a time and material basis. All materials to be charged net plus 10 and 10; all labor to be charged net at your scheduled rate; all bills to be rendered to this office semimonthly. You will instruct your foreman to keep for the benefit of this office time-cards, which I will furnish. These cards to be delivered to me weekly.

"Very truly yours, Geo. D. Hulbert.

"Note to the Owner:

"If the above does not meet with your approval kindly notify this office at once.

"G.D.H.*G."

Following the receipt of this letter the plaintiff wrote a letter to William H. Miller as follows:

"Louis C. Schmied, President.

"Andrew S. Sisman, Vice Pres.—Treas.

"Schmied-Sisman Company, Builders.

"Phone East 2916.

"Lumber, Lath, Interior Wood Trim, General Factory Work. 387-401 Beaufait Avenue.

"Detroit, Mich., July 12, 1916.

"Wm. H. Miller, Cor. State & Shelby Sts., Detroit, Mich.—Dear Sir: We are in receipt of the following order from Mr. Geo. D. Hulbert, your architect, and are pleased to accept the same:

"You will please proceed to furnish all labor and material required to make the necessary repairs and alterations, etc., required in a six-story brick building located on the corner of State and Shelby streets, and held under lease by Wm. H. Miller, all to be done on a time and material basis. All material is to be charged net plus 10 and 10; all labor to be charged net at your scheduled rate; all bills to be rendered to this office semimonthly. You will instruct your foreman to keep for the benefit of this office time-cards which I will furnish. These cards to be delivered to me weekly."

"We thank you for this order and will make every effort to serve you to the very best of our ability. Very truly yours,

"W.C.R.-T. Schmied-Sisman Co."

No reply was made to this letter by defendant Miller, and immediately plaintiff

commenced furnishing materials and employing workmen in remodeling and repairing the building, furnishing labor and materials to the amount of \$3,999.41, upon which payments of \$2,081.50 were made, leaving a balance, as claimed by the plaintiff, of \$1,917.91, for which a claim of lien was filed on December 13, 1916.

It is the claim of plaintiff that the work progressed from early in July, and was finally completed on the 14th day of October, and that during this entire period detailed invoices of the charges made against the defendant Miller were from time to time mailed to him at his address. While the work progressed the plaintiff had its superintendent, foreman, and employes on the job, and it appears that defendant Miller was on the job frequently; that he met the superintendent of the plaintiff, who received directions from Miller, and talked with Miller about the progress of the work; and the superintendent, when on the job, on one occasion asked Miller for a payment of \$1,000 on account.

On November 10, 1916, George D. Hulbert issued a certificate or statement, addressed to defendant Miller, containing the following language:

"I have this day given to Messrs. Schmied-Sisman Co. my certificate for one thousand eight hundred and sixty-nine dollars and fifty-two cents (\$1,869.52), this being the balance of their claim against said building, and they state that it must be paid at once in order to free your building from liens."

On November 13, 1916, the plaintiff received a letter from the attorneys of defendant Miller, in which, after quoting the above language of George D. Hulbert, they say:

"There is a complete statement in the file by Mr. Hulbert, showing that on September 26th there was due Schmied-Sisman Co. a balance of \$1,267.37. Since that date Mr. Miller has paid the additional sum of \$1,150 on your account. Since September 26th no additional work has been done, and it is very difficult to understand how there could be a balance in your favor in excess of \$117.37. We are informed by Mr. Miller that he stands ready to pay the sum of \$117.37, the correct balance due you."

It is a significant fact that no claim was made in this letter that George D. Hulbert was the original contractor, and plaintiff a subcontractor, as is now claimed. When the bill was filed, defendant Miller answered. There was a general denial of the allegations of the bill, but no claim was made that plaintiff was a subcontractor, and George D. Hulbert the principal contractor. The position and claims of the defendant Miller are well stated by his counsel at the hearing, as follows:

"Our case will be—we expect to show that this work was not done, if any work was done, by the Sisman Company. It was not done in pursuance of any contract between the Sisman

Company and W. H. Miller, or anybody authorized by him to make a contract for him with the Sisman Company; that W. H. Miller had a contract to do all this work with George D. Hulbert, and that he paid George D. Hulbert, and that, with the exception of about \$117, the job has been completely paid for by W. H. Miller; that this letter of July 12th, which was written by the Sisman Company, was brought to the attention of the Sisman Company, and it was stated by those in authority in the Sisman Company that they did have a misunderstanding as to what the matter was, but that about the time the work started those in authority admitted that they were doing the work for George D. Hulbert, and that they expected to look to him for their pay, and that they understood that they had no contract of any kind with W. H. Miller."

It should be said that there was testimony in support of the claim of defendant Miller. The claims of defendant Miller may be stated to be that the amount of labor and material was not properly or adequately proved; that the plaintiff was not the principal contractor, but was a subcontractor; that plaintiff has not maintained a cause of action under the Mechanic's Lien Law (Comp. Laws, §§ 14796-14840); and all of these questions are argued at great length.

The questions presented are mainly questions of fact. There was much conflicting testimony. In fact, it is seldom that so much conflicting and irreconcilable testimony is found in a record. It is a case where the circuit judge, who heard and saw the witnesses testify, has a peculiar advantage over an appellate court. We shall not discuss the testimony in detail. We have read and considered the record with care, and are constrained to agree with the result reached by the trial court. The opinion of the trial court is contained in the record. We quote with approval from it as follows:

"Defendant denies that there was a contract with plaintiff, denies that George D. Hulbert was his architect or agent, but alleges that the contract was made with George D. Hulbert. Defendant further alleges that there was a failure to comply with the provisions of the statute relative to mechanics' liens, inasmuch as no sworn statement was filed according to statutory requirement, and that the last of the labor performed or material furnished was prior to October 14, 1916. The testimony regarding the making of the contract is in hopeless conflict, and cannot be reconciled. The testimony of George D. Hulbert would, if he told the truth, have been of great value; but both sides admitted that he could not be brought into court. * * * A letter written by George D. Hulbert and the answer of the Andrew O. Sisman Company constitute a valid contract, when taken in connection with the fact that the repairs were started, carried on, and finished, with labor and material and supervision furnished by said company, with the knowledge of both W. H. Miller, defendant, and George D. Hulbert. It is at this point that the testimony given by the plaintiff cannot be squared with that given

by defendant. Plaintiff's claim is based on the fact that George D. Hulbert was acting as architect and agent for defendant W. H. Miller. Defendant Miller claims that he did not engage or employ George D. Hulbert as architect or agent in this matter, but that in the presence of Harry Hulbert he made a contract with George D. Hulbert to repair said building for the amount of the award, viz. \$3,936.52.

"There is no evidence that George D. Hulbert had ever had any experience as a contractor, or that he possessed the necessary equipment or credit. There is no evidence to show that George D. Hulbert at any time considered himself a contractor, but there is evidence to show that he considered himself as an architect or agent. There is no evidence to show that the plaintiff, the Sisman Company, ever considered themselves anything or other than the principal contractor on the job, and responsible to Miller or his agent. There is no evidence to show that the plaintiff, the Sisman Company, ever considered George D. Hulbert as acting in any other capacity than architect or agent of defendant Miller. The fact that defendant Miller spent so little time on the job would indicate either that he had great confidence in his contractor, or that he had an agent or representative on the job, or both. After the job was completed, and while the matter was in controversy, defendant Miller, by his attorney, wrote a letter to the Sisman Company, in which no attempt was made to deny that the contract was entered into between Miller and the Sisman Company, and performed by the said Sisman Company. These facts, combined with the fact that it seems absurd that Harry L. Hulbert should forfeit his fee as an adjuster, and deceive the company by whom he was employed, for the purpose of giving his brother George D. Hulbert a contract, at a price which promised to yield at best but a small profit, are significant. A fair preponderance of all the evidence convinces the court that a contract was entered into between W. H. Miller, defendant, by George D. Hulbert, his agent, and the plaintiff, Andrew C. Sisman Company, to repair, remodel, and alter said premises on a so-called time and material basis. Having decided the question of contract, it remains to consider whether there is evidence which proves that the provisions of the statute relating to mechanic's liens were followed. There can be no disagreement with the law as cited in brief of defendant's attorneys. The question is: 'Do the facts as proved by the evidence satisfy the court that there was a compliance with the law?' * * * Under all the evidence in this case the court finds that, in regard to furnishing a sworn statement, and in regard to proof as to the last date on which material and labor were furnished, there was a compliance with the law sufficient to maintain the lien. It follows that a decree will be signed by which the plaintiff, the Andrew C. Sisman Company, shall receive the amount of their lien with interest."

Pending the hearing the bill was dismissed as to the defendant W. H. Miller Company.

The decree below is affirmed, with costs to plaintiff.

HUNT v. STROMBERG MOTOR DEVICES CO. (No. 90.)

(Supreme Court of Michigan. Oct. 3, 1921.)

Corporations §—432(12)—Evidence held to show prima facie apparent power in director to employ manager of branch office.

Evidence that O., a director, vice president, and treasurer of defendant corporation, and in charge of its sales department, in which, as manager of a branch office, plaintiff had been employed for three years, under contracts made with O., told plaintiff, towards the end of the third year, that he no longer had power to hire him, that the power had been transferred to R., another director (like O. owning one share of stock), to whom plaintiff was referred, is a prima facie showing of apparent power in R. to employ plaintiff for the following year, so as to render admissible plaintiff's testimony of such an employment so made.

Error to Circuit Court, Wayne County; Ira W. Jayne, Judge.

Action by George H. Hunt against the Stromberg Motor Devices Company. Judgment for plaintiff on a verdict directed for the amount only that defendant admitted, and plaintiff brings error. Reversed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, OLARK, BIRD, and SHARPE, JJ.

Charles H. Hatch, of Detroit, for appellant.

Campbell, Bulkeley & Ledyard, of Detroit (Charles H. L'Hommedieu and Selden S. Dickinson, both of Detroit, of counsel), for appellee.

STEERE, C. J. Plaintiff brought this action to recover damages for breach of an alleged oral contract under which he claims to have been employed as manager of defendant's Detroit branch for the year 1918. The trial court sustained objections to the plaintiff's offered evidence of his contract on the ground that the authority of a director named Ryan with whom the contract was claimed to have been made had not been shown. The questions for review here are whether plaintiff had prima facie shown as a matter of law that Ryan had authority to make the contract as agent for defendant, or that, because of statements by defendant's vice president, O'Neill, it is estopped from denying Ryan's authority.

The Stromberg Motor Devices Company is an Illinois corporation engaged in the manufacture and sale of carburetors, with its headquarters and main office in Chicago. During the time involved here it had six stockholders, the principal one being a corporation called the Stromberg Carburetor Company of New York, located at 37 Wall street, which held 495 of defendant's 500

shares of stock, the other five stockholders with one share each being directors. Two of these were Allan A. Ryan, of 55 Wall street, New York, and William L. O'Neill, of Chicago, who was defendant's vice president and treasurer in charge of its selling department. It maintained a Detroit branch, having an office in that city with a manager in charge who handled the business of what was known as Detroit territory, which included all of Michigan and Ohio except four counties. Plaintiff was manager of its Detroit branch from October, 1915, through 1916, 1917, and until March, 1918. The business of the Detroit territory was apparently quite extensive. Its sales in that territory alone amounted in 1918 to over \$550,000. Plaintiff was employed as manager of the Detroit branch by O'Neill who had general charge of all sales business of the corporation. Plaintiff worked under and made his reports to him.

When plaintiff took charge of the Detroit office in October, 1915, his contract of hiring was oral, but during 1916 and 1917 he had written contracts with defendant proposed, negotiated, and signed by O'Neill as its vice president. For 1916 he received a salary of \$3,600 with additional compensation of 2 per cent. on the net business done in the Detroit territory in excess of \$300,000 and in 1917 a salary of \$5,000 with 2 per cent. additional on the business in that territory exceeding \$250,000.

In November, 1917, plaintiff had a conversation with O'Neill in reference to his services for 1918, in which O'Neill said Mr. Ryan wanted him to work on a different basis, and his contract would be subject to a cut, and told plaintiff "what Mr. Ryan's relations with the company were." Asked by his counsel, "What did he say to you on that subject?" defendant interposed objection to the question, which the court sustained. During their conversation in November plaintiff told O'Neill he would like to continue in the employment, but for not less than his financial returns in 1917. O'Neill said his services were satisfactory and he wanted him to continue by all means, but his contract with the company "was subject to the direction of Mr. Ryan, and the terms must be with his approval." In December, when plaintiff was at O'Neill's office in Chicago, the latter produced and read to him a proposed form of contract which he said "was the kind of form Mr. Ryan wanted executed by the company," and plaintiff told him "that form would not be satisfactory to me, and I did not see how he could expect it would be." O'Neill protested plaintiff's objection to it placed him in an embarrassing position, as he would have difficulty in explaining to Ryan why plaintiff returned and would not accept it, so they arranged that plaintiff would take the proposed contract back to Detroit with him and from there write

O'Neill a letter, which he could show Ryan, returning it with his explanation of why he could not accept the contract in the form proposed. This was done, and O'Neill acknowledged the same in a letter dated December 29, 1917, stating, amongst other things, that they would have an opportunity to discuss the subject at the New York Automobile Show.

They met in New York on January 5, 1918, and O'Neill then told plaintiff that Ryan dictated the form of contract submitted to him in December and "was the man in authority to make these contracts." Later he said to plaintiff, at the Baltimore Hotel, that he was going to see Ryan the next morning and would have his contract for 1918 "fixed up." Plaintiff had no more conversation with O'Neill on the subject, but when in New York on January 21, 1918, went to Mr. Ryan's office and had an interview with him, in which his counsel proposed, but was not allowed, to show he was employed by Ryan as manager of defendant's Detroit branch for 1918, plaintiff not being permitted, among others, to answer the question, "What was said between you and Mr. Ryan on that subject in that conversation?"

Plaintiff returned to Detroit on January 22 and continued his services as manager of defendant's Detroit branch until March 25, 1918, when O'Neill went to Detroit and discharged him, having written him to that effect two days previous inclosing a check for \$785.75 as compensation "in full for commissions, salary, and expenses." In their interview on March 25 he told plaintiff he had come over to replace him by another man, that there was no dissatisfaction with his work, as the fact he had only visited there a couple of times a year since plaintiff was in charge indicated, but he "had to do it." Plaintiff protested that he was employed for the year, desired to remain, stood ready to fulfill his contract, and stated, "I told him of making that agreement with Mr. Ryan and of the conversation between myself and Mr. Ryan on that subject." He was asked, "What did you tell him that you said to Mr. Ryan?" This question was objected to by defendant's counsel, and the objection sustained. Plaintiff was the only witness sworn. Defendant offered no evidence and rested its case on the defense that plaintiff's testimony failed to show any contract of hiring. The court having sustained defendant's objections to the offers and efforts of plaintiff's counsel to prove the contract under his theory of the case, it ended as related, with proper objections and exceptions by plaintiff's counsel to save for review adverse rulings of the court.

As the case terminated our inquiry is confined to the question of whether, at the time the court refused to permit plaintiff to testify as to what was said between Ryan and himself on the subject of his employment, there was any competent evidence in the case

(184 N.W.)

tending to prove that Ryan was authorized as an agent of defendant to employ him. The evidence is direct and positive that O'Neill who was a director, vice president, and treasurer of defendant, in charge of its sales department, in which defendant was employed, so told him. This carries the question back to the evidential sufficiency of what O'Neill told plaintiff to render admissible the latter's offered testimony touching his claimed contract of employment by defendant made through Ryan, acting as its agent.

Defendant's counsel admit that the cases cited in plaintiff's brief establish the rule "that a reference to an inferior by an agent who himself has power to act in the premises clothes the designated person with apparent power to act."

In discussing "What constitutes apparent authority," that proposition is thus stated in Fletcher's Cyclopaedia on Corporations, vol. 3, § 1918:

"Where an officer, having authority to act, refers a person seeking to enter into a contract to another as the proper person to deal with, the latter has apparent authority to act."

But it is urged for defendant that rule can have no application here because O'Neill, instead of having or claiming authority to act, distinctly stated he did not when telling plaintiff Ryan had, and argued that it follows "one not having authority to act cannot by reference clothe another with apparent authority."

We think this contention overlooks the reason of the rule of apparent authority as applied to conditions shown here. O'Neill was an active and responsible officer of the corporation. In this age of corporations, when so great a proportion of the country's business is carried on by them, often through corporations within corporations or subsidiary corporations which the others own and control, yet greater difficulties than formerly confront the outsider when called upon at his peril to verify the authority of their agents and officers in a particular transaction according to the narrow rules of record evidence once more generally recognized, and yet often, though not always, applicable. The circumstances of particular cases frequently present controlling facts of force materially modifying them. As said by Justice Marshall in *Ford v. Hill*, 92 Wis. 188, 66 N. W. 115, 53 Am. St. Rep. 902:

"This is not inconsistent with the law as laid down by this court that corporations are fictitious bodies and act through directors (*Ford v. Plankinton Bank*, 87 Wis. 363), but goes upon the principle that responsibilities will be laid upon the principal for the acts of the agent done within the apparent scope of his authority, according to the course of business as ordinarily carried on, and that the doctrine of estoppel by the conduct of the principal applies to corporations the same as to individuals."

This is not a case where a mere agent or employé in a subordinate position, and not officially connected with a corporation, assumed to direct an inquirer to some person as having authority to do a certain kind of business for it. Ryan was not on the visible surface of this corporation O'Neill's superior, but, like him, one of its directors, each owning one share of stock. It is surmisable that he represented the intangible directing power of the owning corporation, but, beyond his being a director and financially interested to the extent of owning one of its 500 shares of stock, his relations with defendant are largely left to surmise on this record. O'Neill told plaintiff what they were, but the latter was not permitted to tell what O'Neill said on that subject. O'Neill was not only a director, but held two other important offices in the defendant corporation and also a responsible position in active charge of its sales department, up to the time this case was tried. As an officer and agent of defendant he hired plaintiff as manager of its Detroit branch, where he remained and rendered satisfactory service for 2½ years under three successive contracts made with O'Neill as its agent, two of which the latter signed as its vice president. During that time plaintiff worked under him and made his reports to him. When the matter of continuing plaintiff's employment for another year came up, O'Neill said he certainly wished him to remain, but that he no longer had the power to hire him, and in that connection told him to whom such authority had been transferred. Under such circumstances it was but a natural and proper thing in the conduct of the business entrusted to him as manager of that department to communicate such information to an old employé under him whom he had before then himself several times hired for defendant. It was also but natural and reasonable prudence for plaintiff to rely upon his statements under such circumstances. It would have been unreasonable and probably disastrous had he assumed to question the veracity of the vice president of the corporation and his superior officer in charge of the department in which he was employed.

Corporate powers and purposes can only be expressed and performed through natural persons acting as its officers and agents. They are the means, hands, and head by which corporations normally act. A distinction exists between a corporation acting through its officers and by agents. An officer inherently has knowledge, rights, and duties not necessarily belonging to a mere employé. His official position and fiduciary relations with the corporation give greater weight and presumption of authority to his acts and words in matters necessary to carrying on the ordinary business of the corporation; and particularly, as here, when they relate to matters connected with a department under that officer's immediate superintendence.

While the facts are not identical, we think in principle the following excerpt from the opinion by Justice Campbell in *Whitaker v. Kilroy*, 70 Mich. 635, 38 N. W. 606, has application to the situation shown here:

"We think that persons dealing with such a corporation for work have a right to get their information from the person whom the corporation has put in charge, and cannot be required to go elsewhere, and that contracts so made are valid contracts when relating to the ordinary concerns of such business. * * * They have no means of knowledge except inquiry somewhere, and the person put by the corporation in open charge of the business must have power, as to third persons, to represent it."

Agency is essentially a question of fact for the jury when there is any testimony direct or inferential tending to establish it. We are of the opinion that in the rulings complained of the trial court took a too restricted view of the rule of apparent authority of an agent.

The judgment is reversed, and a new trial awarded, with costs to plaintiff.

BIRNEY et al. v. READY et al. (No. 44.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Evidence §397(2) — Written agreement presumed to contain terms agreed on during negotiations.

A written agreement will be presumed to contain the terms agreed upon during negotiations.

2. Specific performance §121(9) — Evidence held to show that purchasers sold their interest under contract to vendor's grantee.

In purchasers' action against vendor's grantee for specific performance, evidence held to prove that purchasers had sold their interest under their contract to grantee absolutely, and that grantee had not agreed to resell the property to purchasers after construction of building thereon.

3. Specific performance §127(1)—Court on finding plaintiffs not entitled to specific performance could order accounting as to receipts and disbursements in operation of hotel.

In action by purchasers of hotel building against vendor's grantee for specific performance in which grantee filed a cross-bill claiming that purchasers had sold their interest in the property to grantee, the court, having found that purchasers had sold their interest in the property to grantee, but had continued in possession operating a hotel therein, could in its discretion order an accounting, if asked, covering receipts and disbursements of the hotel under the purchasers' management from the date of such sale, and could reserve judgment thereon until such an accounting was had.

Appeal from Circuit Court, Berrien County, in Chancery; Jesse H. Root, Judge.

Bill by Timothy A. Birney and another against B. Willard Ready and another, in which defendants filed a cross-bill. Judgment for defendants, and plaintiffs appeal. **Affirmed.**

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Thos. J. Cavanaugh, of Paw Paw, and Edwin J. Donahue, of Niles, for appellants.

Samuel T. Lawton, of Chicago, Ill., and Gore & Harvey, of Benton Harbor (A. G. Graham, of South Bend, Ind., of counsel), for appellees.

STEERE, C. J. Plaintiffs filed their bill of complaint praying enforcement of specific performance of a contract dated November 23, 1914, for purchase of what is known as the Pike House property in the city of Niles, Mich., with the furniture, etc., therein, from F. S. Clafin and Ella M. Clafin, his wife, for a consideration of \$13,452.65 and all unpaid taxes assessed against said property since July 12, 1912, insurance premiums paid by the Clafins since that time and costs with interest thereon of foreclosing a certain mortgage upon the property given by one George Benson; said taxes, insurance, and costs of foreclosing mortgage to be paid before the 1st day of December, 1914, a further payment to be made of \$500 November 23, 1915, and \$500 per year thereafter with interest on all sums remaining unpaid, the property to be kept insured and all taxes paid when due until the contract was fully performed.

On May 10, 1919, F. S. Clafin and wife conveyed this property to T. Willard Ready of Niles for a cash consideration of \$11,518 subject to the contract previously given plaintiffs, on which that amount yet remained unpaid.

Under their contract of purchase plaintiffs, who were practical hotel men then operating a hotel at Lawton, Mich., went into possession of the property they had purchased and have continued to operate a hotel there ever since, keeping up their payments on the contract, or tendering the same, and otherwise fully complying with its terms.

In January, 1920, plaintiffs tendered to Ready the full amount claimed by them to be due under the contract and demanded a deed of the hotel property and bill of sale of the personal property connected with it. Ready refused to accept the tender or to deed his property to them claiming he was the owner both by virtue of his deed from the Clafins and by purchase from plaintiffs of their interest in the property. On Febru-

ary 9, 1920, plaintiffs filed this bill for specific performance.

Defendants duly answered, and filed a cross-bill praying the court to decree defendant Willard Ready to be "the sole owner of all the real estate and personal property described in the pleadings," admitting his purchase of the same from the Clafins subject to plaintiffs' contract, and setting up a subsequent contract, made June 7, 1917, with plaintiffs under which Ready bought all their interest in the hotel property. The cross-bill also prays for an accounting between the parties covering receipts and disbursements of the hotel under plaintiffs' management since June 7, 1917, being the date of the alleged contract of purchase between Ready and plaintiffs of their interest, and that they be required to deliver possession to Ready of all said described real estate and personal property.

Both parties claim title through F. B. Clafin and Ella S. Clafin, concededly absolute owners of the real estate and personal property in controversy prior to November 23, 1914.

The Pike House was an old and comparatively small hotel with but 18 bedrooms, and there developed some agitation to secure a first-class hotel in the city of Niles which resulted in a meeting of the business men's club on the evening of June 6, 1917, to forward a movement to that end, at which it was proposed to raise sufficient money to secure the Pike House property and either improve the old or erect a new and larger hotel. Subscriptions were obtained for that purpose amounting to some \$12,000. One of the Birneys was at the meeting, and also Ready, who was one of 20 who each subscribed \$500, but Ready protested that but little could be accomplished with the money in sight and deprecated a project favored by others to expend that amount in remodeling the old building. Just what occurred at that meeting is in dispute, but it appears that he advocated a new and larger fireproof hotel and was out of harmony with what was proposed. The next morning while in the Pike Hotel he had a talk with plaintiffs on the subject in which he expressed disgust with what had taken place the night before and spoke disparagingly of the efforts of those who seemed to be in charge of the meeting, as he claims they did also. The talk led to negotiations for his purchasing their interest in the property and a memorandum of agreement being entered into between them executed in duplicate, each taking a copy, upon which it is undisputed Ready then paid plaintiffs \$500 and later additional sums, the total aggregating \$3,500, being the amount he claims he agreed to pay them for their equity in the hotel property under the contract which they held from the Clafins. The parties were then on friendly

terms, and, agreeable to both parties, whatever their contract, plaintiffs remained in charge of the hotel, and so continued until this litigation arose. In the meantime it is shown real estate values advanced, and this property materially enhanced in value.

Plaintiffs claim it was a part of the agreement made on June 7 that Ready would erect a new hotel upon the site of the old to cost \$75,000 upon completion of which he would give them a contract for the purchase of the property along the lines of the Clafin contract. They admit, however, that no mention of a new hotel or resale to them was made in the memorandum of agreement relating to their sale to Ready which passed between the parties. Ready denies that there was any such oral agreement as plaintiffs claim, but that they sold him their entire interest in the property without any conditions. The evidence shows and he does not deny that he contemplated and had plans prepared for the erection of a new hotel, and in the meantime spent some money repapering and otherwise repairing the old hotel, which was badly run down. He also purchased some hotel furniture and other essentials for a hotel. Shortly after this agreement of June 7 he also purchased property directly adjoining the Pike Hotel site as well as two other pieces of real estate close by. Both parties appear to have talked freely of the deal between them, and from what they said and he did it soon became a matter of general knowledge and interest. The public press of the city announced the sale of the hotel by the Birneys to Ready and the prospect of his building a large hotel there.

While it is undisputed that there was an agreement between the parties on the subject, made June 7, 1917, with a written memorandum of that date and in duplicate, one taken by Ready and the other retained by the Birneys and put in their safe, each testifies to having lost his copy, and none was produced on the hearing.

The controlling controversy in this litigation is narrowed down by plaintiff's own testimony to the character and contents of this memorandum of agreement.

Plaintiffs in their answer to defendants' cross-bill not only generally "deny that defendant ever satisfied their interest in the (Clafin) contract by any payments" or that they ever assigned to him their interest in said contract, but specifically "deny that they upon the one part and T. Willard Ready upon the other part reduced any agreement of any kind to writing and that they retained a copy and deposited the same in their safe, and that defendant retained a copy;" but, aside from the positive testimony of Ready and his witnesses on the subject, they directly contradict their pleadings denying a written memorandum, as the

following excerpts from their somewhat lengthy testimony shows:

Francis Birney made no mention of this memorandum of agreement in his direct examination, but when asked about it on cross-examination he said in part:

"My brother possibly wrote down the agreement, or Mr. Ready or some one. I didn't. After it was written I slipped out, but was in there then. * * * Whether I signed the paper or not, I know that if I didn't that paper was written there on that day. * * * He read me the contents of the memorandum in the presence of Mr. Ready. I won't say whether I signed that paper or not. * * * My intention was to sign it. * * * That memorandum said that this memorandum agrees to sell T. Willard Ready or words to this effect as he read it to me, the contract between Mr. Clafin and the Birney brothers. That is what it stated. * * * He gave me a check for \$500 at the time, at the time the paper was prepared. * * * The amount of the next payment was \$2,500, I think. * * * At the time this deal was made and this memorandum was made we were to receive \$3,000. * * * It said in the memorandum: 'We hereby agree to sell to Mr. Ready (or words about like that) the Clafin contract with Birney brothers.' * * * The paper was signed on or about the 7th of June, 1917. * * * After the memorandum of agreement with Mr. Ready I made no further payments out of my own funds to Mr. Clafin. We requested Mr. Ready when payments were due, time for it to be paid. * * * Q. What is the total amount you received from Mr. Ready? A. I think \$4,000, but the last \$500 was paid on the contract, payment on the contract came due, from Mr. Clafin to us. * * * At the time of sale of our interest to Mr. Ready, in addition to back taxes and insurance, light, and water and all those things, I am pretty sure we paid Mr. Clafin \$3,000. * * *"

In Timothy Birney's testimony appears the following on cross-examination:

Q. Did that talk result in a memorandum in writing being drawn up? A. Yes, sir. * * * Q. How many copies were made of it? A. I don't think there was but two. * * * I signed it after the agreement was made; yes, sir. Q. You had a copy of that agreement? A. Yes, sir; we had it a while. It was in the desk there. Q. Put it in your safe, did you not? A. I had it in there for a while and then it was—I took it out and put it in the desk and it got lost or strayed or somewhere. * * * I looked for it one time. I know when it was. Mr. Ready and I spoke about it. I don't know whether I found it at that time or not. That was a year and a half ago anyway. * * * It didn't say that we sold our contract. Q. It said you agreed to sell and assign. A. We agreed to assign it. Q. Your contract with Clafin? A. Yes, sir; on a certain agreement. * * * After this agreement was signed and the copies made Mr. Ready paid me \$500, and it was placed in the bank to the credit of Birney brothers. * * * Q. Tell us what was in the paper, all that you remember, every word that you remember. A. It started something, 'We hereby agree, to convey our title in the land contract held with Clafin to Mr. Ready

at the time of his preparing to build the hotel.' The Court: Q. Was there anything in that written contract about a hotel? A. No, sir. Q. I mean erecting a new hotel? A. No, sir. * * * By the Court: As far as the writing was concerned, the writing itself, the memorandum, all there was to it was that 'We agree to convey our title in this contract to Mr. Ready for consideration.' Q. As you think of \$3,000? A. Yes, sir. Q. That is all there was about it? A. Yes, sir; that is at such time— The Court: That was not in the contract? A. No; that was not in the contract. * * *"

Ready, who carried his draft of the agreement in his pocket for some time and showed it to various citizens with whom he talked upon the subject, testified that it read:

"Niles, Michigan, June 7, 1917. We, the Birney brothers, do hereby agree to sell and assign all our title and interest to the property known as the Pike House property, Niles, Michigan, for the sum of \$3,500 to be paid on or before the 1st day of December, 1917"

—that he and the two brothers right then and there signed it, he wrote out and gave them a check for \$500, put his own draft of the agreement in his pocket, and Tim put theirs in the hotel safe. Several other witnesses who saw it testified that it was signed by both the Birneys and to its provisions in substance as quoted. F. D. Cook, then in charge of the Niles Daily Star, testified that he was anxious to get news for his paper, got word of the deal, and interviewed Timothy Birney, who said Mr. Ready had bought the hotel, then saw Ready, who showed a memorandum of agreement made by Ready with the Birney brothers for purchase of the hotel, from which he made some notes and wrote an article for his paper telling of the sale, which was produced in evidence; that the agreement Ready showed him was subscribed Birney brothers and also signed by Timothy A. and Francis J. Birney individually, the substance of it being:

"We, the undersigned, hereby sell and assign our interest and title in the property known as the Pike House property in the city of Niles, Michigan, to T. Willard Ready for a consideration of \$3,500. We acknowledge payment of \$500 and the balance of \$3,000 to be paid on or before the 1st day of September, 1917."

Various witnesses testify convincingly to plaintiff's telling freely that they had sold the property to Ready, Francis stating on more than one occasion that he had both bought and paid them for it.

The trial judge, who heard and saw the witnesses, found:

That this agreement was substantially as above quoted and "an absolute, unconditional sale by the Birney brothers of their interest in the Clafin contract and hotel property to the defendant T. Willard Ready. The testimony of the plaintiffs themselves was very unsatisfactory and far from convincing." * * *

But numerous witnesses were produced who knew the contents of the agreement; the sale was reported in the public press; a number of parties testified that one or other of the Birneys had said that they had sold the property. * * * It seems to me that the great preponderance of the evidence clearly shows an absolute sale."

[1, 2] The story told by the Birney brothers as to an oral agreement in connection with the written memorandum to the effect that Ready would erect for them a new hotel upon the site of the old to cost \$75,000 and sell back the property to them is unsatisfactory and far from convincing. In the first place, they claim it was all one transaction, talked over and agreed upon before the memorandum of agreement was signed by them. When such negotiations culminate in a written agreement, the presumption is that it contains all they agreed upon. They were experienced business men, and it is incredible that they would sign the conceded memorandum of agreement to sell their entire interest in the property with no mention of so important a part of their deal, and credulity is further taxed by their claim that Ready, after paying them \$3,500 for their equity and Claflins \$11,518 for the full title, would build a \$75,000 hotel on the site and then after so large an investment turn the property back to them when the hotel was completed under a contract the consideration for which was not stated. Francis testified, after stating how Ready was to buy the property and build the \$75,000 hotel upon it:

"When the house was built, that we were to take a contract back of the house exactly the same as the Claflins' and pay him so much money annually, which was not stipulated, the amount. Nothing was said further on that line."

If the contract was to be "exactly the same as Claflins'," the payments would be \$500 a year or 150 years in which to pay the cost of the new building alone. While the claimed oral part of the contract is stated by plaintiffs with some variations, the nearest terms of payment on the contract Ready was to give them for the property are, "We were to pay him back this money and as much more as we could raise," and in another part of Francis' testimony, "We were to take it off his hands and pay him back the \$3,000 and as much more as we could at that time and as much a year afterwards."

The trial court denied specific performance as prayed for in plaintiffs' bill of complaint and granted the relief asked for in defendants' cross-bill, including an accounting, and in the decree "further ordered, adjudged, and decreed that the defendants have judgment against plaintiffs for the amount found due to the defendants upon said accounting."

[3] No testimony appears in the record relative to an accounting, and in the opinion filed by the court it is assumed that matter was waived. Evidently the court subsequently concluded it was not. Having found in favor of defendants on the dominant questions presented, it was within the discretion of the court to order an accounting if asked reserving judgment thereon until the same was had.

We find no occasion to disturb the decree of the court upon the questions presented by the evidence before us, and the same is therefore affirmed, with costs to defendants.

KITCHEN v. HILL et al. (No. 5.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Appeal and error ⇨1041(2) — Permitting amendment by adding quantum meruit count held not reversible error.

Where plaintiff agreed to superintend building of houses for 75 cents an hour and 3 per cent. of the value of the houses, and trouble arose between the parties when the work was partially completed, and plaintiff sued for the percentage, and defendants claimed that plaintiff had willfully left the employment and was not discharged, held, that it was not reversible error to permit plaintiff to amend his declaration before submission of the case to the jury by adding the common form of quantum meruit.

2. Trial ⇨251(9)—Instruction permitting recovery beyond claim erroneous.

Where person, employed to superintend building of several houses for hourly compensation and a percentage of the value of the houses, brought action and claimed in his declaration and bill of particulars only for the percentage of the work done, the houses only being partially completed, and the evidence in his behalf was in support of such claim, court erred in charging at plaintiff's request that, "in addition thereto, he would be entitled to recover for the loss of profit, if any, which he sustained by reason of the defendants' refusal to permit him to complete the houses which he had started under orders received from the defendants."

3. Work and labor ⇨29(2)—Recovery by employee on quantum meruit on breach of contract.

Where plaintiff agreed to superintend building of several houses for an hourly consideration and a percentage of the value of the houses, and the relations of the parties terminated when the houses were only partially completed, and plaintiff sued to recover the percentage of the value of the houses as partially completed, he was entitled to recover the percentage claimed if he did not breach the contract, and if he did breach the contract, as against defendants' claim for damages arising from the breach, was entitled under the pleadings on a quantum meruit to credit and compensation for the

services rendered not exceeding the contract price, and, if such credit exceeded the said damages of defendants, plaintiff was entitled to judgment.

4. Work and labor $\S$ 28(4)—Proof should be specific as to value of work done.

In an action to recover value of plaintiff's services in superintending the partial construction of houses, it not being questioned that percentage referred to in contract represented the fair value of plaintiff's services, the proof should be specific as to the value of the work done.

5. Appeal and error $\S$ 882(12)—No complaint as to instruction requested by party complaining.

A party requesting an instruction cannot complain thereof.

6. Work and labor $\S$ 30(3)—Instruction as to recovery on implied contract not required under proofs.

In an action to recover percentage of value of house partially completed by one agreeing to superintend the building of the houses on a percentage basis, wherein the declaration contained a common form of quantum meruit count, held, that an instruction respecting the right to recover on an implied contract was not required under the proofs.

Error to Circuit Court, Oakland County; Kleber P. Rockwell, Judge.

Action by Norman A. Kitchen against J. P. Hill and another. Judgment for plaintiff, and defendants bring error. Reversed, and new trial granted.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

Andrew L. Moore, of Pontiac, for appellants.

Robert D. Heltsch, of Pontiac, for appellee.

CLARK, J. For 75 cents an hour and 3 per cent. of the value, commonly called a bonus, plaintiff agreed to superintend the building of several houses for defendants. When the work was partially completed, trouble arose between the parties, and their relations ended. Plaintiff sued for the percentage, claiming \$867. He had verdict and judgment for \$525.41. Defendants, assigning error, say:

1. That the court erred in allowing an amendment to the declaration. The declaration pleaded at length the facts as claimed by the plaintiff, among them that plaintiff had been discharged from the employment without cause, and sought recovery only for the percentage on that part of the work which had been done. Defendants pleaded the general issue, and gave notice of a counterclaim for damages arising from plaintiff's unreasonable delay in construction, being the advance in the cost of materials and labor

and the cost of carrying the investment, and for further damages for faulty and defective construction of the houses. Defendants also claimed that plaintiff had willfully left the employment and was not discharged.

[1] Seemingly, the claim of the defendants that plaintiff had breached the contract led plaintiff's counsel at the conclusion of the proofs to ask an amendment of the declaration by adding the common form of quantum meruit count. When defendants' counsel objected, the court said:

"Under the provisions of the Judicature Act, I think I am obliged to grant the motion to amend the declaration. Do you care to offer any additional proof under this count, before the case is submitted to the jury?"

And defendants' counsel replied:

"No; we prefer to stand on the pleadings as they were, and not in any way obscure the issue."

That the amendment was necessary for a recovery by plaintiff we need not determine. Its allowance cannot be said to be reversible error. See *Lian v. Bradford*, 209 Mich. 172, 176 N. W. 412, and cases cited.

[2] 2. That there was error in the charge. The plaintiff's claim in his declaration and bill of particulars was for the percentage on the work done, compensation at the contract price, and the evidence in his behalf was in support of such claim. To the instruction as to the percentage, at plaintiff's request, the court added:

"And in addition thereto he would be entitled to recover for the loss of profit, if any, which he sustained by reason of the defendants' refusal to permit him to complete the houses which he had started under orders received from the defendants."

This was error, and we cannot say that it was not prejudicial to defendants.

As the case must go back for a new trial, other questions should be considered.

[3] Each side claimed a breach of contract. In his charge the trial court sought to explain plaintiff's right of recovery as affected by these conflicting claims, and the instructions are said to be erroneous. The following is so characterized:

"In case you find that the plaintiff breached the contract, nevertheless, plaintiff should be entitled to the credit of 3 per cent. upon the finished houses and upon such proportion of the unfinished houses as had been built at the time he was ordered to leave, if he was ordered to leave."

But there was further instruction:

"Now, I say to you, gentlemen, that all of these several claims of the defendants are for your consideration. It is for you to determine whether or not defendants have suffered loss and damage because of plaintiff's conduct, and if you find that defendants have suffered loss

and damage, then they are entitled to a judgment against plaintiff for the amount of that loss and damage.

"In arriving at your verdict, if you find a judgment in favor of plaintiff for some amount, and should also find a judgment in favor of defendants for some amount, then you will offset the amount found in favor of the one against the amount found in favor of the other, and render a judgment in favor of the party who shall have a balance due after offsetting the one claim against the other.

"If the claim of plaintiff shall be fully offset by the claim of defendants, and there is no balance in favor of either, then your verdict will be, as the court already advised you, one of no cause of action. If you find a balance in favor of the defendants, then your verdict will be for the defendants, naming the amount."

[4] If the plaintiff did not breach the contract, under the evidence he was entitled to the percentage claimed. If he did breach the contract, as against defendants' claim for damages arising from the breach, he was entitled, on the quantum meruit, to credit and compensation for the services rendered, not exceeding the contract price, being under the evidence the said percentage on the work done, and, if such credit exceeded the said damages of defendants, plaintiff was entitled to judgment. See *Allen v. McKibbin*, 5 Mich. 449. It does not seem to be questioned that the percentage represented the fair value of plaintiff's services, not exceeding the contract price; but the proof should be specific as to the value of the work done, for which compensation is sought. The jury should not be permitted to speculate on the value of the houses, completed or partially completed. But we quote again from the charge:

"I advise you further that, if you find that plaintiff breached this contract, then he cannot recover, for it is not the policy of the law that one can make a contract, and then breach it, and then claim damages because of the breach; and so in this case, if the contract relations between the plaintiff and the defendants terminated because of the wrongful act of the plaintiff, or because he breached the contract, then he cannot recover."

[5] Of this instruction, requested by the defendants, they may not complain. It was not favorable to plaintiff. One may not profit by his own wrong, and have damages because of his breach of contract; but, as we have seen, a plaintiff may be entitled, on the quantum meruit, to a verdict and judgment in spite of his breach of contract. See *Allen v. McKibbin*, supra; *Manistee Navigation Co. v. Filler*, 185 Mich. 302, 151 N. W. 1025.

Plaintiff's counsel says that, if in the excerpt from the charge last above quoted the word "recover" in each instance had been followed by the word "damages," it would not be objectionable. But plaintiff sought recovery only for the percentage on the work done, and, though contending that defendants

breached the contract, he claimed judgment for the percentage only.

[8] An instruction respecting the right to recover upon an implied contract was given. This was not required under the proofs.

For the error pointed out, the judgment is reversed, with costs to defendants. New trial granted.

TOWAR COTTON MILLS, Inc., v. ABBEY et al. (No. 41.)

(Supreme Court of Michigan. Oct. 8, 1921.)

1. Trusts $\S$ 41—Burden on grantee to establish conveyance was in fulfillment of parol trust.

Where deed to land was secured for the purpose of heading off an attachment on a claim against grantor, the burden was on the grantee in an action to quiet title to establish the fact that the deed was made pursuant to and in fulfillment of the terms of a parol trust, under which it was alleged the grantor was holding the property.

2. Trusts $\S$ 44(1)—Claim by grantee that deed was in fulfillment of parol trust held not sustained.

In an action by grantee of land to enjoin sale under execution against grantor and to remove cloud on title occasioned thereby, where it appeared that grantor was selling stock for the grantee, being charged a specified amount therefor, and receiving his profits or commissions by a sale at an advanced price, taking land as payment from purchasers of the stock and holding it for sale subject to the approval of the grantee, *held*, that plaintiff did not establish that grantor was holding the land for it under a parol trust; the grantee having no right to dispose of its stock under the state law for other than "cash or its equivalent."

Appeal from Circuit Court, Kalamazoo County, in Chancery; George V. Welmer, Judge.

Bill by the Towar Cotton Mills, Incorporated, against Perley Abbey and others. Decree for defendants, and plaintiff appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

Alfred S. Frost, of Kalamazoo (Burns & Hadsell, of Niles, of counsel), for appellant.
Harry C. Howard, of Kalamazoo, for appellees.

SHARPE, J. The plaintiff is a corporation organized under the laws of the state of Maine. It procured authority to do business, and also for the sale of its stock, in Michigan. Its principal place of business in this state is at the city of Niles, where it operates

a plant for the manufacture of cotton belting and cotton fabrics. In October, 1917, it entered into a written contract with Dingenman Binkhorst, doing business as D. Binkhorst & Co., of Kalamazoo, under which Binkhorst was authorized to dispose of its stock on a commission. (This contract will hereafter be more particularly referred to.) He accepted deeds of conveyance, mortgages on real estate, bonds, and other stocks and securities in payment or exchange for stock. The defendant Abbey was employed by Binkhorst as a salesman of stock. On August 13, 1918, he began a suit in attachment to recover for services so rendered, and, acting under the writ issued the sheriff attached certain real estate, the title to which was in Binkhorst. Notice of the levy was filed with the register of deeds on the same day. The suit proceeded to judgment. A writ of execution was issued thereon and a levy made upon the attached real estate. A warranty deed of the lands so attached was made by Binkhorst and his wife to Henry M. Towar, dated August 13, 1918. Its execution was acknowledged by Mrs. Binkhorst at Kalamazoo on the same day and by Binkhorst at Toledo, Ohio, on the 14th. It was recorded on September 24, 1918.

The plaintiff corporation filed this bill to enroll the sale under the execution to remove the cloud on the title occasioned thereby, and to quiet the title to plaintiff in the lands levied upon. On the hearing, the trial court made a decree dismissing the bill.

It is the claim of the plaintiff that, while the title to the real estate was in Binkhorst at the time of the levy, it in fact belonged to the company; that its right thereto became fixed and settled by the deed from Binkhorst. This involves a consideration of the evidence. The written contract with Binkhorst is not in the record. The testimony relative to it was admitted on plaintiff's undertaking to subsequently produce it. The proofs were closed and the case submitted without its production. As defendants' counsel discusses and seems to rely on some of its provisions, we feel constrained to consider it.

Henry M. Towar, now vice president and treasurer of the company and who, at the time the contract was made was its secretary and treasurer, testified that Binkhorst was not acting as its agent, that—

"We had a contract with him to buy our stock at a certain price below par, which was his commission for selling the stock, his brokerage or commission, and he had to give us a certain price. * * * Binkhorst was to pay us 90 for our stock. If he sold it for 91, it would be up to him. He would get 1 per cent. If he sold it for 99, he would get 9 per cent.

"The Court: He had to sustain a loss if there was a loss? A. He had to, yes, but he was very careful to see that there wasn't any. Ultimately there was a loss, because he did not sell off this in the lawsuit."

He further testified that there was a parol agreement relative to such deals:

"This was an agreement to dispose of any real estate, subject to our approval, that he might take in payment of the capital stock of our company," and that all such deals were reported to the company.

The conveyances and securities were all taken in Binkhorst's name. He further testified:

"Mr. Binkhorst was never in our employ. We had a contract with him to sell stock. * * * When he took anything which was not cash or its equivalent, he would go on later and convert it into cash, at the best terms he could. He always had to pay us the same amount for this stock, which was in accordance with the contract. * * * If, for example, he took stock, he would sell it, and then have it resold. If it didn't come up to the price Mr. Binkhorst took it at, he had to make good to us, under his contract. * * * The deed was for properties he had on hand in his name, to give him credit for them, at the amount he took them in at, whether they were worth that or not. We took them in at the price he figured on, and we have already got our money on two of the places now. Such properties as we have already sold, we are ahead on, and have given him credit for them against the balance outstanding. It was true on the real estate, that he was charged with the stock he sold, and was credited with what he turned back to us on it, but it was not true of everything else. He got credit for his commission." "We claim he owes us, and he claims we owe him." "We kept a book account with Binkhorst. * * * When we issued stock, we would charge Binkhorst himself, so that he would have the power to sell the stock."

He further testified that the company procured authority from the securities commission for the sale of its stock and he knew that under such authority the company had no right to dispose of it "for anything but cash, or the equivalent of cash"; that all such sales were reported to the commission as for cash or "under the general caption of securities."

"Q. You say that he, where he got title to these properties that were mortgageable, would mortgage them and send the proceeds to you, and thereby the Towar Company escaped any liability on the note or mortgage? The liability was Binkhorst's? A. Yes.

"Q. You would not have the Towar Cotton Mill Company give a mortgage on these because there would be the personal responsibility on the note covered by it? That was another reason why it was convenient to have it in Binkhorst's name? A. That was it, yes."

[1, 2] We agree with the trial court in the conclusion reached by him. At the time of the levy of the attachment, the title to the real estate was in Binkhorst. Standing alone, his deed to plaintiff would but be evidence of a purpose on his part to prefer plain-

tiff as a creditor. The deed was secured by plaintiff after it knew of Abbey's claim, in fact, we think it may fairly be said, for the purpose of heading off the attachment. The burden is on plaintiff to establish the fact that it was made pursuant to and in fulfillment of the terms of a parol trust. Mr. Towar alone testified relative to it. He several times stated that Binkhorst was not acting as an agent for the company and yet plaintiff's claim rests on the fact that he was so acting and took title to this real estate in himself as a matter of convenience in disposing of it. Binkhorst sold plaintiff's stock for whatever price he chose and took anything he pleased in payment for it. It was charged to him on the books of the company. The remittances made were not sent by him or received by the company as proceeds of the sale of real estate, but as payments on stock so charged to him. Mr. Towar admits that the company had no right to dispose of its stock for other than "cash or its equivalent," and that to do so would violate the authority to sell conferred on it by the securities commission.

Under the record, it seems clear to us that the plaintiff is not entitled to equitable relief.

The decree is affirmed, with costs to the defendant Abbey.

CHURCH v. STOLDT. (No. 11.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Jury $\S$ 133—Juror's membership in automobile association not ground for challenge for cause, where defendant was not shown to have been insured.

In personal injury action, prospective juror's membership in automobile insurance association was not ground for challenge for cause at a time when defendant was not shown to have been insured.

2. Appeal and error $\S$ 1045(2)—Excusing of juror on plaintiff's challenge for cause held not ground for reversal.

In personal injury action, sustaining of plaintiff's challenge of juror for cause, because a member of an automobile insurance association, though defendant was not shown to have been insured thereby, was not ground for reversal, where defendant did not exercise all his peremptory challenges, nor question the competency and impartiality of the jury as finally constituted, except as affected by plaintiff's examination as to their membership in such insurance company.

3. Jury $\S$ 131(2)—Permitting examination of jurors as to members in insurance association within court's discretion.

In an action for injuries to child, struck by defendant's automobile, permitting plaintiff's counsel to examine prospective jurors as to their membership in automobile insurance association, to determine the advisability of a

peremptory challenge, held within court's discretion.

4. Jury $\S$ 131(4)—Court may allow much latitude on examination of jurors on voir dire.

Much latitude may be allowed by the trial court on examination of jurors on their voir dire to enable the parties to intelligently exercise their right of challenge either peremptory or for cause, the court having the power whenever the examination is unduly protracted, or it appears that questions are not in good faith and for prejudicial purposes to summarily check counsel.

5. Municipal corporations $\S$ 706(7)—Contributory negligence of 10 year old girl, struck by automobile at street intersection, held for jury.

Contributory negligence of 10 year old girl, struck by defendant's automobile while crossing street at street intersection, held a question for the jury.

Error to Circuit Court, Lapeer County; William B. Williams, Judge.

Action by Frank H. Church, administrator of the estate of Merle Church, deceased, against Albert Stoldt. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Theo. D. Halpin, of Lapeer, for appellant.
B. F. Reed, of Lapeer, for appellee.

STEERE, C. J. While driving east along Genesee street in the city of Lapeer, on his way from Saginaw to his home near Imlay City, defendant's touring car struck and fatally injured plaintiff's daughter, Merle Church, a girl 10 years old, as she was crossing Genesee street at its intersection with Main street, along which she was going south on her way home from school. She was carried into the high school building, located at the northwest corner of that crossing, where she died soon after her father and a physician who had been summoned arrived. Under the Survival Act (Comp. Laws, §§ 12383-12403) plaintiff recovered in this action a verdict for her estate of \$1,547.08.

The accident occurred on the afternoon of October 17, 1916, shortly after schools had closed for the day, at a time when numerous pedestrians, including school children, were passing that four corners in different directions. The intersection is a busy crossing of two much-traveled thoroughfares. Through traffic between Lapeer, Flint, and Davison passes over it, as well as much local traffic, including taxicabs and other vehicles, going to and from the Michigan Training School. Many pupils, attending the high school located there and a ward school on Main street a few blocks to the north, pass there.

Merle Church was a bright, healthy child,

of normal size and mentality for her age, a fourth grade pupil attending the Main street ward school north of Genesee street, south of which she lived. On that day she and a little girl companion, on their way home from school went south together on the west walk of Main street, both having on roller skates. About the time they reached the crossing two teams drawing empty hay wagons were crossing Main street going west along the north side of Genesee street, driven by two brothers named John and Samuel Taylor, who were returning home from delivering their loads at an elevator. John was in front, and his passing checked the progress of persons walking south on Main street. Observing several girls waiting at the north curb of Genesee street for an opportunity to cross, Samuel stopped his team before he reached the crosswalk to let them pass. He did not particularly notice the Church girl nor defendant's auto until about as it struck her, when he saw it pass him and run across Main street before stopping, and at the same time saw the girl lying in the road. He testified that, as he saw the car at and just after the accident, it had in his opinion a speed of "twenty miles or better" when it struck the girl. The speed of the car as it hit the child is variously estimated by other witnesses, from defendant's claim of "less than 10 miles an hour" to "from 20 to 25 miles an hour." James Daniels, an experienced driver, who had owned a car of the same make as defendant's for three years and driven from 8,000 to 10,000 miles each year, testified:

"You could stop that car, driven at 10 miles an hour, on a dirt road, inside of 3 feet."

Defendant's car ran across Main street and beyond before stopping. Measurements from the crosswalk where the girl was struck to the point where witnesses testified the car stopped showed the distance to be over 90 feet. Defendant testified that as soon as he hit the girl he stepped on both brakes and tried to stop as quick as he could. On cross-examination he answered:

"If I was only going 10 miles an hour, I can't account for it going the length of the car after I applied the brakes."

He did, however, during his testimony, account for his car finally stopping east of Main street by the explanation that he did stop it immediately, but "got kind of excited, and I got up and forgot to pull the lever, and the car went into gear again, and she ran down hill across Main street, down where the car finally stopped, before I got squared around and stopped it."

This was the second car defendant had owned. He was an experienced driver, had driven past that corner before, and knew there was a schoolhouse located there. On

that day he was driving with all side curtains on the left side of his car towards the schoolhouse he was passing. Of the situation and his knowledge upon the subject he testified in part as follows:

"When I approached that crossing, I didn't see anything in the street; but I saw the kids playing around there. I saw a couple of teams coming. I passed the first near the walk there somewhere. I was on the right side of the road, and I should judge there must have been 6 or 7 feet, anyway, away from the team I passed. I didn't see nothing on the road as I approached the crosswalk until I hit the girl. I didn't see her until the car hit her. * * * I knew there was a schoolhouse there on that corner, and I had it in mind as I approached that intersection. I saw the children playing all around there. * * * I do not remember seeing any girls on the crosswalk. The children I saw were on the walk and playing around. * * * I did not have in mind that some one might step from behind that wagon as it passed over the crosswalk. That didn't occur to me. I kind of think I did have it in mind that some one might step from out behind the wagon. I couldn't say why I say now I did, and a moment ago I said I didn't. * * * I was looking all I could, and sure I was looking at the rear of that wagon. * * * I do not know how far I was east of the crosswalk when the car made the first stop. I do not know how fast I was going."

Defendant's counsel recognizes there was abundant evidence of his negligence to carry that question to the jury, but urge that a verdict should have been directed in his favor on the ground of contributory negligence, and that in any event there is reversible error in the court permitting plaintiff's counsel, when examining jurors on their voir dire, to inquire of each juror who owned an automobile whether he was a member of or held a policy in the Citizens' Mutual Automobile Company of Howell.

The record shows 17 jurors were interrogated on that subject by plaintiff's counsel, 9 of them before any objection to that line of inquiry was interposed. Plaintiff's counsel then challenged a juror for cause on the ground he was shown to have a policy in the company, to which defendant's counsel objected, and the court at first overruled the challenge, but, after argument of the question by counsel in the absence of the jury, decided the challenge was well taken. Defendant's counsel then interposed a challenge to the entire panel, on the ground that plaintiff's repeated questioning of jurors as to their being insured was for the purpose of getting before them "the fact there was a policy in the case," and was manifestly improper, prejudicial, and not in good faith. The point was thereafter saved by objection to all questions upon the subject when asked of succeeding jurors.

[1, 2] Of the juror excused it can well be contended, as the record then stood, that

plaintiff's challenge for cause was not tenable, for the insurance company mentioned was not a party to the action, nor defendant shown to be insured by it, and the presumed objective of any permitted voir dire examination upon that subject was necessarily limited to peremptory challenge. But error does not necessarily follow when the court, through abundance of caution to secure an impartial jury, excuses a juror on ground not technically sufficient to support a challenge for cause, as it would in retaining one who is challenged and ought to have been rejected. *Atlas Mining Co. v. Johnston*, 23 Mich. 36. No objection appears to have been made by defendant to the juror called in place of the one rejected, beyond that urged against all the others. Defendant is not shown to have exercised all of his peremptory challenges, nor to have then questioned the competency and impartiality of the jury as finally constituted, except as affected by plaintiff interrogating them relative to their connection with the named insurance company. The court had discretionary powers within the limit exercised.

Upon the question of disqualification of a juror by reason of membership in a mutual insurance company not a party to, but interested in, the litigation, counsel cite *Detroit v. Detroit Ry.*, 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. Rep. 600, where it was held the interest of a taxpayer in a litigating municipality did not disqualify him from serving as a juror. When that case was decided, taxpayers in counties were by statute made competent jurors in any action to which the county was a party; but the provision did not then include cities or townships, as it now does (3 Comp. Laws 1915, § 12599), and, although the authorities upon the subject in the absence of statutory provisions were not agreed, the court found that the practice in this state was in harmony with a cited line of authority sustaining the contention that the remote interest of a taxpayer in a municipality was not sufficient to exclude him from serving as a juror because interested in the result of the trial. It has, however, been expressly held in this state that members of a mutual fire insurance company were disqualified from serving as jurors in an action to which it was a party. *Martin v. Farmers' Mut. Fire Ins. Co.*, 139 Mich. 151, 102 N. W. 656. On principle it would seem to make little difference whether or not the company was in form made a party to the action, if it had contracted to indemnify the defendant, against whom it was planted.

Upon the claimed prejudicial effect of plaintiff's counsel interrogating jurors on their voir dire as to their holding policies in a named mutual insurance company, and thereby implying its interest in the litigation, counsel cite *Kerr v. Nat., etc., Mfg. Co.*, 155 Mich. 191, 118 N. W. 925; *Hughes v. City*

of Detroit, 161 Mich. 283, 126 N. W. 214, 137 Am. St. Rep. 504; *Morrison v. Carpenter*, 179 Mich. 207, 146 N. W. 106, Ann. Cas. 1915D, 319; *Fitzgerald v. Detroit United Ry.*, 206 Mich. 273, 172 N. W. 608; *Sherwood v. Babcock*, 208 Mich. 536, 175 N. W. 470; *Grubaugh v. Simon J. Murphy Co.*, 209 Mich. 551, 177 N. W. 217. All of those cases, with one exception, relate to attempts by plaintiff's counsel, after the jury had been selected and during the trial, to show that defendant was indemnified by insurance, most of them in his address to the jury. In *Grubaugh v. Simon J. Murphy Co.*, supra, plaintiff's counsel sought to introduce the subject early in the case by interrogating defendant's counsel as to whether he appeared for an interested insurance company, and emphasizing the fact that an insurance company was the real defendant after an adverse ruling by the court. A careful examination of the record in the instant case shows that plaintiff's counsel went no further than to ask the direct question of jurors, when examined on their voir dire, if they were insured in the Mutual Automobile Insurance Company named.

[3] The question of right to inquire of jurors as to their being insured in an indemnifying company not a party to the action before they are accepted is one upon which considerable authority is to be found, including several decisions in our own state. This court has drawn the line at interrogating jurors on the subject while the jury is being selected, which at that stage of the proceedings is apparently limited to determining the advisability of a peremptory challenge. Beyond that point the subject is strictly excluded, and further reference to it in presence of the selected jury is held prejudicial error. The later rulings of this court upon the question are foreshadowed in the case of *Peter v. Chicago, etc., R. R. Co.*, 121 Mich. 324, 80 N. W. 295, 46 L. R. A. 224, 80 Am. St. Rep. 500. It there appeared inferentially, from examination of jurors on their voir dire, that insurance companies were interested in the result of the action. Counsel emphasized that fact in summing up the case, and the court, without questioning the right to interrogate jurors upon that subject while a jury was being selected, said that the—

"comment [of counsel] as to the amount of capital stock of the insurance company was untimely, and should have been omitted. We need not determine whether this comment was damaging error not cured by the charge, as the case must go back on other grounds."

Justice Grant there said, in a dissenting opinion upon other grounds:

"It was certainly proper to examine the jurors as to their relations with these companies, and to ascertain if they had an interest in them. It was therefore impossible to keep the fact from the jury. The court, in most

emphatic language, instructed them that this action was properly brought, that they must dismiss from their minds all consideration of the question of insurance, and must give the full value of the lumber, regardless of the insurance, if the defense was liable. Under this state of facts, I think that the appellate court should assume that the jury followed the instructions. * * * The fact was necessarily before the jury, and the court did all that could be done to prevent any prejudice on the part of the jurors."

In subsequent decisions this court has in effect indorsed these views. Such is the import of cases cited by defendant wherever the question is touched, to which may be added *Snyder v. Mathison*, 196 Mich. 378, 163 N. W. 104, *Link v. Fahey*, 200 Mich. 303, 166 N. W. 884, and *Webster v. Stewart*, 210 Mich. 18, 177 N. W. 230.

In the present case plaintiff's counsel made no reflecting comment, and said nothing about insurance before the selected jury during the trial, or when examining them as to their qualifications, beyond asking the question as stated. Defendant was not even shown to be insured, nor that any insurance company was interested. The trial court instructed the jury in emphatic language that no question of insurance was before them, they should entertain no impressions about it, the case was between plaintiff, as administrator of his daughter, and defendant, *Stoldt*, concluding:

"And I say to you that you would violate the sanctity of your paths if you would allow the question whether he is or is not insured to enter your minds or influence your judgment in this case."

[4] It is a generally recognized rule that much latitude may be allowed by the trial court in examination of jurors on their voir dire to enable parties to intelligently exercise their right of challenge, either peremptory or for cause. Within reasonable range, the latitude of such examination is discretionary with the trial court, which has the power whenever the examination is unduly protracted or it appears questions are not in good faith and for prejudicial purposes to summarily check counsel. As against the discretion of the trial court we are not satisfied that the questions complained of were not asked in good faith, to enable plaintiff's counsel to intelligently exercise his right of peremptory challenge.

[5] In support of the contention that a verdict should have been directed for defendant because of decedent's contributory negligence, counsel cite the following cases; *Zoltovski v. Gzella*, 159 Mich. 620, 124 N. W. 527, 26 L. R. A. (N. S.) 435, 134 Am. St. Rep. 752; *Mollica v. Mich. Cent. R. R. Co.*, 170 Mich. 96, 135 N. W. 927, L. R. A. 1917F, 118; *Tolmie v. Woodward Taxicab Co.*, 178 Mich. 426, 144 N. W. 855; *Hill v. Lappley*, 199 Mich. 369, 163

N. W. 657; *Fulton v. Mohr*, 200 Mich. 538, 166 N. W. 851; *Deal v. Snyder*, 203 Mich. 273, 168 N. W. 973; *Flintoff v. Muskegon Traction & Lighting Co.*, 208 Mich. 527, 175 N. W. 438; *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282. While analogous in certain respects, those cases so differ from this in various essential facts as not to be of controlling value upon the question of decedent's negligence. One marked distinction is that none of the cases involve an injury to a pedestrian by a motor vehicle at a street crossing, except the *Tolmie* Case, where in broad daylight a man of mature years and large experience upon the streets as a teamster walked into the path of an approaching taxicab in plain view to him from the time he started to cross, which companions by his side readily observed and avoided. That accident occurred at a quiet crossing, with no other vehicles near and no confusion of passing teams or pedestrians to distract his attention. The conditions surrounding this little girl at the busy crossing where she was run over were radically different.

Upon that phase of the case the inquiry is limited to whether facts existed carrying the question of the girl's negligence to the jury, measured by her age, intelligence, and experience, so far as disclosed. When she and the little girl with her, on their way home from school, along the west walk of Main street, approached the Genesee crossing, they, with others, were temporarily stopped by the traffic on the latter street. She was in the lead, a short distance ahead of her companion, and stopped when down the incline of the walk, near the edge of the curb, as John Taylor was driving across it, closely followed by his brother, Samuel, who, noticing the children waiting, stopped his team, leaving the walk clear for them to cross. This was in effect an invitation for those waiting on the walk to go ahead, a significant thing as bearing upon the girl's negligence. On seeing this man up in his wagon facing west, with a clear view down Genesee street in that direction, stop his team to leave the walk clear for them to cross over the street ahead of him, it would not be unnatural for a little girl, stopped by traffic at the curb, to take his conduct as an assurance that those waiting could safely proceed. Of her conduct at that time Ethel Fisher, a high school student 19 years of age, who was standing back of the curb and on higher ground, testified she saw Merle Church standing in front of her by the curb, and looking around as John Taylor's team and wagon passed over the crosswalk, and when Sam. Taylor stopped his team, with the heads of his horses far enough from the crossing "so there wasn't any danger of getting hurt," the girl looked both ways, "to the east and west, and started ahead"; that she did not skate, but walked

on her skates—"just ordinary walking"; did not hurry, but went at "an ordinary walk"—and was struck by defendant's automobile, just after she passed the rear of John Taylor's wagon. This witness had driven and timed automobiles, observed them running at different rates, and made estimates of their speed, was familiar with speed limits in cities, had estimated whether passing cars were within the law, and noted the speed of defendant's car just before and at the time of the accident. Asked at what rate of speed it was going when it struck the girl, she replied, "Well, the lowest estimate, from 20 to 25 miles an hour."

Counsel for defendant urged it was the duty of plaintiff's decedent to look to the west immediately on passing out from behind John Taylor's wagon, and she was guilty of contributory negligence in not doing so. On the court's refusal to direct a verdict for defendant, his counsel tendered and the court submitted to the jury the following special question:

"Did Merle Church, as she passed from behind John Taylor's wagon and while she was yet a safe distance from the automobile, look towards the west?"

This the jury answered in the affirmative, and appellant's counsel now contend there was no testimony in the case to warrant an affirmative answer. Defendant's wife, who sat on the back seat, saw the girl before the car struck her, although he did not. She testified that the only indication the girl saw the car was from her actions, when she gave a start back, and said:

"That is the first I seen of her, when she gave her start back, just as though something drew her attention to it."

While direct affirmative testimony on that question is meager, we are not prepared to say there are no facts and circumstances from which a jury might reasonably draw a favorable inference. Neither are we persuaded, under the circumstances of this case, that in any event an answer to the question proposed would furnish the test of the child's negligence as a matter of law. Just what she actually saw, or heard, or thought on that occasion cannot be told by her. She may have seen the automobile and misjudged its speed. There was reason for her being upon the street at that place and time. She was not playing in the street, or idly loitering upon it, but passing the crossing point on her way home from school in the performance of her duty. She had a right to expect any driver approaching that busy crossing under the conditions shown would exercise reasonable care, by not driving his car over 10 miles an hour and keeping it

under safe control, as was his duty. *Babbitt on Motor Vehicles* (3d Ed.) § 385.

The relative rights and duties of pedestrians and drivers at street crossings is discussed and fully stated in the recent case of *Benjamin v. McGraw*, 208 Mich. 76, 175 N. W. 394. Applying the principles there recognized to the facts in this case, where the pedestrian is but a child, the question of her contributory negligence was fairly within the realm of facts for determination by the jury.

The judgment is affirmed.

LANSING et al. v. PERRY. (No. 64.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Nuisance $\S$ 3(11)—Garage not nuisance per se.

The operation of a garage business is not a nuisance per se.

2. Nuisance $\S$ 3(11)—Garage on much-traveled street not enjoined as nuisance.

The construction of a garage building and the operation of a garage business therein on street on which there was heavy traffic, such as street cars, freight cars, and trains, with automobiles and trucks, with the noise and odors incident to such traffic and on which the property was more valuable for business than for residential purposes, will not be enjoined as a nuisance.

3. Nuisance $\S$ 19—Business will not be enjoined until nuisance is made manifest.

Generally, when a building about to be erected, or proposed business to be conducted on unrestricted property is not per se a nuisance, and the apprehended injury is but conjectural and contingent, equity will refrain from interfering until an actual nuisance is made manifest.

Appeal from Circuit Court, Ingham County, in Chancery; Guy M. Chester, Judge.

Bill by Alicia Lansing and others against Milton H. Perry. Decree for defendant, and plaintiffs appeal. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

C. W. & W. S. Foster, and Cummins & Nichols, all of Lansing, for appellants.

Frank L. Dodge and Dean W. Kelley, both of Lansing, for appellee.

STEERE, C. J. Plaintiffs filed this bill of complaint to enjoin defendant Perry from constructing a proposed garage building and operating therein a public garage on a lot owned by him in block 172 of the city of Lansing, located on the east side of Washington avenue in the neighborhood where they reside. The suit was duly brought to issue and

heard on testimony taken in open court. While much testimony was taken, the existing facts are little in dispute; contradictions in the evidence offered by the respective sides running largely to diverse opinions and inferences.

Not only defendant's lot, but all property in that block and vicinity, is entirely unrestricted. Injunction restraining erection of the proposed building was denied, but plaintiffs' bill was not entirely dismissed, the court's decree being so framed as to prohibit certain specified activities particularly protested against by plaintiffs and require the business done in said building to be so conducted as not to create a nuisance.

The circuit judge who heard the case filed an opinion with findings which very accurately marshals the salient facts and clearly presents the questions of law involved.

After a careful examination of the record in verification of the facts stated, arguments presented in briefs filed, and consideration of the authorities cited, we find the statement of facts and conclusions of law so satisfactorily stated and reasoned by the trial judge that we are content to adopt his opinion, as follows:

"Washington avenue, running north and south, is the principal street in the city of Lansing. A large portion of this avenue is paved to the width of 75 feet. In the business portion of the city and as far south as Lenawee street it is paved to the width of 75 feet, and from Lenawee street south to the bridge across Grand river it is paved to the width of 40 feet. There is a double street car track on this avenue through the business portion of the city running south and crossing Grand river bridge. That for some distance south of Grand river bridge on Washington avenue the larger portion of the frontage is occupied by factories and for business purposes with only a few places in this section where people live.

"This suit has reference to the properties fronting on Washington avenue between Lenawee street and the Grand river bridge, a distance of the $3\frac{1}{2}$ blocks, the half block being next to the river.

"The frontage on Washington avenue on each side of the avenue from Lenawee street to Hillsdale street is substantially 890 feet, from Hillsdale to St. Joe street is substantially 275 feet, and from St. Joe street to Main street is 231 feet. The blueprint Exhibit A (copy from the record is printed herewith), which is conceded to be correct, attached to the bill of complaint, shows the lots contained in these blocks. Referring to this blueprint, the evidence shows:

"That between Lenawee and Hillsdale streets on the west side of Washington avenue the north one half of the frontage (marked Bowerman place) has been purchased with the view of building a business block or selling it for a business place. On the other half of this frontage are the Elliott and Davis residences. On the east side of the avenue there are three places of business fronting on the avenue at the north end of this block. The next two places south of these small store buildings have

old houses occupied by tenants and are being offered for sale for business purposes. The south half of this frontage is marked 'Whitney' and is a nice residence.

"Between Hillsdale and St. Joseph streets on west side of the avenue, on the north one-fourth of frontage, is a residence occupied by the I. O. O. F. for office purposes. The next place south, being one-fourth of frontage, is Thorburn's residence, and on back end of lot is a veterinary hospital. The balance of the frontage of this block belongs to the General Motors and is vacant property. The evidence indicates that this corner will be occupied by a business block. On the east side of the avenue the north half of the block belongs to the Woman's Club. On this lot is a good-sized club house and quite spacious grounds. South of this property are two residences, Davis' and Nichols'.

"Between St. Joe and Main streets on the west side of the avenue are situated the residence of two of the plaintiffs, Potter and Olds, each owning one-half of the frontage. On the east side of the avenue the north $65\frac{1}{2}$ feet fronting on the avenue is owned by Rehm and occupied as a residence and is for sale. The next lot, 50 feet front, south of above property, is a vacant lot belonging to defendant and is the property in question. The next lot, 50 feet frontage, belongs to plaintiff Lansing, and is her residence and has been for many years. The next lot, $65\frac{1}{2}$ feet frontage, is vacant property belonging to plaintiff Olds.

"Between Main street and the river on the west side of the avenue is the property of plaintiff Scott and is a residence, and on the east side of the avenue is the property of Johnson, upon which is a residence.

"Plaintiffs contend in this case that defendant, by constructing building for the purpose of carrying on a business on the lot in question, is interfering with long-established rights of theirs, namely, the right to have, maintain, and enjoy their homes free from the disturbance and annoyance of a business activity in their midst, and that such a structure is unsightly and out of harmony with a district for residential purpose, and therefore would destroy the comfort, enjoyment, and desirability of such homes and lessen the value of their property.

"Plaintiff also claims that defendant purposes to maintain a garage with all the incidents of such a business such as storing and selling gasoline, repairing cars, testing out engines, and storing cars, with all the objectionable odors, noises, and dangers that go with such a business, and therefore such business constitutes a nuisance in their midst.

"There is no claim of any building restrictions attached to any property in this locality, and the evidence shows that defendant has received a building permit from the proper authorities to construct the building in question. The evidence shows that this is to be a two-story building, sides stuccoed, properly and well constructed of good material and workmanship; that the front of the building is artistically designed and constructed of the best material, and when completed will be ornamental as a business place.

"The evidence shows that this is not to be a garage, as charged in the bill of complaint, but that this is to be a place for the showing and

sales of new cars and any such service as is incident to the sale of cars. There is not to be any gasoline filling station on or connected with these premises and no gasoline sold at this place.

[1, 2] The evidence shows a very large amount of traffic on this street at this time and much noise. The proposed place of business and business will not to any particular marked degree increase the use of the street nor the noises and odors already occasioned on this street by street cars, interurban cars, freight cars and trains, automobiles, and trucks. This building is not a nuisance. The business to be carried on therein is not a nuisance per se. Under the evidence in the opinion of this court the proposed business is not and will not be a nuisance.

"Another question that should not in any judgment be lost sight of is the growth, progress, and advancement of the city. If this city, the capital of the state, is to develop as it should be the pride of every one to have it, there must necessarily be an expansion of its business district. Such business district should not be broken up and scattered. Manufacturing no doubt should be installed in suburban districts. Commercial and mercantile business is better if centrally located and in one business district. The growth of Lansing is such that its business district must expand. It cannot expand without encroaching on and intruding into residential districts and to some inconvenience homes. One home is as sacred to the owner as another regardless of its value. Which way can the business district of Lansing expand and which is the most natural way?

"It appears to the writer of these findings that the most logical way for expansion is along Washington avenue and with the view that probably all the territory between the business now on Washington avenue north of Grand river may connect with the business south of Grand river.

"The thoughts contained in the above paragraph are suggested by the following language quoted in the case of Dittman v. Repp reported in 50 Md. 522, 33 Am. Rep. at page 327: 'If a man lives in a town, of necessity he must submit himself to the consequences of the obligations of trades which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce, also for the enjoyment of property, and for the benefit of the inhabitants of the town.' In this case the court says on the same page: 'Every one taking up his abode in the city must expect to encounter the inconveniences and annoyances incident to such community; and he must be taken to have consented to endure such annoyances to a certain extent.'

"The introduction of business houses and business in this territory lessens the value for residence purposes, but it materially increases the value of the property for business purposes. The value largely depends on the purpose for which it can be used. Aside from the question of sentiment and one or two very large homes, the property is as valuable, if not more valuable, for business purposes than it is for residences.

"Counsel for plaintiff contend that this case is controlled by Barth v. Hospital Association, 196 Mich. 642, 163 N. W. 62, and Saier v. Joy, 196 Mich. 295, 164 N. W. 507, L. R. A. 1918A,

825, and also that Birchard v. Lansing Board of Health, 204 Mich. 284, 169 N. W. 901, 4 A. L. R. 990, sustain their contention. The Barth Case is one involving a psychopathic or insane hospital; the Saier Case is one involving a morgue and undertaking rooms; and the Birchard Case involves a pesthouse. In the first two cases the court found that the mental condition of residents would be affected by constant fear, annoyance, and inconvenience, making living in the vicinity uncomfortable, unpleasant, and unsafe. In the Birchard Case the court, referring to the first two cases, said, 'We recognized that there might be no actual danger if properly conducted, but that their maintenance in close proximity to the home would create such dread and fear in the mind of the normal person as "would destroy the comfort, the well being and the property rights of the plaintiffs," depressing the mind and lowering the vitality of the normal person, rendering one more susceptible to disease, and reducing the value of the property so situated,' and rendered injunctive relief. In this case the court says: 'But substantially all the experts who testify to this effect agree that their opinion is not shared by the general public, and that the normal person has a horror and dread of a pesthouse, and a fear of infection from proximity to it.'

"These cases have the elements of dread, fear and horror, which lessen vitality, strength, and resistance of the normal person and subjects him more readily to annoyance, discomfort, and disease. The instant case does not possess these elements, and in my judgment those cases are not controlling in this.

"Counsel for complainant also cite McMorran v. Fitzgerald, 106 Mich. 649, 64 N. W. 569, 58 Am. St. Rep. 511.

"Injunctive relief was granted in this case when defendant invaded a suburban residential district and engaged in an offensive and noisy business which injured plaintiff's property by smoke and soot and made life uncomfortable by unpleasant odors and noises.

"The evidence in this case shows that the noises on this street now are such that at times you cannot carry on a conversation on the porches of the homes, that there is the usual smoke and odors occasioned by cars being used in large numbers on the street, and it is speculative and very uncertain as to whether the business intended as shown by the evidence will perceptibly add to the turmoil, annoyance, and inconvenience now experienced by residents on this avenue."

"The question of whether a business not prohibited by law and which is not immoral is a nuisance is one of fact, depending on the manner in which it is operated, its location, and the effect it has on those in the community in which it is located. It must be something more than distasteful and displeasing. It must amount to an annoyance, detriment and injury.

"As before stated, the evidence does not show that the proposed business will be a nuisance. True, a business might be operated so as to become a nuisance if it should be conducted as plaintiffs charge in their bill of complaint, but that is not the situation in this case.

"Then the other question in this case is: Can a man who owns property on Washington avenue between the present business section north of Grand river and the business section

south of Grand river introduce a lawful business in his house or build a business block for a lawful business where his home stands if objected to by the residents of that territory? It should be remembered that this is not a restricted territory. I am impressed that the owner of property in this section has a right to build a business place in this section for a lawful business therein and conduct such lawful business so long as it does not become a public or private nuisance. If plaintiffs can stop this building because it is introducing business in a residential district and thereby damaging their property for residence purposes, but increases its value for business purposes, then plaintiffs can prevent the encroachment of the business district toward their residences which would make their property less desirable for residences but more desirable for business purposes. The damage for residence purposes is compensated for by the increased value for business purposes. It is not attempted in this case to expand or introduce business in a suburban district.

"With this view, I think defendant should be permitted to construct the building as outlined and described by him and carry on the business of sales and showroom as described by defendant, but that defendant shall not keep for sale or sell gasoline on the premises, nor obstruct the street by parking cars thereon, nor run a general repair shop. He shall be permitted to carry on such repair service as is incident to the handling of cars which are a part of his show and sales business; this to permit the receiving an old car in exchange when a new car is sold and the sale of the old car and such reasonable repair to same as is customary in a sales and show department, and defendant shall not operate the business so as to occasion unusual noises or odors in such a sales and show business. No business shall be conducted in this place so as to constitute a private or public nuisance."

[3] This case is clearly governed by the well-recognized general rule that when a building about to be erected or proposed business to be conducted on unrestricted property is not per se a nuisance and the apprehended injury is but conjectural and contingent, equity will refrain from interfering until an actual nuisance is made manifest. That principle finds support in *Siegel v. Circuit Judge*, 155 Mich. 459, 119 N. W. 645, *Mackenzie v. Pauli Co.*, 207 Mich. 456, 174 N. W. 161, 6 A. L. R. 1305, *Wolfschlag v. Applebaum*, 213 Mich. 180, 182 N. W. 47.

The decree is affirmed, with costs to defendant.

NIEDZINSKI v. CORYELL. (No. 16.)*

(Supreme Court of Michigan. Oct 3, 1921.)

1. Municipal corporations §706(1)—Declaration alleging automobile driver's failure to turn to left in passing bicycle rider going in same direction held sufficient.

In action for injuries to bicycle rider, sustained in collision with defendant's automobile

when its driver attempted to pass bicycle going in same direction, declaration alleging that defendant's son, in driving the automobile, was negligent in failing to turn out to the left to pass the bicycle, and asking for damages in accordance with Comp. Laws 1915, § 4925 (which was clerical error for 4825), held to state a common-law cause of action for negligence, with a statutory right to recover against the owner of the automobile.

2. Pleading §30—Clerical errors held not to affect sufficiency of declaration.

In declaration alleging negligence "constituted in" automobile driver failing to turn out to the left to pass bicycle rider going in same direction, and demanding judgment against owner in accordance with Comp. Laws 1915, § 4925, the use of the word "constituted," instead of "consisted," and the citation of section 4925, constituting a part of the Drain Law, instead of section 4825, held not to affect sufficiency of the declaration, being clerical errors, which could not have been misleading.

3. Municipal corporations §705(10)—Bicycle rider, who rode straight ahead, not negligent, where automobile coming from behind could pass on either side.

Bicycle rider, who rode straight ahead, without swerving to the right or left, when automobile approached him from the rear, with room to pass by on either side, is not contributorily negligent, in absence of statute or ordinance.

4. Municipal corporations §703(1)—Bicycle not a "motor vehicle," within traffic statutes.

A bicycle is not a "motor vehicle," within statutes regulating traffic.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Motor Vehicle.]

5. Municipal corporations §703(1)—Traveler may occupy part of public highway most convenient, when not needed by others with superior rights.

A traveler may occupy and use any part of the highway he finds most convenient or agreeable, when not needed by others whose rights are superior.

6. Municipal corporations §703(1)—Automobile subject to laws governing vehicles.

Aside from special statutes, automobiles are subject to existing general laws governing vehicles on public highways, with no paramount rights.

7. Municipal corporations §706(7)—Whether bicycle rider swerved to left on approach of automobile from behind held for jury.

In action for injuries to bicycle rider, struck by automobile in driver's attempt to pass bicycle going in same direction, the question of whether the bicycle rider swerved to the left on automobile's approach from behind held for jury.

8. Witnesses §345(1)—Evidence as to conviction of witness admissible to affect his credibility.

In action for injuries sustained in automobile-bicycle collision, cross-examination of au-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 3, 1921.

tomobile driver as to his having been convicted of crime *held* proper; evidence of such conviction being admissible as bearing on his credibility.

9. Trial $\Rightarrow$ 133(2)—Remarks of counsel in argument to jury *held* not ground for reversal, in view of instruction.

In action for injuries sustained in automobile-bicycle collision, in which there was evidence as to automobile driver's conviction for driving automobile at excessive speed, admitted as affecting his credibility as a witness, remarks of plaintiff's counsel in argument to jury that "this young man, three times convicted of violation of law, didn't have any right to run us down," *held* not ground for reversal, in view of instruction that evidence as to convictions should be considered only as bearing on his credibility as a witness.

Error to Circuit Court, Bay County; Samuel G. Houghton, Judge.

Action by Barney Niedzinski against Charles Coryell. Judgment for plaintiff, and defendant brings error.. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE; JJ.

Morris L. Courtright, of Bay City, for appellant.

W. A. Collins, of Bay City, for appellee.

STEERE, C. J. At about 6 o'clock in the evening of October 27, 1917, Harry Coryell, son of defendant, was driving his father's Cadillac touring car, with the latter's knowledge and consent, south along Washington avenue in the city of Bay City, returning with three companions from attending a football game, when he came into collision with plaintiff, who was riding a bicycle down the avenue in the same direction, injuring plaintiff and damaging his bicycle, to just what extent is in controversy. This action was brought in the Bay county circuit court to recover damages from defendant as owner of the automobile. Plaintiff had verdict and judgment in the sum of \$645.

Washington avenue is a main thoroughfare of Bay City, extending through it centrally in a northerly and southerly direction past the City Hall, nearly in front of which the accident occurred. Through that part of the city are double railway tracks along the avenue, and it is paved 40 feet wide between curbs. At the time of the accident it was raining some and daylight fading.

Plaintiff was a coal miner, and had worked that day until 4 o'clock, when he went home, fed his chickens, etc., and shortly before 6 went down town on his bicycle to get some meat and a pair of shoes, with which he was returning home when the accident befell him. He testified he was going south on his bicycle, some 3 or 4 feet distant from the west rail of the west street car track; that the

street was all clear of traffic in that locality, and as he rode along he heard an automobile coming behind him from the north, giving him the impression that it was coming fast, but the road was clear, and he did not turn around to look, and did not know how fast; that he kept going straight along without changing his course, because he saw that the automobile had plenty of room to pass him on either side; that it struck his bicycle in the rear and threw him down, severely injuring him and the bicycle. The evidence appears to be undisputed that the rear end of the bicycle was wrecked and the front practically uninjured.

The testimony of defendant's son is that he saw plaintiff when 75 feet away, riding his bicycle down the street ahead of him, about half way between the west track and the curb; that he appeared to be "wobbling along a little" when he first saw him, was carrying a bundle in one hand and steering his bicycle with the other, "going down rather crooked," and said of the accident:

"I saw him turn to the left, and I went right by, and he actually ran right into me in the front fender, whereby it threw him right down, and the boys that were with me didn't know anything of the kind that I hit this man, and I got out and picked him up, and we walked into the police station, and they took his name, and from there I took him home. Q. Did you run into him? A. No; he actually ran into me. Q. Did it become necessary for him to turn the bicycle toward the street car track? A. Yes; he turned the bicycle toward the street car track. * * * Q. What did you do? A. I made a violent—I made an attempt to avoid the accident. Q. By what doing? A. By turning to run that much farther east. Q. Where did his bicycle hit the automobile? A. Why, just exactly in front of the City Hall."

He further said that, as they picked plaintiff up and helped him into the City Hall, he appeared to have been drinking. Plaintiff denied that he swerved his bicycle either way, or that he had been drinking. The negligence charged in plaintiff's declaration is:

"Running said automobile at an excessive speed and in failing to turn to the left to pass said plaintiff"—concluding: "Wherefore plaintiff claims a judgment in the sum of \$2,000 in accordance with the provisions of section 49(8 ?) 25, Comp. Laws of Michigan of 1915."

A motion was made at the close of plaintiff's testimony for a directed verdict, which was denied, and later a motion was made for a new trial on various grounds, including the claim that the verdict was against the weight of evidence and excessive, which was also denied.

Defendant's 20 assignments of error are directed against the insufficiency of plaintiff's declaration, rulings of the court during the progress of the trial, refusal to direct a

verdict for the defense, and parts of the charge. Of the declaration defendant's counsel refer at length to Black's Law and Practice in accident cases for the essentials of a negligence declaration, and point out that in scant phrases plaintiff's curt declaration simply alleges the two charged acts of negligence as "excessive speed," which he failed to prove, and "failure to turn out to the left in passing," without any allegations of duty, or statement of facts and circumstances showing defendant owed any legal duty to plaintiff.

[1, 2] In defense of the brevity of his declaration, plaintiff's counsel points out that it follows a form prescribed in the new rules of the court promulgated pursuant to the Judicature Act; the form selected as a model being entitled "Declaration for Negligence in Running Train over Crossing." That form appears on page 265 of Searles' Michigan Court Rules. The declaration follows the form in outline, with a series of concise, numbered paragraphs in similar phraseology; but, this not being a crossing case, the allegations of negligence are necessarily different and of counsel's own composing. It is indicated that in so doing counsel sought to fit his charges to the Motor Vehicle Law, both as to speed and passing. Plaintiff did not see defendant's automobile until after the accident, and could furnish no evidence as to its speed. Defendant's proof was that the car carefully kept within the 15-mile speed limit. The trial court directly and correctly took from the jury the question of excessive speed, which leaves the declaration stating in substance, as applied to the case submitted to the jury, that on the day in question plaintiff, while in the exercise of due care, was lawfully traveling along a designated highway on his bicycle, when defendant's automobile, driven by his son, "was so carelessly managed by said operator" that it ran plaintiff down, severely injuring him and destroying his bicycle, and the particular act of carelessness or negligence "constituted in * * * failing to turn out to the left to pass said plaintiff."

The carelessness of counsel in drafting the declaration is noted in a failure to follow the form adopted by substituting "constituted" for "consisted," and in the concluding paragraph citing section 4925, Comp. Laws of 1915, which is part of the Drain Law. The appropriate section of the Motor Vehicle Law evidently intended is 4825, and this may be passed as a clerical error. We think no one would be misled by those inaccuracies, or fail to understand that the negligence charged as cause of the accident was failure of the young man driving the passing auto to observe due care and turn aside according to the "law of the road" when passing plaintiff going in the same direction.

[3] One of defendant's most strenuously argued assignments of error is refusal of the

court to grant his motion for a directed verdict on the ground it conclusively appeared plaintiff's negligence caused the accident. In support of this it is pointed out that, in reply to counsel's question on cross-examination, "Which side would the automobile be required to pass you, do you know, if it wanted to pass?" he said, "On the right side." It is argued from this that plaintiff evidently expected the automobile to pass him on the right, and he therefore swung to the left. That might be a legitimate argument to a jury on the issue of fact as to whether plaintiff did turn to the left. He testified that he did not do so, while defendant's evidence was that he did. He said he was riding near the center of the street, on the right side of the car track, and continued to do so until the auto struck him; that to pass him on the left from its proper side of the street behind him the auto would have to cross the street car tracks; the street was clear, and there was plenty of room to pass him on either side, so he kept right on in his course. If he did, which was a question of fact, in the absence of any applicable statute or ordinance, he was strictly within his rights, and guilty of no negligence.

[4] Apparently plaintiff was not the only one confused as to the law applicable to the situation. The arguments advanced and statements made by court and counsel during the trial indicate the then impression that provisions of the motor vehicle statute applied; but we are not dealing with a case involving vehicles meeting from opposite directions, or motor vehicles passing each other, or overtaking and desiring to pass "vehicles drawn by a horse or horses or other draft animals." While a bicycle is a vehicle, it is not the kind of vehicle mentioned in the statute. When other vehicles meet or pass it, both are to be governed by what is known as the rule or law of the road, which it may be noted has in many respects been followed by our statutes relative to automobiles.

[5, 6] Unquestionably a traveler may occupy and use any part of the highway he finds most convenient or agreeable, when not needed by others whose rights are superior, and aside from special statutes automobiles are subject to any existing general laws governing vehicles on public highways, with no paramount rights. Long and universal customs for approaching, meeting, and passing persons or vehicles on highways under varying conditions have in many particulars been so commonly observed as rules of safety and convenience that they are recognized by the courts as rules or laws of the road of legal import, and in effect have become part of the common or bench law of the country. Many of them have been adopted in statutes; some have not. The most familiar of these is to travel the right side of the road, and keep to the right in meeting and passing. As the right side of the road is the same for those

going in the same direction, it is also recognized as the natural, commonly necessary, and proper rule of the road for the rear traveler, if he desires to pass, to turn by at the left; but even that course demands extra caution to avoid vehicles coming from the opposite direction, with the right of way on that side of the road. Of this it is said in Elliott on Roads and Streets (3d Ed.) § 1084:

"Indeed, it is most common for the rear vehicle to pass the other on the left. The leading traveler is not bound to turn either to the one side or the other, if there is sufficient room to pass on either side. If there is not sufficient room, it is said to be 'the duty of the foremost traveler to afford it, on request made, by yielding an equal share of the road, if that be adequate and practicable; if not, the object must be deferred till the parties arrive at ground more favorable to its accomplishment.' But it is, perhaps, doubtful if such duty can be deemed an absolute legal duty, and, even if it should be so considered, the failure of the leading traveler to perform it by turning out to one side will not justify the other in purposely running into him, or attempting to pass at all hazards. The only rule of general application that can be laid down is that he who attempts to pass another going in the same direction must do so in such manner as may be most convenient under the circumstances of the case, and if negligent, and damage results to the person passed, the former must answer for it, unless the latter by his own carelessness or recklessness brought the disaster upon himself."

Of passing in the same direction it is remarked in Angell on Highways, 452:

"The law has been declared to be that a traveler may use the middle or either side of the road at his pleasure, and without being bound to turn aside for another traveling in the same direction, provided there be sufficient room to pass on the one hand or the other."

[7] There was certainly room to pass on the one hand or the other in this case. The paved street was 40 feet between curbs, and ahead of the approaching automobile only occupied by plaintiff on his bicycle, which, lengthwise of the highway, occupied no more space than would a pedestrian. If he was "wobbling along," half way between the west track and the curb, when the driver of the auto saw him 75 feet away, the latter had a clear three-quarters of the entire street on the left available, and it was his duty in passing to exercise that care to avoid an accident commensurate with such situation. Defendant's only claim of contributory negligence is that plaintiff swerved his bicycle to the left, or the wrong way, which is denied, presenting a question strictly within the province of the jury.

[8, 9] Prejudicial error is urged against the court allowing plaintiff to show young Coryell had been convicted of crimes on different occasions, without producing the records of such convictions, and comments thereon

made by plaintiff's counsel in his argument to the jury. On cross-examination of this witness by plaintiff's counsel the following questions and answers were permitted against defendant's objections:

"Q. Have you ever been arrested and convicted of crime? A. Yes, sir. * * * Q. How many times? A. Three times."

When overruling defendant's objections, the court announced that the answers were admitted only as bearing on the witness' credibility. After moving to strike out the testimony as incompetent and immaterial, defendant's counsel further interrogated the witness on the subject, and showed that each of the three offenses for which he had been convicted on his plea of guilty, and fined, was driving an automobile at an unlawful speed. In summing up plaintiff's counsel said, in answer to argument of defendant's counsel, as he claims:

"And we did not owe him any duty to go over to the right unless you sounded a signal, and there is no proof you sounded any signal. This young man, three times convicted of violation of law, didn't have any right to run us down, whether we were drunk or sober, or whether he was Charles Coryell's son or a king's son, and you cannot run us down—"

At this point defendant's counsel cut off the climax by interrupting with an exception, which the court granted, having previously stated that the jury would be instructed as to the application of evidence relative to the young man's former convictions. This the court took pains to do, fully and correctly, emphasizing to the jury that the fact the young man "had previously been arrested and pleaded guilty to fast driving" was no evidence "he is guilty of negligence in this case," could not be considered by them for that purpose, was only permitted in evidence as bearing on the witness' credibility, etc., particularly cautioning them against being influenced by consideration of the rank of parties, or yielding to any impulses of revenge, sympathy, etc. The testimony objected to was admissible for the purpose stated. The jury was properly cautioned by the court. We find no reversible error in what occurred.

The court's charge is rather lengthy and something of a dissertation on the Motor Vehicle Law, containing in parts matter not strictly applicable. Counsel for defendant assigns error on numerous excerpts which, standing alone, seem somewhat inappropriate and questionable, indicating the court viewed the negligence, if any, as statutory. Most matters complained of, when read with the charge as a whole, cannot be taken seriously.

Counsel emphasize and argue as a "very material error" the following:

"Now, if one person approaches another and desires to go by, he is required to make it known to the other that he is there. The stat-

ute provides that he shall blow a horn or bell or whistle, or some sort of sound, as that is referred to; but the law is to this effect: That if one person overtakes another he must in some manner inform the other of his presence and that he wishes to pass, if he so desires."

As before noted, the matter of statutory duties and rights of the parties seems to have been at times urged by both parties. Defendant's counsel was insistent on plaintiff's duty to turn to the right on ascertaining the automobile was approaching from the rear. He was informed and did know of its approach as he testified, and expected it to pass; but, if his version is true, there was abundant room to pass on either side, and he kept his course. This discussion of that subject by the court finds an excuse in defendant's insistence that it was plaintiff's duty to turn to the right; but at conclusion of the protracted charge, on defendant's counsel asking, "Do I understand your honor instructs the jury that it was the duty of Harry Coryell to give some signal of his approach if he desired to pass?" The court replied: "No, I did not say that; I didn't intend to, any way."

Regardless of the somewhat irrelevant dissertations complained of, a direct and distinct instruction runs through the charge, repeated more than once, that the only point or issue in the case for the jury to decide was whether plaintiff unexpectedly swerved to the left, and by such negligent act caused or contributed to the accident, reiterated near the conclusion of the charge, as follows:

"If the plaintiff was going in a straight course, and was struck from behind squarely, then the driver of defendant's automobile would have been negligent, if that was the case. If he was turning (out?) around, as an ordinarily prudent, careful person would, and turning out sufficiently to pass, as an ordinarily prudent person would do, and the plaintiff swerved to the left, and the accident happened, and the defendant not being negligent, if he was not negligent, or did not do it differently from what an ordinarily prudent person would have done, then he would not be liable."

The claim of excessive speed being eliminated, the declaration stated a simple common-law cause of action for negligence, with a statutory right to recover against the owner of the automobile, if negligence was proven which involved no issue of fact for the jury. The determining issue of fact left to the jury was simple, easy to understand, plainly stated in the charge, and emphasized by repetition in varying language.

On the controlling issues of fact as to negligence and damages, we are not prepared to condemn the verdict of the jury, or the findings and conclusion of the court that it was not against the overwhelming weight of

evidence, nor upon an examination of the entire record hold that it affirmatively appears the errors complained of have resulted in a miscarriage of justice.

The judgment is affirmed.

ROWLEY v. LAINGSBURG CEMETERY ASS'N. (No. 26.)

(Supreme Court of Michigan. Oct. 8, 1921.)

1. Injunction $\Leftrightarrow$ 194—Declaratory decree, in addition to injunction, fixing rights not invalid, refused.

Where member of cemetery association sued to enjoin forfeiture of rights in lot, and obtained an injunction on the ground that assessments complained of were invalid, as having been voted by the trustees, instead of by the members or stockholders, of defendant, such member was not further entitled to a declaratory decree fixing his rights in the event (a) that the stockholders or members vote an assessment; (b) that he, if living, refuses to pay; and (c) that on such refusal the defendant attempts a forfeiture.

2. Cemeteries $\Leftrightarrow$ 15—Certificate of purchase of lot held to give only right of burial.

A certificate of purchase given by a township, certifying that purchaser had paid the sum of \$6 "in full for the proprietorship" of a cemetery lot, gave the purchaser only a right of burial in, not title to, the lot, under Comp. Laws 1897, § 4415.

3. Adverse possession $\Leftrightarrow$ 60(2)—Possession of burial lot not adverse.

Entry of a burial lot under a certificate of purchase executed by township, and possession thereof by burial of members of family therein, were by permission, license, and right of burial, and, continuing in that character, could not ripen into absolute ownership by adverse possession.

4. Cemeteries $\Leftrightarrow$ 11—Order of court unnecessary for transfer by township of cemetery to association.

Order of circuit court on petition of township board of health was not required before transfer of a cemetery by a township to a cemetery association organized under Comp. Laws 1915, § 11122 et seq., conveyance being had under section 11140, because section 5094 does not apply to transfers to associations so incorporated.

Appeal from Circuit Court, Shiawassee County, in Chancery; J. H. Collins, Judge.

Action by William H. Rowley against the Laingsburg Cemetery Association. From a decree for only part of the relief prayed for, plaintiff appeals. Affirmed.

Argued before STEERE, O. J., and MOORE, WIEST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

Albert L. Chandler, of Owosso, for appellant.

Pulver & Bush, of Owosso, for appellee.

CLARK, J. For a lot in a township cemetery plaintiff received a certificate in the following form:

"Sciota Cemetery.

"Township of Sciota, March 10, 1890.

"No. _____.

"This certifies that William Rowley has paid the sum of \$6.00 in full for the proprietorship of the north half ($\frac{1}{2}$) of block (18), division (A), of Sciota Cemetery.
"\$6.00.

"Chairman of Board of Health.

"Clerk of Board of Health."

Several members of the plaintiff's family were buried thereafter in the lot. In May, 1913, the defendant cemetery association was organized. 3 Comp. Laws 1915, § 11122 et seq. By two deeds, the first in October, 1913, and the second in November, 1919 (a question having been raised as to the validity of the first deed), remaining rights of the township in the cemetery were conveyed to the defendant under the provisions of section 8380, 3 Comp. Laws 1897 (3 Comp. Laws 1915, § 11140), and plaintiff thereby was given the right to vote at corporate meetings of defendant.

Defendant's affairs were managed by a board of trustees, who determined that the owners of burial rights in the cemetery should be assessed to raise funds for the purpose of keeping the cemetery lots in a slightly condition. Plaintiff was so assessed. He refused to pay. When the total of several unpaid assessments was \$4.50, defendant notified plaintiff that, if the assessments were not paid within 30 days from the date of the notice, all plaintiff's rights of burial in said lot after that date would become forfeited and subject to sale.

[1] The bill of complaint sets up in detail the attempts of defendant to levy and collect the assessments, and plaintiff's resistance of the claimed right, and prays that the threatened forfeiture be restrained and that plaintiff's title to the lot be quieted. The forfeiture was enjoined. The assessments were found invalid, as having been voted by the trustees, instead of by the members or stockholders, of the defendant. But plaintiff by his appeal seeks to have a declaratory decree fixing his rights in the event (a) that

the stockholders or members vote an assessment; (b) that he, if living, refuses to pay; and (c) that upon such refusal the defendant attempts a forfeiture. Such declaration must be declined. See *Anway v. Grand Rapids Railway Co.*, 211 Mich. 592, 179 N. W. 350, 12 A. L. R. 26; *City of Owosso v. Union Telephone Co.*, 185 Mich. 349, 151 N. W. 1029.

[2] The trial court correctly held that the plaintiff, upon his certificate of purchase, acquired a right of burial in, not title to, the lot. Counsel have shown diligence in citing authorities sustaining such holding. Some of them are *State v. Scoville*, 78 Conn. 90, 61 Atl. 63; *Nicolson v. Daffin*, 142 Ga. 729, 83 S. E. 658, L. R. A. 1915E, 168; *Stewart v. Garrett*, 119 Ga. 388, 46 S. E. 427, 64 L. R. A. 99, 100 Am. St. Rep. 179; *Jacobus v. Children of Israel*, 107 Ga. 518, 33 S. E. 853, 73 Am. St. Rep. 141; *McWhirter v. Newell*, 200 Ill. 583, 66 N. E. 345; *Perley's Mortuary Law*, p. 178; *Gowen v. Bessey*, 94 Me. 116, 46 Atl. 792; *Partridge et al. v. First Independent Church of Baltimore*, 39 Md. 631; *Page v. Symonds*, 63 N. H. 19, 56 Am. Rep. 481; *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 40 Atl. 871, 78 Am. St. Rep. 897; 5 R. C. L. 246. See, also, *Badeaux v. Ryerson*, 213 Mich. 642, 182 N. W. 22. And the statute in force when the certificate of purchase was given for the lot in the township cemetery provided that the fee of the land should remain in the board of health in trust for the township. See section 4415, Comp. Laws 1897.

[3] Nor is there merit in plaintiff's claim of title to the lot by adverse possession. His entry and possession were by permission, license, and a right of burial, and they, continuing in that character, could not ripen into absolute ownership.

[4] Upon the hearing plaintiff claimed that the transfer of the cemetery to defendant was invalid, being without an order of the circuit court, upon petition of the township board of health, as provided by section 5094, 1 Comp. Laws 1915. This statute the trial court correctly found—

"does not apply to transfers made under the provisions of the act under which defendant was incorporated, * * * and that the township board of health of Sciota township, or its township board, could transfer to this defendant the right in this cemetery under the provisions of section 11140, C. L. 1915, without the permission of the circuit court."

As to the relief afforded plaintiff, the decree is affirmed, with costs to appellee.

METCALF v. PEERLESS LAUNDRY & DYE CO. (No. 36.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Municipal corporations $\S$ 706(7) — Negligence of prospective street car passenger struck by automobile truck held for jury.

In action for injuries to prospective street car passenger struck by defendant's automobile truck passing within six feet from running board of street car in violation of city ordinance, the question whether the pedestrian, whose view of street was obstructed by automobile parked along curb where car stopped, was negligent, *held* for the jury.

2. Municipal corporations $\S$ 705(10) — Prospective street car passenger may assume that automobile drivers will not violate ordinance fixing safety zone.

Where city ordinance prohibited running of automobiles within six feet of running board or lower steps of street car which has stopped or is stopping to take on or let off passengers, a prospective passenger may assume that he will not be injured while within six feet from such portion of street car by automobile violating the ordinance.

3. Evidence $\S$ 123(11)—Statements by driver of truck as to accident not admissible.

In action for injuries to pedestrian struck by defendant's automobile truck, a policeman's testimony as to statements by truck driver as to how accident happened, made some time after plaintiff had been carried to a nearby restaurant, *held* not admissible on objection that it was not *res gestæ*.

4. Appeal and error $\S$ 170(7)—Admission of testimony as to statements of automobile driver in negligence action held harmless in view of driver's own testimony.

In action for injuries to pedestrian struck by defendant's automobile truck, admission of testimony as to statements by truck driver as to how accident happened *held* harmless, under Comp. Laws, $\S$ 14565, where the driver himself had already testified to a state of facts not inconsistent with the facts stated to the policeman.

5. Trial $\S$ 255(4)—Admission without limitation of statement admissible for purpose of impeachment not error in absence of request to limit.

In action for injuries sustained in automobile accident, the admission of a written statement made by automobile driver more than five months after the accident *held* not error, where it was admissible to contradict the testimony given by the driver during the trial, and where the court was not requested to limit its effect.

6. Damages $\S$ 132(1)—\$2,000 verdict for permanent injuries held not excessive.

\$2,000 verdict to 72 year old plaintiff struck by defendant's automobile truck, for injuries shown by evidence to have been of a permanent nature, and to have prevented plaintiff from working from time of accident to time of trial, *held* not excessive.

Error to Circuit Court, Saginaw County; Clarence M. Browne, Judge.

Action by Elmanzor B. Metcalf against the Peerless Laundry & Dye Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Purcell & Tessin, of Saginaw, for appellant.

John F. O'Keefe, of Saginaw, for appellee.

STONE, J. This case is here upon writ of error sued out by the defendant to review a judgment of \$2,000 for the plaintiff for personal injury to plaintiff by reason of the claimed negligence of the defendant. The plaintiff, a man 72 years of age, was injured on April 25, 1919, by being struck by an automobile delivery truck owned by the defendant, and being driven by an employé of the defendant, near the intersection of Bristol street and Washington avenue, in the city of Saginaw, as plaintiff was in the act of going from the south curb towards the street car track in Bristol street. South Washington avenue at Bristol street runs north and south, and contains two street car tracks. Bristol street runs east and west, and ends at Washington avenue. It contains a double street car track, which turns north into South Washington avenue. At the time of the injury there was parked on the south side of Bristol street at the curb about 40 feet west of the intersection of South Washington avenue a Maxwell touring car with the top and hind curtain up, which somewhat obstructed the view to the west along Bristol street of persons stepping from the south sidewalk into the street to take the car going easterly on Bristol street. At the time the weather was clear, and there was nothing to obstruct the view of a person looking west from South Washington avenue on Bristol street, except the parked automobile above referred to, but any object that might be directly in the rear of the approaching street car might not be seen. A little over a block on Bristol street west from South Washington avenue is the Bristol street bridge, which spans the Saginaw river, and over which the line of street cars which operates in Bristol street runs. All street cars approaching from the west on Bristol street stop for a railroad track at the east approach of the bridge, and there is a slight upgrade from the bridge to Washington avenue. The city hall is located on the southwest corner of Bristol street and South Washington avenue.

The plaintiff claims that on the day mentioned he was at the city hall, and about 10:30 o'clock in the morning, he came down the sidewalk leading from the easterly front

doors of the city hall, and when he reached the sidewalk at the corner he saw a street car approaching from the west on Bristol street, and that he intended to get on this car at the regular stopping place on the south side of Bristol street near the corner of Washington avenue; that he walked west towards the street car, which had stopped, or was about to stop at the place on Bristol street, where cars take on and let off passengers, and that while walking upon Bristol street, upon the south sidewalk in the direction from which the car was coming, he looked to the west to ascertain whether there were any motor or other vehicles upon Bristol street coming in an easterly direction; that, while he saw the street car coming toward him, he neither saw nor heard any motor vehicle approaching him; that after he had left the curb and was in the act of crossing the south side of Bristol street, which at this point was of the width of 17 feet or thereabouts, and without any warning being given by the driver of the automobile truck, he was suddenly struck, knocked down, and injured by said truck coming from the west; that at the time he left the curb and started for the street car his vision of the street to the west was somewhat obstructed by the parked automobile, and that he was prevented from having a clear view west until he passed beyond the width of the parked automobile into the traveled part of the street, when the motortruck of the defendant came suddenly from the west upon him, without giving him warning of any kind; and that he looked west upon Bristol street to ascertain whether any automobiles were coming towards him just before he left the curb, and it is not clear whether he looked again when he reached the traveled portion of the road, or whether he was struck immediately. He claimed to have no recollection of seeing the truck of defendant, and did not remember being struck. He claimed that he was not himself negligent in attempting to cross the south side of Bristol street for the purpose of entering the street car, then about to stop at the corner, as that was a regular stop. He claimed that the employé of defendant was negligent in the manner in which he operated the truck in that he sounded no horn, gave no signal of any kind, and that the truck was being operated at a dangerous rate of speed, in view of the surroundings and conditions at the time and place; that defendant was negligent in driving too near the street car when it was about to stop, or had stopped, for the purpose of receiving and discharging passengers. The plaintiff further claimed that the parked automobile was opposite the place where the street car stopped, which he claimed under the ordinance of the city constituted a "safety zone" to the extent of at least the distance of 6 feet to the south of the rear entrance to the street car; that the

distance of this place on Bristol street where the car stopped to take on and let off passengers, and between the south rail of the street car track and the curb, was but 17 feet, and that the distance from the curb to the outside of the parked car was about 7 feet, leaving a distance, from the south rail of the car tracks to the line parallel with the north side of the parked automobile of but 10 or 12 feet; that the body of the street car and the entrance stop to the car occupied about a foot and a half, leaving but $8\frac{1}{2}$ feet between the street car and a line parallel with the north side of the parked car; that 6 feet of this latter space was declared under the ordinance to constitute a safety zone for passengers alighting from or boarding the street car at this point; that, there being only a remaining space of $2\frac{1}{2}$ feet, the defendant's truck could not pass through said space without driving into the safety zone, and that by reason thereof it was and became the driver's duty to stop his truck at least 6 feet from the rear entrance of the street car; that at the time the street car stopped at least two persons were about to get on this street car, and that the plaintiff, looking west to ascertain whether there were any automobiles approaching the car, and seeing none, had a right to pass over the street to the safety zone, and was not obliged to continuously look to ascertain whether automobiles were approaching as he proceeded to the car, but had the right to assume that defendant's employé operating said car would obey the ordinance and stop his truck before entering the safety zone, and would use ordinary care in the operating of the vehicle, in approaching the street car, for the safety of pedestrians upon the street; that defendant's employé failed in the performance of his duty; and that by reason of his driving said truck through such space and safety zone the plaintiff was struck and permanently injured; There was evidence tending to support these claims.

The defendant, on the other hand, claimed that its driver of said truck was an experienced and capable driver; that while said employé was on his way to the Bancroft House with a load of laundry he drove on Bristol street and across said bridge, and that when upon the bridge he was in the rear of said street car, which also was proceeding east, and that when the street car reached the railroad crossing it stopped, and defendant's driver stopped the truck; that when the car proceeded said driver turned into the regularly traveled portion of Bristol street on the southerly or right side thereof, and drove along near the street car as it proceeded easterly towards Washington avenue, and in plain view of plaintiff, and was running at a slow rate of speed; that the driver of the truck did not see plaintiff until just before he was struck; that plaintiff stepped out into

the street in the pathway of the truck without warning, and that the driver could not see plaintiff before he got into the street, on account of the parked automobile, and that the truck stopped almost as soon as it struck plaintiff; that at the time of the accident the truck was about abreast of the street car; and that there was a safety stop, so called, just before the street car would enter the South Washington avenue tracks, and at this point passengers were received and discharged by the street car company, and that there was nothing in the street to designate a safety zone at this point. There was also testimony tending to support defendant's claims.

After plaintiff had rested his case a motion was made to direct a verdict in favor of defendant on the grounds that there was no evidence of negligence of the driver of the truck, and that the evidence conclusively established the fact that plaintiff was guilty of contributory negligence, under the law. The court reserved its decision on this motion. Again at the close of the evidence the defendant renewed the motion for a directed verdict, which was again taken under advisement, and the case was submitted to the jury, and a verdict for plaintiff was rendered. There are many assignments of error embracing rulings of the court on admission and rejection of testimony, refusal to direct a verdict for defendant, failure to charge as requested in the charge as given, and the denial of defendant's motion for a new trial, which raises the question of the weight of the evidence to support plaintiff's claim. Many of the assignments of error go directly to the question of whether or not plaintiff was entitled to recover, as a matter of law, on the ground that he was guilty of contributory negligence, and whether or not the verdict was against the great weight of the evidence.

[1] We have read and re-read this record with great care, and are unable to agree with counsel for defendant that it should be held that the plaintiff was guilty of contributory negligence as matter of law. We are of the opinion that that question was one for the jury under proper instructions. Upon that subject the trial court gave many of the requests to charge presented by counsel for defendant, with slight modifications, as follows:

"I charge you, as a matter of law, a pedestrian is guilty of contributory negligence if he fails to take all reasonable and necessary precautions for his own safety in entering upon the traveled portion of a street, and if you find, as a matter of fact, plaintiff did not look for approaching automobiles, or, if he did look, that he could have seen said automobile delivery vehicle which subsequently struck him, and failed to observe it, then he is guilty of contributory negligence, and the verdict will be no cause of action. It is not enough that the plaintiff

testifies that he looked in the direction from which said automobile was approaching; if said automobile was in plain view, it was incumbent upon him to see it, and the fact that the plaintiff testifies in this case that he looked and did not see an automobile approaching from the west, when as a matter of fact it is in plain view, precludes the idea that he could not see it, and if you should find as a matter of fact that said automobile was in plain view, when plaintiff testifies that he looked and did not see the same, then your verdict will be for defendant."

"The ordinary care which the law demands of one in the public highway is to look before attempting to cross, and if you should find as a matter of fact that the plaintiff did not look before he attempted to cross said street to the street car, then he is not entitled to recover, and your verdict will be for the defendant. * * * And if you should find as a matter of fact that, if plaintiff had looked, he could have seen the said automobile approaching, then your verdict shall be for the defendant, notwithstanding that plaintiff testifies that he looked and did not see the automobile."

The foregoing is a small portion only of the charge, of like tenor. Section 5 of the traffic ordinance is as follows:

"Distance from Street Cars.—The driver of every vehicle shall keep such vehicle at not less than six feet from the running board or lower step of any street car headed in the same direction which is stopping or has stopped for the purpose of taking on or discharging passengers; and, if by reason of the presence of other vehicles at the place where such car is stopping or has stopped, or by reason of the narrowness of the street, it is not possible to preserve the distance of six feet from the running board or lower step as herein prescribed, then the driver or operator of such vehicle shall stop the same at least six feet from the rear of such car and remain standing, until such car has taken on or discharged its passengers and again started. In passing a car which is stopping or has stopped for the purpose of taking on or discharging passengers, the driver of such vehicle shall check such vehicle to one-half the lawful speed, and pass said car at no greater speed, and at least six feet from the running board or lower step of said street car."

The rate of speed under the ordinance in the business district is 10 miles per hour, and outside the business district 15 miles an hour.

[2] It was conceded by plaintiff that the place where the injury occurred was not in the business district. The driver of the truck was familiar with the safety stop before the intersection of the streets involved. The plaintiff claims, and we think correctly, that the law did not require him to continually look to the west, and that after he entered what may be termed the safety zone, or the 6-foot limit, he had a right to assume that he would not be injured while standing there, and that the driver of the truck would not violate the traffic ordinance. The law is

well stated in *Berry on Automobiles* (2d Ed.) §§ 263 to 268. In section 270 the author says:

"Where by ordinance or statute drivers of vehicles are forbidden to drive within a specified distance of a street car when it is stopped for the purpose of taking on or letting off passengers, a passenger has the right to assume that while within such distance from a standing street car from which he has alighted he occupies a position of safety, and in the absence of any warning or reason to believe that a driver is about to or will violate the law in this respect, he is not negligent in failing to look each way of the street to see if drivers are driving on the prohibited portion of the street."

See, also, sections 230-232.

We think the above doctrine has been repeatedly approved by this court in the following cases: *Benjamin v. McGraw*, 208 Mich. 75, 175 N. W. 394; *Church v. Larned*, 206 Mich. 77, 172 N. W. 551; *Patterson v. Wagner*, 204 Mich. 593, 171 N. W. 356; *Tuttle v. Briscoe Mfg. Co.*, 190 Mich. 22, 155 N. W. 724; *Schock v. Cooling*, 175 Mich. 313, 141 N. W. 675; *Bouma v. Dubois*, 169 Mich. 422, 135 N. W. 322; *Garhard v. Ford Motor Co.*, 155 Mich. 618, 119 N. W. 904, 20 L. R. A. (N. S.) 232; *Darish v. Scott*, 212 Mich. 139, 180 N. W. 435; *Hauser v. Youngs*, 212 Mich. 508, 180 N. W. 409.

We refrain from quoting from the above-cited cases, because of the length of this opinion.

Counsel for defendant cite as controlling the case of *Tolmie v. Woodward Taxicab Co.*, 178 Mich. 426, 144 N. W. 856. Not only did three of the justices dissent in that case, but we think it is readily distinguished from the instant case on the facts. In that case there was nothing to obstruct the view of the plaintiff; there was no street car approaching; he was not in a place of safety; there was no violation of a traffic ordinance that misled the plaintiff; and he saw the automobile when 15 or 20 feet away, and deliberately walked into the path of the approaching vehicle. We do not review the decisions in other jurisdictions, because we think the question is covered by our own decisions.

We are of opinion that the trial court properly submitted the question of plaintiff's contributory negligence to the jury, and did not err in refusing to direct a verdict for defendant, as requested.

The most meritorious question in the case is raised by the Eleventh and Thirteenth assignments of error, which may be considered together. The witness Louis L. Frost, who drove defendant's truck, was called by plaintiff for cross-examination under the statute. It appeared that soon after plaintiff was hit and fell in the street he was carried to a nearby restaurant, and Frost was there.

Witness Cline, a policeman, arrived at the restaurant some time after the plaintiff was taken there. In the direct examination of

Cline by plaintiff's counsel the following occurred:

"Q. Did he [Frost] make any statement to you as to how he was running this car, how this accident happened? A. No.

"Defendant's Counsel: Object. Exception.

"A. He did after I asked him.

"Q. You may tell the court what he said.

"Defendant's Counsel: I object as incompetent and immaterial. Mr. Frost has not been examined on that. Any statement made by Mr. Frost at the time is not competent, isn't binding upon defendant, and not a part of the res gestae.

"The Court: It appears now that Frost was employed by the defendant. A. I said, 'Didn't you know you were supposed to stop?' He says, 'Yes, and I feel sorry; I know I'm to blame for going through there.' He didn't say any more."

The trial court admitted in evidence, over defendant's objection, a written statement, signed by Frost, the driver of the truck, made on October 2, 1919, more than five months after the injury. It was as follows:

"October 2, 1919.

"Statement of Louis Lagrande Frost in regard to accident that happened on corner of Washington and Bristol street on April 25, 1919, when Elmanzor Metcalf was struck by an automobile owned by Peerless Laundry & Dye Company, of Saginaw, West Side: I went to the Peerless Laundry to collect a bill, and Mr. Powers asked me to make a trip with his car to the Bancroft Hotel to deliver some goods. I told him I had no driver's license. He said that wouldn't make any difference, and said he was one-half (hour) late, and wanted me to hurry up. I took the machine and drove down Hamilton street to Bristol and across Bristol to Washington. A street car was coming to a stop on the corner of Bristol and Washington, and an automobile was parked between the curb and the street car. I tried to pass before the street car came to a stop, and didn't see any man standing there until my car struck him. I stopped my machine as soon as possible and went to him and rendered all the assistance I could. I helped to carry him to the hotel. When I saw him lying on the street I thought he was dead. I went with him to the hospital, and then they took me to the police station, and I was detained there until 9:30, and from there I went to my home and stayed. I am now living at Frost Corners with my father. This statement is made of my own free will and accord.

"Louis Lagrande Frost."

When this statement was offered in evidence and objected to, plaintiff's counsel, among other things, said:

"This witness has testified, and he has said that he didn't tell Mr. Powers that he had no license to drive this car. The statement offered in evidence is for the purpose of impeaching him upon that subject. The statute gives us the right to call the employe of the opposite party and gives us the right to cross-examine, and gives us the right to impeach his testimony. Here is a statement made by him with reference to that. We offer it in evidence to

impeach him. * * * I offer it: First, as a statement from this witness with reference to how this accident happened; second, for the purpose of impeaching the testimony that he gave on cross-examination."

It is the claim of defendant's counsel that the testimony of the witness Cline was erroneously received, that the statement of Frost there referred to was no part of the *res gestæ*, and that the question is ruled by the case of *Hyatt v. Leonard Storage Co.*, 196 Mich. 337, 162 N. W. 951, and the cases there cited.

[3, 4] We think the testimony should not have been received, and the pertinent question is whether its reception constituted reversible error, in view of the provisions of Act No. 89, Public Acts of 1915 (Comp. Laws, § 14565). The record in the *Hyatt Case* was an exceptional one. There we said:

"One cannot read this record without being impressed with the fact that the testimony here complained of was probably controlling of the verdict in the case, and we think, therefore, that its reception was prejudicial error."

Can that be said in the instant case? In the light of this record we think not. The witness Frost had already testified to a state of facts not inconsistent with the facts stated to Cline. Section 14565 provides that no case shall be reversed on the ground of the improper admission of evidence, "unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." We have recently applied this rule in both criminal and civil cases. In the case of *Link v. Fahey*, 200 Mich. 308, 166 N. W. 884, a similar question was considered, and it was said:

"A careful reading of the record impresses us with the belief that no different result would have been reached by the jury if the alleged objectionable testimony had been rejected. Independent of such testimony, plaintiff had sustained his theory of the case, by what appears to us to be a clear preponderance of the evidence. Assuming, then, that the declarations of the driver of the automobile, made soon after the collision, should have been excluded as hearsay or mere narrative of a past event, we are still of the opinion that its admission, even if erroneous, was not prejudicial."

[5] We think that language applicable to the situation here. We cannot say that the error here complained of has resulted in a miscarriage of justice. In our opinion the same should be said as to the written statement of Frost. He had testified that he did not tell Powers that he did not have a license or right to drive an automobile, and that the question was not asked. The statement was to the contrary, and it was competent to contradict him upon that point. It was admissible for that purpose. The court was not

requested to limit its effect by any request to charge, and we must hold that the rulings did not constitute reversible error.

[6] What we have said indicates our views upon the weight of the evidence. In our opinion the verdict of the jury was not against the weight of the evidence, and the trial court did not err in denying the motion for a new trial. Neither do we think that the verdict was excessive. There was evidence of much pain and suffering of plaintiff as a result of the collision, that the injuries were of a permanent nature, and that plaintiff had been unable to work from the time of the injury to the trial.

We have examined all of the assignments of error discussed by counsel, and, finding no reversible error in the record, the judgment of the circuit court is affirmed.

BRENDER et al. v. STRATTON. (No. 69.)

(Supreme Court of Michigan. Oct. 7, 1921.)

1. Deeds §70(3)—Fraudulent representation must be false representation as to existing fact.

A fraudulent representation, invalidating a deed, must be a false representation as to an existing fact.

2. Deeds §194(5)—Recordation and production of deed by grantee creates strong presumption of delivery.

The fact that a deed has been recorded and is produced by the grantee during the trial creates a strong presumption of delivery.

3. Trusts §20—Parol trust under absolute deed may be recognized by trustee in pleadings or other written concessions.

A parol trust in lands under an absolute deed may be recognized by a trustee in pleadings or other written concessions relating to it.

4. Trusts §31—May be declared as defined and admitted by grantee, though deed in absolute form.

In surviving wife's action to have husband and wife's deed to husband's sister set aside, in which the sister testified that, though deed was absolute in form, the land had been conveyed to her for benefit of the infant child of her brother and his wife, that she had no disposition to use the land for her own personal interests, and desired that a trustee be appointed to hold the property in trust for the child, to carry out the wishes of her brother, and that she had provided for such a trust by her will, the court, notwithstanding Comp. Laws, §§ 11565, 11575, 11975, may declare a trust, but must make it conform to the trust as defined and admitted by the sister.

Appeal from Circuit Court, Kalamazoo County, in Chancery; George V. Welmer, Judge.

Action by Jennie E. Brender and another against Anna E. Stratton. From the judgment rendered, both parties appeal. Affirmed, as modified.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Jackson, Fitzgerald & Dalm, of Kalamazoo, for plaintiffs.

Clare E. Hoffman and Chas. Thew, both of Allegan, for defendant.

STEERE, J. Plaintiffs are the widow and guardian of the only child of George B. Brender, who died July 27, 1911, at his home in Kalamazoo county, Mich. He was married to plaintiff Jennie E. Brender in 1899. He then owned a farm of 120 acres in the township of Comstock, in said county, which is the subject of this litigation. Immediately upon his marriage he and his wife settled upon said farm, where they continued to make their home and live together during the remainder of his life, occupying, cultivating, and claiming it as their own. Their only child, Mary E. Brender, was born there July 29, 1906. Following his death, and up to the time of the hearing in this case, his widow and their daughter who were his sole heirs at law, continued to make their home upon said premises as before under claim of ownership; the same being cared for and managed by the widow.

Defendant, Anna E. Stratton, is an elder sister of deceased, a widow well along in years, of intelligence and education, having been a school teacher in her younger years, well versed in business methods, with some knowledge of and experience in conveyancing. She was in friendly family relations with her brother and his wife during his lifetime, and while she was at their home on the farm now in dispute, shortly after the birth of their child, in the summer of 1906, she drew up, at her brother's request, as she claims, a warranty deed of their farm, running to herself as grantee which they signed and acknowledged. The instrument she prepared is in form a warranty deed, conveying to her, for a stated consideration of \$7,800, the 120-acre farm in question, correctly described. It bears date August 9, 1906, is signed by George B. Brender and Jennie E. Brender, in the presence of two subscribing witnesses, was acknowledged before a notary public on October 1, 1906, and recorded in the office of the register of deeds of Kalamazoo county on the same date. The occasion for this conveyance and attending circumstances are in dispute.

On August 28, 1917, defendant commenced ejectment proceedings to evict plaintiffs and possess herself of this farm upon which they had been living under claim of ownership up to that time. This bill was shortly thereafter filed, asking that said deed of August

9, 1906, running to defendant as grantee, be held for naught, and she required to surrender and discharge the same from the public records; also that in the meantime proceedings in her ejectment suit be stayed until the further order of the court, concluding with a general prayer for relief.

The grounds for relief stated by the widow in the bill of complaint are in substance fraud, want of consideration, and nondelivery. Execution, acknowledgment and recording of the instrument are admitted. It also alleges that deceased was influenced to have the deed made and recorded under an obsession that it would protect him from threatened litigation over an unjust claim, about which he had been harassed and worried, and his wife, having perfect confidence in her husband, joined him in the conveyance, with the understanding that it would not be delivered, or any rights transferred to the grantee by it.

Defendant's answer traverses plaintiffs' bill with admissions and denials, in substance claiming the deed was for a sufficient consideration, without fraud, duly delivered, and in all particulars a valid conveyance to her of the property, of which she claims to be the absolute owner in fee.

[1, 2] Plaintiffs' charge of fraud is based on the claim, as stated in their counsel's brief, that in order to induce Mrs. Brender to sign the deed defendant "represented to her that she was executing or had executed a codicil to her will, so in case anything happened to her the property would come back to the grantors within five years, and showed her a writing to that effect." This is scarcely consistent with her statement:

"I did not have any talk with Mrs. Stratton with reference to the making of this deed before it was made. * * * I don't think we had any talk about the property."

She did also state:

"She showed me a codicil in the will and read it. * * * She had in her will at the time, if anything happened to her in five years, that the property should be transferred back to Mr. Brender and I. I read this in her will; she handed it to me."

If so, defendant certainly did not thereby induce her to sign the deed by a false representation to her as to an existing fact, which is an essential of a fraudulent representation. Defendant denied this transaction in toto, and asserted she never had a codicil to any of her wills, but frankly said that after receiving the deed she made provision in her will relative to the property, as her brother had expressed his desires to her. Mrs. Brender's testimony that the deed was never delivered, and was kept in her husband's possession, amongst her husband's papers, until his last sickness, but could not be found after his death, is met, not only by the strong presumption of delivery from

its having been recorded by a grantor and brother of the grantee (Griffin v. Hovey, 179 Mich. 104, 146 N. W. 210), and production by defendant at the hearing, but by the latter's positive testimony of its delivery to her by her brother and the attending circumstances.

In plaintiffs' bill of complaint they state in substance that Mrs. Brender was led to sign the deed through representations of her husband that he was being harassed and worried "over a threatened suit," which might be avoided by their signing and recording said deed—in other words, a fraudulent intent and attempt to hinder and delay a claim creditor. If so, she was knowingly a party to the attempted fraud, and is in no position to be granted relief by a court of equity. Defendant denies any knowledge of that element in the case, and states entirely different reasons given to her by both grantors for making the conveyance. In a written opinion the trial court sustained defendant's contentions upon the questions of delivery, fraudulent representations on her part, etc., with ample supporting evidence we think, and on the record as a whole concluded as follows:

"She should be adjudged to be a trustee of the property in question for the use and benefit of the minor child during the lifetime of plaintiff, if defendant shall so long live, and, if not, then some other person should be appointed by this court in her place and stead. The trust should be executed under the direction of this court, and should terminate upon the death of plaintiff, at which time the legal title should vest. The defendant should be required to file a proper bond with the clerk of the court for a faithful performance of her trust. The amount of the bond and the question of costs will be determined upon the settlement of the decree."

From a decree in harmony with such holding both parties have appealed.

If oral evidence were admissible to establish an express parol trust, there is an abundance to sustain in most respects that found by the court; but both the statute of uses and trusts and that on fraudulent conveyances interpose obstacles to an easy disposition of the case on the oral evidence alone. 3 Comp. Laws, §§ 11565, 11575, 11975.

This case is unique in certain particulars. Defendant's pleadings are well prepared by competent counsel in full denial to cover an absolute defense; but, while asserting an absolute legal title and right as a matter of law to do with the property as she sees fit, fully and repeatedly testifies that she claims no beneficial interest in the property beyond a small indebtedness for money loaned her brother, and that she in truth and fact holds title to the property under a sacred trust for the benefit of his family, the reason for and nature of which she discloses in her lengthy direct and cross examinations.

The Brender family of her generation consisted of three girls and three boys, raised

on a farm in that locality. Their parents were pioneers, manifestly industrious and thrifty, who first settled upon an 80-acre farm, and during their lifetime accumulated much other land with the assistance of their children, who were likewise industrious and helpful. It was the ambition of their father to acquire sufficient land to give each of his children at least 40 acres. They were apparently clannishly inclined. The family held together and worked in common for accumulation of property longer than customary. As the years went by they slowly bettered their financial condition and became well-to-do. Defendant, who was one of the older children, worked out, acquired a better education than the others, became a school-teacher, and was thereby a more helpful member of the family. She later married a Mr. Stratton, who was a prosperous man of affairs, at one time sheriff of his county, giving her opportunity to acquire further experience and knowledge of business matters. When the elder Brender's estate was administered, the children agreed to keep the Brender homestead property together as near as possible, each owning a portion, and she interested herself with the others to that end. When George B. and another younger brother started out for themselves, she was able to and did help them, financially and otherwise. After George married, she visited at his home and was on friendly terms with his wife. She testified that about the time, or shortly before, their daughter Mary was born, both George and his wife, who apparently had talked the matter over together, interviewed her about deeding this property to her, to hold for them and their child when they were done with it. Her account of the proposal is in part as follows:

"We were in her home up stairs. She (Jennie) called me to come up stairs, and I came up, and she showed me some of her work, and then she says, 'Now, I want to talk with you about something.' She said: 'We were talking'—meaning herself and George—they were talking about making a deed to me of the place. This was before the child was born. She explained, in case she did not live and the child lived, she wanted me to take this property and look after the child's interests. * * * She spoke about having heart trouble, and she spoke about her mother had heart trouble at that time. She spoke about George having poor health."

On her direct examination she was cautioned by her counsel that she could not tell of conversations with her deceased brother; but on cross-examination plaintiffs' counsel went into the subject quite fully, and she then testified among other things:

"He said: 'My health is not good; it is pretty poor, and I am having real bad spells, and Jennie has heart trouble, and we have decided we want the property to go where it came from, to the Brenders, where it came from.' As I understood, they were talking of dividing their

interests. * * * I had another talk with him as to what I was to do with the property. I don't recollect all the times. Shortly before he died he was on his bed, and I was sitting on the side of the bed talking with him. That day was the last time he spoke about it. He says: 'About this property, I want you to hold it as you think best. I want Jennie provided for as long as she is mine. If she marries, and is some one else's than mine, I don't want you to let her suffer. I want it to go to the little girl, and I want you to do it in such a way that she can't get rid of it, or any one get it away from her. If she should die, I want it to go back to the Benders, where it came from.' That is the last talk we had. Previous talks had been along that line. I understood that was my mission. * * * I am giving my brother's words as near as I can. He was always very mindful about the little girl. He wanted his wife taken care of as long as she was his widow; that is, if she came to need."

She also repeatedly testified that she had made a will providing that the property should go back to her brother if she died before he did, and after his death another providing substantially as detailed in her account of the last conversation with her brother. At various points scattered through her testimony this story is repeated in substance.

The reason for the commencement of this action stated by counsel to have been the approaching expiration of the statute of limitations, which, in view of differences arising between deceased's widow and defendant during the probate of the estate, might bring other complications into the case. During redirect examination by her own counsel she said:

"I am willing at the present time to make provision of this Comstock farm in the same manner as I have made it, as described in the will. I have no disposition whatever to use it for my own personal interests."

The testimony shows that proposals to that effect had been made by her or her counsel to plaintiffs, which were rejected, under the contention that the deed was absolutely void, and the property belonged to plaintiffs as the heirs of George B. Brender. Near the close of the case the following occurred in open court, in the presence of defendant and opposing parties:

"The Court: Before we took a recess, Mr. Hoffman, you said something in behalf of your client, to the effect of transferring this property to a trustee under certain conditions. Who do you mean by a trustee? By whom do you propose to have the trustee named?"

"Mr. Hoffman: For instance, the judge of probate of Allegan county."

"The Court: Why the probate judge of Allegan county; the property is in this county and the child is in this county—lives here."

"Mr. Hoffman: So our client would have something to say about the administration of the estate, and have somebody who would carry out the terms of the trust, not only in let-

ter, but in spirit. There would be no object at all to transferring that property to some trustee in sympathy with the widow, having in mind the interest of the widow and the child. We would want a trustee who would look after the interest of the child, and protect the child's interest, if there ever was a time when there was a conflict between the interest of the widow and the child."

"The Court: Where would the probate court of Allegan county have authority to appoint a trustee?"

"Witness: I am a resident of Allegan county."

"The Court: The court might possibly in this proceeding. If the child is to have a guardian, it would have to be appointed by the probate court of this county."

"Mr. Thew: Our client claims she has been left by her brother a duty to perform, and naturally she would take that more as a personal duty, and watch over the child better than anybody else. It is not a bare proposition of turning over the money and land, from our standpoint; she wants to have something to say as to who the trustee would be. It is her wish that the trustee would be some one who would not be under the influence or related to the widow. As far as a bond before this court is concerned, that would cut no figure, or be any obstacle, as far as I can see."

It is urged and argued in behalf of plaintiffs that the full relief asked should be granted, and the deed held void in toto, or, if not, it should be declared a mortgage for the few hundred dollars defendant testified deceased owed her, and in any event the ejectment action should be restrained, under defendant's own testimony that she claims no beneficial interest, and holds the title for the use and benefit of those now in possession, and in any aspect of the case that the decree declaring her seized in trust of the property for the minor, Mary E. Brender, should be sustained.

Standing on her claimed absolute ownership, entitling her to dismissal of plaintiff's bill as against their claim for full relief under it, defendant's counsel most earnestly pressed in argument, as their reason for appeal, the nature of the trust declared by the trial court, which is made to terminate on the death of Jennie E. Brender, and then passes absolute ownership of the property to the daughter, Mary E. Brender, without any restrictions or provisions for contingencies, contrary to her evidence in the case, or any suggested concessions by or for defendant.

A careful reading of defendant's testimony, including a transcript of that taken in probate court and put in evidence, while indicating, as described by one of the witnesses, that "she is a woman who says nothing" about her private affairs, and an evident aversion to, if not resentment over, the inquisition she was subjected to, which tinctures her testimony in certain particulars with a lack of candor and evasion to inconsistency, yet discloses that all through her

long examination, both direct and cross, she consistently insisted upon her "mission" as trustee of this property, stating the circumstances, reasons, and conditions under which she received title to it, asserted that she did not "expect to get any personal benefit out of it," and disclaimed any beneficial personal interest in it.

[3,4] That a parol trust in lands under an absolute deed may be recognized by a trustee in pleadings or other written concession relating to it is well settled, and it has been held that, where a defendant has testified in a signed deposition that he holds property in trust, a trust may be declared. But whether defendant's oral evidence to that effect, twice given under oath in open court where the property in question is involved, satisfies the statute, we need not determine. Here we have, not only defendant's testimony in detail to the fact of her trusteeship and personal concessions, but also the assent by her counsel in open court, in her presence and manifestly with her approval, as quoted above. Those offers, or concessions, were called to our attention by her counsel upon the argument in this court with no suggestion of repudiation, and the grievance urged against the decree appealed from was that the trust declared by the court was not the trust conceded and to which she testified.

This contention is well founded. We are satisfied that the court of first instance, and this court, on a hearing de novo in an equity case, may and should take defendant at her word and as she testified, supported by the concessions and overtures of her counsel as shown, and declare a trust such as she defined and admitted.

While defendant stated her trusteeship in varying language, she referred particularly to her will as containing what she conceived and admitted was her duty under it. No will was produced in evidence, but she testified that in each will since taking title to the property she had, as she remembered, made a provision in regard to this property as follows:

"Before the death of my brother George, I provided that the use of that property should go to him during his lifetime, and after his lifetime to his daughter, Mary E. Brender, and, if she died without children, it should revert or go back to the Brenders; that was at his request. * * * I also made provision for the care and support of Jennie Brender, if she needed it, always. After George died, as near as I can remember, I made a will giving the use of this property to the little girl, Mary E. Brender, when she became of age. I think I put it at 35 years. Later I changed it to 30 years. She was to have the use of it during her lifetime, and, if she had children, it was to go to them. If not, it was to go back to the Brenders. And I also made provision for Jennie."

The decree declaring a trust must be modified, to comply in substance with the provisions as to which defendant testified, and, so modified, will stand affirmed, with costs to defendant.

MULFORD v. STENDER et al. (No. 25.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Interpleader $\S$ 8(1) — Executor may interplead distributee and his assignee.

Where distributee under will assigned the amount payable to him, and then repudiated the assignment on the ground of fraud of the assignee, and both claimed the money, the executor properly filed a bill of interpleader.

2. Courts $\S$ 514—Court first obtaining jurisdiction has exclusive right to decide matter.

Where legatee assigned his right to amount payable to him, and then repudiated the assignment, and executor filed a bill of interpleader, in which legatee asked that a decree of interpleader be entered, the court properly entertained jurisdiction and disposed of the case, notwithstanding that, pending the action, another action was brought in another court in a foreign state by the legatee against the assignee, to recover money paid and to rescind the assignment on the ground of fraud, under the rule that the court which first obtains jurisdiction has the exclusive right to decide the matter in issue.

3. Husband and wife $\S$ 14(2)—Declaration of trust must be signed by wife, holding by entireties.

A declaration of trust, not signed by wife of declarant, with whom he held the property by the entireties, was of no avail.

4. Wills $\S$ 743—Consideration for assignment by legatee of amount payable to him from estate held inadequate.

In interpleader by executor to determine whether legatee or assignee of legacy should receive the same, legatee having repudiated the assignment, the consideration for the assignment, corporate stock, held so grossly inadequate as to shock the conscience of a chancellor, and the court should have granted relief to the legatee, and should not have directed payment of the money to the assignee; the corporation not having done or suffered anything in reliance on the subscription.

Appeal from Circuit Court, Wayne County, in Chancery; Ormond F. Hunt, Judge.

Bill of interpleader by Elmer W. Mulford, sole executor of the last will and testament of Hugo H. Stender, deceased, against William Stender and the Niles Invisible Door Check Company. From an adverse decree, the first-named defendant appeals. Reversed, and decree entered.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

William E. Henze, of Detroit, for appellant.
Henry C. L. Forler, of Detroit, for appellee
Niles Invisible Door Check Co.

STONE, J. On January 25, 1918, Elmer W. Mulford, as executor of the last will and testament of Hugo H. Stender, deceased, filed a bill of interpleader in the circuit court for the county of Wayne, in chancery, against William Stender and the Niles Invisible Door Check Company, a Michigan corporation, in which he alleged that there was in his hands, as such executor, the sum of \$3,900, which originally was payable to said defendant William Stender as one of the legatees under said will, but which sum the defendant the Niles Invisible Door Check Company claimed by virtue of an alleged assignment from said defendant Stender; that defendant William Stender had repudiated the said alleged assignment, and that plaintiff was unable to ascertain who was entitled to said sum of money; and prayed that the parties defendant might make answer, and that the court might hear the matter and decide which of the defendants was entitled to said fund.

On March 2, 1918, the defendant Niles Invisible Door Check Company filed its answer, setting forth that it was entitled to the fund under an assignment from defendant William Stender, dated April 5, 1917, and praying that it might be so decreed by the court.

On March 28, 1918, defendant William Stender filed his answer, in which he set forth that on April 5, 1917, the defendant Niles Invisible Door Check Company, by William Daniel Johnson, its secretary and treasurer, and the owner of the majority of the stock of said corporation, obtained from him a conditional subscription for 50 shares of the preferred stock of said company, of the par value of \$5,000, and that said Johnson, while acting as the attorney for said defendant Stender in the matter of the estate of Hugo H. Stender, deceased, had obtained the sum of \$1,100 of the moneys coming to said defendant Stender from said estate, and had applied the same on the purchase price of said \$5,000 worth of stock, without the knowledge or consent of said defendant Stender. He further alleged that the said subscription was obtained from him, as was also the claimed assignment of the money due him from the estate aforesaid, by certain false and fraudulent representations, and that he had brought suit in the circuit court for Cook county, state of Illinois, against the Niles Invisible Door Check Company and said William Daniel Johnson to recover the said sum of \$1,100 taken by said Johnson as aforesaid, and to rescind the alleged subscription and assignment by him to said Johnson of the said sum of \$3,900. He asked that a decree of interpleader be entered, and prayed

that the final adjudication of the matter be deferred in the Wayne circuit court, in chancery, until a final decree had been obtained in the case pending in Cook county, Ill.

The court below refused to continue or postpone the hearing of the case, and the same was heard upon pleadings and proofs, and on November 6, 1920, a final decree was entered in favor of the defendant Niles Invisible Door Check Company, and directing the plaintiff to pay said fund to that defendant, together with such interest as had accrued thereon. Costs were awarded to plaintiff, to be paid out of said fund, and costs were awarded said company as against the defendant William Stender, together with such costs as were taxed to the plaintiff.

[1] The defendant Stender has appealed. Under the authority of *Maxim v. Shotwell*, 209 Mich. 79, 176 N. W. 414, the bill of interpleader was properly filed.

[2] It is urged by counsel for defendant Stender that the court below improperly heard and disposed of the case, and that its action should have been deferred until the Illinois court had tried the case there pending. But as it appears that the bill of interpleader was first filed, and as defendant Stender in his answer asked that a decree of interpleader be entered, we are of the opinion that the Wayne circuit court, in chancery, properly entertained jurisdiction, under the familiar rule that the court which first obtains jurisdiction has the exclusive right to decide the matter in issue. *Barnum Wire & Iron Works v. Speed*, 59 Mich. 272, 28 N. W. 802, 805; *Allen v. Allen*, 188 Mich. 532, 155 N. W. 488, and cases there cited. We shall therefore proceed to consider the case upon its merits.

It is the claim of counsel for defendant Stender that he (Stender) is a person of weak mind, and is easily imposed upon by a designing and scheming person, and that he was made the dupe of the witness Johnson, and it must be conceded that the record gives some support to this claim. Defendant Stender testified to the effect that, prior to the execution of any papers, he went to Johnson's law office in Chicago to retain him to look after his matters in Detroit pertaining to the said estate, because he had become dissatisfied with the allowance of certain claims against the estate. Johnson does not deny that Stender consulted with him about the matter, or that he went to Detroit to examine into it, but says that he was not employed as attorney, but that his action was purely voluntary, and created no confidential relation. Stender claims that he went to Johnson's office several times between March 27 and April 5, 1917; that he was directed there by a Mr. Koehling, whom he had known for some time, and that on March 28th he found Johnson in his office with two other

men, and heard the telephone ring; that one of the men took the receiver, and then said, "Mr. So and So would like to buy 200 or 250 invisible door checks"; that he (Stender) left that day, without the parties coming to any arrangement, but returned on the next day, when he claims a similar conversation took place about a man wanting to buy some of said stock. He claims that he then inquired of Johnson about the door checks and the company, and was shown certain photographs, and then went with a Miss Jacobs and another person from Johnson's office to see some of the door checks in operation in the Marshall Field building and some other store.

There is an irreconcilable conflict between the testimony of the defendant Stender and that of Johnson, as to the representations made by Johnson. It does not appear, however, that on or about April 5, 1917, and after Johnson had visited Detroit and learned about the estate, Stender signed and delivered to Johnson the following papers:

"Niles Invisible Door Check Co., 29 South La Salle street, Suite 918. Telephone Randolph 4480. Chicago, Ill. Subscription to 6 per cent. preferred cumulative stock of the Niles Invisible Door Check Co. The undersigned hereby subscribes to and purchases fifty shares, of \$100.00 each, par value, of the 6 per cent. cumulative preferred stock of the Niles Invisible Door Check Co., a Michigan corporation, total amount \$5,000.00, good after this subscription agreement has been countersigned by its authorized representative. Duly executed stock certificates shall be issued within five days from date of payment. All checks must be made payable to the order of Niles Invisible Door Check Company. Said \$5,000.00 to be paid as soon as money is collected from estate of Hugo H. Stender, and which \$5,000.00 I hereby assign to said company. Wm. Stender, Subscriber. Address: 620 Wells St., Chicago, Ill. Dated April 5, 1917. Authorized representative: A. C. Jacobs. Accepted. W. D. Johnson, Secretary."

While Miss Jacobs testified that she had no connection with or interest in said company, it will be observed that she signed the above paper as "authorized representative." The following instrument was also signed by defendant Stender, and delivered to Johnson, on the latter's letter head:

"William Daniel Johnson,
"Attorney and Counselor at Law, 908-910 National Life Building, 29 South
La Salle Street.
"Telephones: Randolph 5672 and 5673,
"Chicago, April 5, 1917.

"Mr. William H. Henze, 618 Moffat Building, Detroit, Michigan—Dear Sir: To the bearer, Mr. William D. Johnson of Chicago, Illinois, I have assigned five thousand dollars (\$5,000) of the amount due me of the estate of Hugo H. Stender, deceased, for which I have purchased securities from him of the same amount. You

will please pay to him on account of said five thousand dollars (\$5,000) the twelve hundred dollars (\$1,200) now in your possession, less five per cent. (5%) due you as services for collecting same. I trust that you may find it convenient to make payment of said sum to him at this time.
Wm. Stender."

We are satisfied from the evidence that Johnson represented to Stender that the stock of the Niles Company was a valuable stock; that the company was a going concern, doing a good business, and earning dividends. Stender testified that he visited the factory at Niles, Mich. He testified:

"I went to Niles, between the 2d and 3d of May, and I found in Niles that the whole thing was rubbish—a junk shop. The factory of the Invisible Door Check Company was not going. There were no men working there; there was no material there either. There were three or four men, and one man sat around the stove. I went back to Chicago and saw Johnson. I told him, 'I was in Niles yesterday, and looked at the factory, and you told me that the factory was so good, you got so much work to do you cannot fill orders, and all that kind of stuff.' I say there was no material there. Nobody was working there. Then he says, 'I show you the factory, and it will not cost you one cent.' I said, 'I saw the factory one time; that is enough for me.' * * * After that I went to Johnson and said, 'I want my money back,' and offered him the shares. I said the factory is not in good standing, after I had been to the factory and saw there was nothing doing."

It should be here stated that Johnson had collected from the plaintiff \$1,140, for which he gave Stender a certificate for 11 shares of said preferred stock and \$40 in cash. In July, 1917, Stender received a letter and a check from Johnson for \$16.50 as a dividend which check was never paid, and Johnson claims that it was issued by mistake. He testified on the subject as follows:

"The stenographer told me that Mr. Koehling had dictated that letter, and I said, 'What in the world does Koehling mean?' Well, Mr. Koehling told me later that he had dictated a letter because he understood we were paying a dividend, and he wanted to keep Mr. Stender satisfied, and put it on my desk, and I, not looking it over to see whether it was proper or not, said, 'Don't you know that you could not send a dividend check to one man, and overlook the rest?'"

It is conceded that no dividend was ever paid. In the meantime Stender had attempted to repudiate his subscription, and on December 12, 1917, he sent the company and Johnson a notice as follows:

"You are hereby notified that I have heretofore canceled by personal notice to Mr. William D. Johnson, secretary of your company, and I do hereby cancel, any and all subscriptions for the stock of your company, which you may have or hold, or which you may pretend to have or hold, made, or alleged to have been made, by the undersigned.

"[Signed] Wm. Stender."

[3, 4] Much of the testimony of the witnesses for the company is inconsistent, and at variance with documentary evidence contained in the record. As tending to show the general slackness pertaining to the affairs of the company, it appears that the annual reports of the company were not made at the time required by the statute. When made, they showed the value of the real estate used in the business to be \$20,000. It turns out that the factory had been levied upon and sold upon execution before Stender's subscription was made. Of this he was entirely ignorant. Johnson does not claim that he told Stender of this material fact. There was also a \$3,000 judgment standing against the company. The sheriff's deed of the factory property bears date June 10, 1918, and it recites that it was sold on execution January 8, 1917, and not redeemed. It was deeded to Wilbur N. Burns, by the usual form of sheriff's deed on execution sale. On June 19, 1919, the premises were conveyed by Burns and wife to "Fred N. Bonine and Viva T. Bonine, husband and wife, jointly," by quitclaim deed. Fred N. Bonine had on May 5, 1919, made a declaration of trust, stating that he was holding the property in trust for said company. This was prior to the deed from Burns to him. Not being signed by his wife, with whom he held the property by the entirety, the declaration was of no avail. The title of the property stands, upon this record, in the names of Bonine and wife.

In our opinion the equities of the case are with defendant Stender. It appears clear to us that these parties defendant were not dealing at arm's length, whether Johnson was the attorney of Stender or not. Johnson, representing the company, was a shrewd lawyer, and had superior knowledge of the condition of the company and its property, which he did not disclose, but did misrepresent in the dealing with Stender. The consideration for this assignment was so grossly inadequate as to shock the conscience of a chancellor, and a court of equity should grant relief. The court below was of the opinion that defendant Stender, by his conduct, ratified the subscription and assignment contract, and that he is now estopped from repudiating the same. The \$1,100 transaction is not here involved. The company has not done or suffered anything, in reliance upon the subscription, that should bar the defendant Stender from defending against the claim of \$3,900 yet unpaid.

The decree below is reversed. A decree will be entered here, directing the plaintiff herein to pay to the defendant Stender the sum of \$3,900, together with such interest as has accrued. The plaintiff will be allowed his

costs, to be taxed, to be paid out of the said fund, and defendant Stender will recover his costs, to be taxed against the defendant the Niles Invisible Door Check Company.

BUDNICK v. PETERSEN. (No. 67.)

(Supreme Court of Michigan. Oct. 8, 1921.)

1. Highways ⇨173(1)—Duty of automobilist to keep on traveled portion of road.

It was the duty of an automobilist in the nighttime to keep in the traveled and paved portion of the road which he was traveling, and not to run into pedestrians walking outside the pavement.

2. Highways ⇨172(1)—Duty of automobilist to slacken speed when blinded by glaring light.

If the vision of an automobilist was obscured by the glaring lights of an approaching car, it was his duty to slacken his speed and have his car under such control that he might stop it immediately, if necessary.

3. Highways ⇨184(3) — Pedestrian held not guilty of contributory negligence as matter of law.

A boy walking arm in arm with several other boys outside a 16-foot pavement on a highway, when he was run down by an automobile, held not guilty of contributory negligence as a matter of law.

4. Death ⇨103(1)—Instantaneous death held question for jury.

In action for death when run down by automobile, where there was evidence tending to show that when decedent was picked up he was groaning, and continued to do so until he reached a hospital, where his dissolution occurred about 15 minutes thereafter, held, that it could not be determined as a matter of law that his death was instantaneous so that right of action would not survive in his personal representative.

Error to Circuit Court, Muskegon County; John Vanderwerp, Judge.

Action by Catherine Budnick, administratrix, against Albert M. Petersen. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

Lillie, Lillie & Lillie, of Grand Haven, for appellant.

John G. Anderson and Charles B. Cross, both of Muskegon, for appellee.

SHARPE, J. On May 18, 1920, at about 11 o'clock at night, three boys, William Peters, Charles Swift, and Clarence Herbst, each about 15 years of age, who had been

attending an entertainment at a schoolhouse and were returning to their homes, were going north, walking abreast with locked arms, along what is known as Henry street, a highway just outside the limits of the city of Muskegon. This street was 86 feet in width, and had in the center a 16-foot asphalt pavement, without curbs. The defendant was driving an automobile in the same direction the boys were walking. They saw his car coming behind them when some distance away. They also saw a car approaching from the north. They moved over to the east, outside the pavement, to let these cars pass. They did not unlock arms, but moved closer together. Herbst, on the east, was near the edge of the ditch, and Peters, on the west, was in the sand near the pavement. Defendant did not see the boys. His car, in passing, struck Peters, throwing him about 25 feet. The first intimation he had of the collision was "when he felt the bump," and his companion, Miss Hamill, said to him that he had "hit something." He then stopped and took the boy to a hospital, where he soon after died. There was testimony that another car, not observed by the boys, was going in the same direction as defendant. Two witnesses testified that these cars were apparently racing. They were almost, if not quite, abreast at the time of the collision.

The plaintiff had verdict and judgment for \$3,125. But two questions are raised by the assignments of error: (1) The contributory negligence of the deceased. (2) Plaintiff's right to recover under the survival act.

[1-3] 1. *Contributory Negligence*.—There was evidence clearly establishing the fact that at the time Peters was struck he was outside the traveled portion of the highway. This should have been to him a place of safety. Defendant in no way justified himself in invading it. His negligence in doing so is conceded on this record. The reciprocal rights and duties of pedestrians and drivers of automobiles, on the public ways, have been considered by this court in several recent cases. *Perkins v. Holser*, 213 Mich. 579, 182 N. W. 49, and cases there cited. It is unnecessary to repeat what was therein said. Those relied on by defendant's counsel (*Hill v. Lappley*, 199 Mich. 369, 165 N. W. 657; *Fulton v. Mohr*, 200 Mich. 538, 166 N. W. 851; *Deal v. Snyder*, 203 Mich. 273, 168 N. W. 973; *Gillett v. Mich. United Trac. Co.*, 205 Mich. 410, 171 N. W. 536) are all cases in which the person injured was on the traveled portion of the street. The distinction is apparent. This highway was constructed for use by Peters quite as much as by defendant. It was defendant's duty to keep on the traveled

portion thereof. He was chargeable with notice that pedestrians might be walking along the road. The law required him to have his car equipped with lights. By their use he could observe the presence of pedestrians, and they be informed of his approach. Peters saw the light from defendant's car. He also saw the car approaching from the north. He yielded to them the entire width of the pavement, 16 feet. This space was sufficient to permit the two cars, if operated with reasonable care, to pass in safety. This defendant did not see Peters. If his vision was obscured by the glaring lights of the approaching car, it was his duty to slacken his speed and have his car under such control that he might stop it immediately, if necessary. Peters, as a matter of law, was not chargeable with notice that the defendant might be compelled to leave the pavement to avoid a collision with the approaching car. He was in no such apparent danger as would have justified an instruction that his failure to step further from the pavement rendered him guilty of contributory negligence. See *Gerhard v. Ford Motor Co.*, 155 Mich. 618, 119 N. W. 904, 20 L. R. A. (N. S.) 232; *Bouma v. Dubois*, 169 Mich. 422, 135 N. W. 322.

[4] 2. *Survival*.—If there was any competent evidence tending to show that the deceased survived the injury, the judgment entered must be affirmed. There was evidence tending to prove that when he was picked up he was groaning, and continued to do so until he reached the hospital. His dissolution occurred about 15 minutes thereafter. This court has on several occasions considered the question here presented. In *Swaczky v. Detroit Edison Co.*, 207 Mich. 494, 174 N. W. 197, it was said:

"The recognized test in this state, distinguishing between the two causes of action, survival and instantaneous death, is whether the active cause of death continued to operate directly upon the injured person until life was extinct."

In *West v. Detroit United Ry.*, 159 Mich. 269, 123 N. W. 1101, this court said:

"Where there is a continuing injury, resulting in death within a few moments, it is 'instantaneous' within the meaning of the statute."

See, also, *Olivier v. Railway Co.*, 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607, 3 Ann. Cas. 53; *Ely v. Railway Co.*, 162 Mich. 287, 127 N. W. 259; *Paperno v. Engineering Co.*, 202 Mich. 257, 168 N. W. 503.

On the record here presented, we cannot say as a matter of law that death was instantaneous.

The judgment is affirmed.

MAPES v. BOERSMA. (No. 59.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Trial $\S$ 295(1)—Charge must be construed as a whole.

A charge must be taken as a whole, and excerpts from it must be considered in connection with what precedes and what follows them.

2. Appeal and error $\S$ 1003 — Verdict set aside only when clearly against weight of evidence.

A case can be reversed on the ground that the verdict is against the great weight of the evidence only when the verdict is clearly and manifestly against the weight of the evidence.

Error to Circuit Court, Kent County; John S. McDonald, Judge.

Action by Charles H. Mapes against Everett Boersma. From judgment for defendant, plaintiff brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Clare E. Hoffman, of Allegan, for appellant.

Dorr Kuizema, of Grand Rapids, for appellee.

MOORE, J. About 9 o'clock on the evening of August 28, 1919, plaintiff was driving his horse and buggy on the Dixie highway, and claims that he came in collision with an automobile driven by defendant, while plaintiff was driving on the right side of the traveled track at a place where the traveled portion of the highway was at least 18 feet wide. A trial before a jury resulted in a verdict of "no cause of action." Upon this judgment was rendered. A motion for a new trial on the ground that the verdict was contrary to the great weight of evidence, that the court had erred in the charge as given, and in failing to give certain requests offered by plaintiff, was denied. The case is brought to this court by writ of error.

The appellant discusses his assignments of error under five groups. We have examined all of them, but shall discuss those only under groups 3 and 5.

[1] Group 3 relates to the failure of the judge to give certain requests tendered on behalf of the plaintiff, and to the charge as given. Counsel, after quoting from the charge itself, states the grievance as follows:

"It will be observed that the court in paragraph 15 told the jury that if plaintiff was guilty of negligence which in the slightest degree contributed to the injury he could not recover, but he applied a different rule as to defendant's conduct in the twentieth paragraph, for he there said that before plaintiff could recover he must show that defendant's negligence 'caused his injuries directly.'"

"And to make the way still more rocky, he instructed the jury that plaintiff must establish both of these propositions by a fair preponderance of the evidence. Such an instruction was condemned by this court in *Van Slyke v. Books*, 181 Mich. 88, 147 N. W. 579, where a like expression was used, and this court said: 'We should say that we think it more prudent for the trial court in a civil case to not require a greater weight of proof than the ordinary preponderance of evidence.' *Barrett v. Conn. Fire Ins. Co.*, 195 Mich. 217, 161 N. W. 916."

In his disposition of the motion for a new trial the judge said:

"Under the circumstances there was no error in the court's instructions relative to the preponderance of the evidence. The word 'fair' was inadvertently used. When all that was said on this subject is considered together, it will appear that the jury was informed that nothing more than an ordinary preponderance was required."

It has often been held by this court that—

"Excerpts from a charge must be considered in connection with what precedes and what follows them. The charge must be taken as a whole." *Harrison v. Grier*, 198 Mich. at page 675, 165 N. W. 855.

The charge as given was evidently an effort to give all the law applicable to the case necessary for the jury to render an intelligent verdict. It covers more than eight printed pages of the record. It may be well to quote some of it, which reads:

"It is the plaintiff's claim that at the time of the accident, which was on the 28th day of August, 1919, he was driving with a horse and buggy from Moline to his home and was going south, driving in a careful and prudent manner on the right side of the traveled portion of the road. That the defendant was driving his automobile north on the highway at the same time and to the left of the center of the traveled portion of the highway at a rate of speed that was greater than reasonable and proper, having regard to the traffic and the use of the highway at the time and so as to endanger the life and safety of the property of the plaintiff, and without displaying thereon a lighted lamp on the front of his motor vehicle, the light of which was visible at least 200 feet in the direction in which said motor vehicle was proceeding; and that as the defendant approached the plaintiff, defendant failed to seasonably turn to the right of the center portion of the track or to give reasonable warning of his approach to the plaintiff, and that as a result of the defendant's conduct on this occasion there was a collision which frightened plaintiff's horse causing it to run away and into a fence where it was killed, damaging plaintiff's buggy, his clothing, and injuring him; and it is to recover damages for these injuries that the plaintiff has brought this suit.

"On his part the defendant denies that he was

guilty of any negligence which caused or contributed to the plaintiff's injuries. While he admits that his lights were poor, he says that for that reason he was driving his car with very great care, and that the accident was due solely to the negligence of the plaintiff himself, who was not on the right side of the traveled portion of the road. These are the claims which I have only briefly stated. You have heard them stated in greater detail by the witnesses and by counsel. * * *

"Before the plaintiff can recover in this case he must establish by a fair preponderance of the evidence two propositions: First, that the defendant was negligent, and that such negligence was the proximate cause of the injury; and, second, that he himself, that is, the plaintiff, was not guilty of any negligence which contributed in the slightest degree to his injury. These are the two elements of the plaintiff's case. Unless he has established both of them by a fair preponderance of the evidence he cannot recover.

"Taking them up in their order, the first one is that the defendant was negligent, and that such negligence was the proximate cause of his injury. Negligence may be defined to be the want of ordinary care, and ordinary care is such care as an ordinarily prudent person would use under like or the same circumstances. With which proposition in mind you will consider these two elements of the plaintiff's case: First, was the defendant negligent? Now the negligent acts charged against the defendant by the plaintiff in his declaration are: First, that he did not have sufficient lights, that is, such lights as the law requires him to have; second, that he did not turn out to the right of the center of the traveled portion of the road as he met the plaintiff; and, third, that he was driving at an unlawful rate of speed."

The court then read the provisions of the statute with reference to the duties of persons driving automobiles and other vehicles on the public highways. We again quote:

"The law then required the defendant in this case as he approached the plaintiff to seasonably turn to the right of the center of the traveled portion of the highway, and the law, as I will tell you, placed the same duty upon the plaintiff as he approached the automobile to turn to the right of the center of the traveled portion of the highway. * * *

"Now these are the negligent acts which the plaintiff charges against the defendant: That he violated the statutes of this state which require sufficient lights and required him to seasonably turn when he met the buggy, to seasonably turn to the right of the traveled portion of the highway and so on. The violation of a statute is negligence per se; that is, negligence in itself. The law placed this duty upon the defendant as I have read it to you, and if he neglected that duty, he would be guilty of negligence. * * *

"If, however, you find that the defendant was negligent as the plaintiff claims, then you will determine the second element, namely, was the plaintiff guilty of any negligence which in the slightest degree contributed to the in-

jury? That is what we call contributory negligence. The law requires of a person that he use ordinary care for his own protection, and if he does not do so and is injured and his negligence contributes in the slightest degree to his injury, he cannot recover. That is what we know in the law as contributory negligence.

"Now it is the claim of the defendant in this case that the plaintiff was guilty of contributory negligence. The defendant says that he did not seasonably turn to the right of the traveled portion of the road; that he could see the automobile coming a hundred feet away, and that it was his duty to turn to the right of the traveled portion of the highway. There is a disputed question of fact for you to determine.

"If after the determination of these facts you find that the plaintiff was guilty of contributory negligence which contributed to the injuries which he received, then he cannot recover for he would have failed to establish the second element of his case, which is just as necessary as the first.

"If, however, on the other hand, you find that the defendant was negligent as the plaintiff claims and that such negligence was the proximate cause of the injury that is the direct, producing cause of the injury, and you also find that the plaintiff was not guilty of any contributory negligence, then the plaintiff can recover and then you should proceed to estimate his damages."

We think a reading of these quotations make it clear the jury could not have misunderstood the charge of the court, and the legal rights and duties of the respective parties to the litigation.

[2] We now consider the fifth group of assignments of error. Counsel say:

"The verdict was contrary to the overwhelming weight of the evidence and should have been set aside."

We quoted sufficiently from the charge of the court to show the claims of the parties to the suit. The plaintiff and the man who was riding with him gave testimony that strongly supported his claim. Several of the witnesses who lived near the accident by the aid of a lantern looked over the ground soon after the accident, and gave testimony tending strongly to sustain the contention of the plaintiff. On the other hand, the testimony offered on the part of the defendant tends to show that, in the evening when starting for his home in Grand Rapids, some miles away from Grand Rapids, he could not light the headlights of his car, and that he obtained some kerosene oil with which he filled the side lamps of his automobile, and that after lighting them he started for home driving slowly and with great care, keeping well on the right side of the highway, which all the witnesses agree had a good graveled roadway 20 or more feet wide.

The defendant testifies that he did not see the plaintiff at all, and that his automobile did not hit any object with sufficient im-

pect to attract his attention, and that he did not know any accident had occurred until informed of it later.

There were three adults riding in the automobile with the defendant, all of whom gave testimony tending to show that the automobile was kept well to the right of the center of the highway, and was driven with great caution.

These witnesses testified in substance that each of them got just a glimpse of the buggy and that there was just a little noise at the side of the automobile. We quote:

"Q. Well, what was it? A. We heard something scrape along the side of the machine. It didn't leave any mark on the side, not in the least, and it didn't swerve the machine or give it a jar."

Several witnesses testified that there were no marks on the automobile to indicate that it had been in collision with any object.

Some testimony was given on the part of the plaintiff which may have influenced the jury in its verdict. We quote from the cross-examination of the plaintiff:

"We were driving along; the horse was walking. I was watching the road. It was quite dark; could see an object ahead of me 10 or 12 feet, something like that. I kept on the side of the road. I know I was on that side of the road because I pulled over as far as I could.

"Q. Did you watch Mr. Boersma coming? A. Why, as far as I could see the lights. I saw there was a Ford coming. I saw him not to exceed a hundred feet, and I don't think it was that far.

"Q. You can see lamp lights farther away than that? A. Not as black as they were, I don't think.

"Q. You can see lamp lights a long distance? A. Not as black as they were.

"Q. So you say you couldn't see this automobile coming a hundred feet away? A. I don't think I saw over a hundred feet away. I was watching the road. I was not paying attention to anything else, just merely watching the road. We were talking together as we were riding along, just letting the horse walk."

The nephew of the plaintiff who was riding with him testified on the cross-examination, in part, as follows:

"Q. And you knew it was going to happen? A. I could see him coming right into us. I don't remember that we gave any warning of any kind. We didn't carry any lights."

This court has frequently had occasion to say, when it would reverse a case because of the refusal of a trial judge to set aside a verdict for the reason, that it was against the great weight of the evidence. One of the recent cases is *Porth v. Cadillac Motor Car Co.*, 209 Mich. where at page 96, 176 N. W. 554, the rule is stated. See, also, *Lignell*

v. Bruhns, 211 Mich. 346, 178 N. W. 665. We find no reversible error.

The judgment is affirmed, with costs to defendant.

CLARK v. CHAPMAN. (No. 45.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Bailment $\Leftarrow$ 4—Pledges $\Leftarrow$ 5—Subject of, must consist of personal property.

Only personal property can be a subject of pledge or bailment.

2. Pledges $\Leftarrow$ 1—"Pledge" defined.

A "pledge" is a vadium bailment, or the delivery of personal property, including substantially every valuable thing of a personal nature, to another, to be held as security for some debt or obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pledge.]

3. Pledges $\Leftarrow$ 5—Real estate mortgage may be pledged.

A real estate mortgage, before foreclosure, is personal property, and is subject to pledge by the owner.

4. Pledges $\Leftarrow$ 2—Rights as between pledgor and pledgee governed by law of place where pledge is made.

A real estate mortgage, as a direct contract between the original parties, is governed by the laws of the jurisdiction in which the land is located; but its assignment and delivery, with the note it secures, in bailment as a pledge of personal property, is a new and independent contract between other parties, to be governed by the law wherever it is made.

5. Pledges $\Leftarrow$ 57—Note secured by mortgage on land in other state, held as pledge, may be foreclosed.

Equity has jurisdiction to foreclose a pledge, consisting of a note secured by mortgage held by pledgee as collateral to a note, and to order sale of the pledge, notwithstanding location of the land in another state.

Appeal from Circuit Court, Ottawa County, in Chancery; Orien S. Cross, Judge.

Bill by Jarrett N. Clark against Elizabeth Allen Chapman. Decree for plaintiff, and defendant appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Lillie, Lillie & Lillie, of Grand Haven, for appellant.

Jarrett N. Clark, of Zeeland (Diekema, Kollen & Ten Cate, of Holland, of counsel), for appellee.

STEERE, C. J. Plaintiff's bill is filed to foreclose a pledge, consisting of a note secur-

ed by mortgage on land in North Dakota and held by him as collateral to a note given by defendant to a corporation in Chicago called the United Agency, and by it sold to plaintiff, who is a resident of Zeeland, Ottawa county, Mich. Defendant resides in the city of Chicago, Ill.

The bill of complaint introduces the subject with the information that prior to November 13, 1918, defendant Elizabeth Allen Chapman owed the United Agency, a corporation of Chicago, \$1,915, which she reduced on that date to \$2,549.75, giving a renewal note to the agency for that balance, which, with indorsements thereon at the time this bill was filed, is as follows:

"\$2,549.75

"Chicago, Ill., November 13, 1918.

"On or before May 13, 1920, after date, I promise to pay to the order of United Agency Chicago, Illinois, two thousand five hundred forty-nine and $\frac{75}{100}$ dollars, at Zeeland State Bank, Zeeland, Michigan, value received, with interest at the rate of 6 per cent. per annum.

"Due May 13, 1920.

"Elizabeth Allen Chapman."

Rev. Stamps, 50c and 2c, canceled "11-13-18. N. A."

Indorsed on back:

"6 Mo. int. pd. to 5-13-19.

"Pay to the order of J. N. Clark. Albert La Huis, Trustee for the United Agency."

While plaintiff's bill does not connectedly relate events and leaves much to inference, it is inferable that the Albert La Huis, a resident of Zeeland, who as trustee for the United Agency indorsed this note and assigned its collateral to plaintiff, Clark, was connected in some capacity with the United Agency of Chicago, but just how is left largely to surmise. After setting out the note of November 13, 1918, in full, showing its indorsement to plaintiff by La Huis, the bill states that on July 19, 1918, defendant, to secure her original indebtedness, gave La Huis an assignment of a note and a real estate mortgage on North Dakota lands, dated June, 1916, "made and executed by Gordon Gardner, mortgagor, to J. J. Murphy, mortgagee"; said mortgage having been properly recorded in Hettinger county, N. D., June 29, 1916, and said assignment of it by her to La Huis on September 29, 1919.

The bill further states that on "June 6 and 7, 1918, and also at a later date," the United Agency turned over to La Huis notes, mortgages, and other securities "as trustee for said bondmen," who with him had indorsed notes and signed bonds for the agency, by resolution of its board of directors giving him power to sell the same—

"as he deemed best for the interest of all concerned, and apply the proceeds of the same in the repayment of the loans of the company at the Zeeland State Bank, or to reimburse the

said bondmen for such amounts as they, for any reason, may have advanced or assumed."

La Huis sold plaintiff the note, indorsed as shown, and assigned to him the collateral Dakota mortgage, as is alleged, "for value, before due, and in the ordinary course of business." On May 11, 1920, plaintiff sent the note to a bank in Chicago for collection, "at the written request of plaintiff's duly authorized agent,"; but the note was not paid when due, or since. Plaintiff then filed this bill in the circuit court of Ottawa county, Mich., in chancery, asking that a sale of said note and mortgage be authorized, that after a stated time to redeem defendant be forever foreclosed, and, if foreclosure sale is made, that the proceeds be applied—

"First, to the payment of this proceeding and the expenses of sale; second, to the payment of the amount due from defendant to plaintiff; and, third, to repay to the defendant the residue arising therefrom, if any there should be."

If the proceeds of the sale prove inadequate, a decree of personal liability for the deficiency is asked against defendant.

Defendant appeared and answered, making a total denial, with explanations and allegations, and gave notice of a motion in the nature of a demurrer to dismiss said bill of complaint on various grounds set forth in the answer, which also prays the benefit of a demurrer. The grounds of demurrer are in substance that plaintiff has an adequate remedy at law, and has not stated a case entitling him to relief in a court of equity; foreclosure of the claimed pledge, or mortgage, held as collateral security is a matter exclusively within the jurisdiction of the North Dakota courts in the county where the land lies, and proceedings are now pending there against plaintiff, Clark, and La Huis to have set aside and declared void any assignment which they or either of them claim to hold of the Dakota mortgage and note it was given to secure; the circuit court of Ottawa county, Mich., in chancery has no jurisdiction to decree a foreclosure or sale of such a pledge, if given; that the mortgage held as collateral security by Clark, if under a valid assignment, which is questioned, is as a pledge, but a local chose in action relating to real estate, which can only be realized upon by sale under foreclosure on the real estate in Dakota.

The manifest purpose of this bill is, as plaintiff's counsel states, to "foreclose and sell a pledge" consisting of a "note secured by a mortgage on land in North Dakota" held by plaintiff as security for a note given by defendant to the United Agency and now owned by him. To that end a decree of foreclosure is sought, analogous to the foreclosure of a real estate mortgage, giving defendant right

to redeem within a specified time, etc., with contingent order of sale and personal decree or judgment against her for deficiency. While other incidental grounds of demurrer are proposed, the serious and controlling question presented is the jurisdiction of a Michigan chancery court to entertain the case and grant the relief asked in whole or in part, where the security for the claimed pledge, consisting of commercial paper, is a mortgage on real estate in a foreign jurisdiction.

Of this defendant's counsel contend that their bill is not to foreclose a real estate mortgage as such, does not ask "that any land interest or estate in land be sold," that "the pledge is a promissory note given by one Gardner to one Murphy, which is secured by a mortgage on land in North Dakota," and assent that the scope of the proceeding "is to foreclose a pledge, to authorize a sale of collateral security to satisfy a note payable in Michigan, now held by plaintiff, a resident of Michigan in a proceeding commenced in the county of plaintiff's residence."

Defendant's counsel emphasize the fundamental principle of jurisprudence that no state court has jurisdiction to render judgment or decree which will operate extra-territorially, so as to affect the title to land in another state, and point out that even in this state bills in equity affecting interests in real estate must be filed in the county where the lands are situated in whole or in part, and a mortgage is an interest in land, and say that, if not technically for a direct foreclosure, the bill seeks decree for a public sale of this mortgage in Michigan, where there is no market for it, and to foreclose all defendant's equities in the property; that such a decree inevitably "affects an interest in and the title to real estate in North Dakota, and the rights of parties over whom the court has no jurisdiction." So far as parties are concerned, the court has jurisdiction over the parties to this suit, and it certainly can render no decree affecting the rights in the land, or otherwise, of those who are not parties.

For authority to support their respective contentions counsel resort mainly to textbooks and decisions from other jurisdictions. But two claimed analogous decisions by this court are cited. Plaintiff's counsel cite as analogous *Drake v. Cloonan*, 99 Mich. 121, 57 N. W. 1008, 41 Am. St. Rep. 586. The proceedings there were similar in some respects, but the pledged collateral on which a lien was sought to be foreclosed consisted of notes secured by a mortgage on real estate located in Oakland county, where the suit was begun. The circuit court dismissed the bill. On appeal the decree of the lower court was reversed, and a decree entered in this court for foreclosure of the mortgage. Had the instant suit been commenced in Hettinger

county, N. D., the citation would be more directly in point.

Defendant's counsel cite as similar in facts and sustaining their contention *Richard v. Boyd*, 124 Mich. 396, 83 N. W. 106. In that case Boyd had an undivided one-twentieth interest in a large tract of land located in the state of New York, owned by several persons in common, as the bill distinctly alleged. His interest was evidenced by a receipt for moneys paid by him on the purchase price. He subsequently assigned that receipt to complainant as security for a loan of \$500 and to protect complainant in signing with him, as an accommodation maker, a \$2,000 note to a bank; said note being "the proper debt of said J. A. Boyd." He also agreed to pay one-twentieth of the taxes assessed against the tract of land. He defaulted in those obligations, and complainant filed a bill in Michigan to enforce such lien. He asked a decree that the receipt be sold and proceeds applied to payment of his claim; that he might purchase the same with full subrogation to the rights of defendant; praying also that—

"The interest of the said defendant to said lands, and all his rights and interests by virtue of said receipt and agreement and the subsequent understandings of the parties, and their dealings in reference thereto, and their action in reliance thereon, including the payment of taxes, with reference to such proportions, be adjudicated and decreed to be the right to have conveyance of an undivided one-twentieth part and parcel of the sum total of the said described tracts of land."

Also that, in default of the payment of the sums due, the—

"defendant, and all persons claiming or to claim from or under him, may be foreclosed and barred of and from all equity of redemption or claim of, in, or to said agreement and contract made and delivered to him by the said Hugh Richard."

It being shown by the bill that defendant actually owned an interest in the land itself and that complainant had already secured from him a lien upon the land which the purpose of the bill was to foreclose, the suit was palpably a direct attempt to foreclose an equitable mortgage on an interest in land lying outside the state, and a demurrer to the bill was sustained. There the mortgagee was attempting to foreclose a mortgage on land outside the state and against the mortgagor who owned the same, the transaction was between the original parties, in fact and effect a direct debt owing to complainant from defendant secured by a mortgage which he gave on his own property to complainant. In the instant case the mortgagee had apparently sold and assigned the note and mortgage to defendant, who then assigned the same to La Huls as security for her note

and debt to the United Agency. The Agency, by La Huis, sold her note and assigned this note and mortgage securing the same to plaintiff, Clark; it being held by Clark under assignment for her debt, which was entirely distinct from the principal original debt created and secured by the note and mortgage.

"An ordinary absolute assignment of a mortgage with the note, made by way of security for another debt, is a pledge rather than a mortgage." Jones on Collateral Securities and Pledges (3d Ed.) § 140.

That author points out the remedies as follows:

"As with a mortgage, so with a pledge, the creditor may upon default pursue any or all of his several remedies. The remedies upon a pledge are also similar to those upon a chattel mortgage. They are: (1) By action upon the debt secured; (2) by sale of the pledge at common law without judicial proceedings; (3) by sale under statutory provisions; (4) by sale under a decree of a court of chancery; (5) by sale under a special power of sale." Section 589.

And of permissible resort to a chancery court he says:

"A pledgee may properly enforce his lien by a bill in equity, especially when the contract of pledge neither provides for the time of redemption nor the manner and time of sale, and his rights and powers are in any manner questioned or denied. This remedy is more complete than the common-law right to sell the pledge, after notice. The pledgee thereby relieves himself from ulterior questions as to the propriety of his course, and the court can act with due regard for the rights of all parties concerned." Section 640.

[1-3] Only personal property can be the subject of pledge or bailment, and a pledge is a vadium bailment, or the delivery of personal property (which includes substantially every valuable thing of a personal nature) to another, to be held as security for some debt or obligation. A real estate mortgage, before foreclosure, is now ranked as personal property, and recognized as subject to pledge by the owner. Only the dealings and rights of the parties to this suit in their relations as pledgor and pledgee are involved, or to be considered, in passing upon the jurisdiction of equity to entertain an application to foreclose a pledge, as such necessarily to be regarded as purely personal property.

[4] Undoubtedly the mortgage, as a direct contract between the original parties to it, is governed by the laws of the jurisdiction in which the land it incumbers is located; but its assignment and delivery with the note it secures in bailment as a pledge of

personal property is a new and independent contract between other parties, to be governed by the law of the place where it is made. 27 Cyc. 1282.

[5] The general rule appears well settled that the door is open for a pledgee to apply to the chancery courts for determination of rights between him and his pledgor, and for a decree authorizing sale of the pledged property under direction of the court, and the court has authority to entertain the same on proper showing, pass upon the merits of the application, and on good cause shown may in its discretion authorize sale of the pledge, under proper restrictions imposed in advance, can after sale inquire into its fairness and the sufficiency of the amount bid, and may reject or affirm the same in the exercise of its equitable jurisdiction. 81 Cyc. 885. In *Cleghorn v. Minn. Title Ins. & T. Co.*, 57 Minn. 341, 59 N. W. 320, 47 Am. St. Rep. 615, the principle is well stated as follows:

"This was always a well-recognized head of equitable jurisdiction, even where the pledgee or mortgagee had a right to sell the property. The sale being under the direction and control of the court, it has the power, as is its duty, to see to it that the property shall not be sacrificed; and hence such a sale is not liable to the evils or abuses to which a sale by a party himself is subject. Just when and under what circumstances a court would or should order a sale of commercial paper or other collateral of similar character is not necessary to consider. The right to do so, at least under special circumstances, is undoubted. Pom. Eq. §§ 164, 1231; Daniel, Neg. Inst. § 833; Jones, Pledges, § 655; *Donahoe v. Gamble*, 38 Cal. 340."

As justifying special circumstances counsel for plaintiff state that the original obligation to him matures considerably in advance of the pledged note and mortgage, that the contract of pledge neither provides for manner or time of sale or redemption, and the rights under which he holds his pledge are questioned; while counsel for defendant contends that presumptions take care of the matter of sale, the fact of earlier maturity is not pleaded, and a suit is now pending between the parties in North Dakota involving the validity of the assignment of the pledge. Those and other interesting questions which counsel raise and argue are mainly matters of proof rather than pleading, for the trial court to dispose of on the hearing as the case may develop and equity require.

We think the bill, though somewhat meager in detail, considered as a whole, states a situation authorizing the chancery court to assume equitable jurisdiction.

The order overruling defendant's demurrer is affirmed, with costs to plaintiff.

SMITH v. SMITH. (No. 2)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Trusts $\S$ 89(2)—Property in wife's name held to have been paid for and improved with earnings of husband as well as of wife.

In husband's action against wife for determination of his rights in real estate that had been purchased in wife's name prior to the taking effect of Comp. Laws 1915, $\S$ 11478, evidence held to prove that the property had been paid for and improved with earnings of husband as well as those of wife.

2. Trusts $\S$ 81(2)—Wife who purchased land in own name with husband's earnings held land in trust for husband.

Where wife used husband's earnings, turned over to her by husband, in the purchase and improvement of real estate used by husband and wife as a home, and took title thereto in her own name without husband's knowledge or consent, she held title in trust for husband under the statute of uses and trusts (Comp. Laws 1915, $\S\S$ 11571, 11573), though she did not actually intend to perpetrate fraud on husband; the purchase of the land in her own name being constructive fraud.

3. Descent and Distribution $\S$ 115—Gifts $\S$ 47(1)—Husband and wife $\S$ 49½(7)—Presumption that money paid to wife or child is a gift or advancement rebuttable.

Money paid to a wife or child will be presumed to have been a gift or advancement, but such presumption is rebuttable.

Appeal from Circuit Court, Genesee County, in Chancery; Fred. W. Brennan, Judge.

Action by William H. Smith against Sarah Smith. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Herbert W. Smith, of Lapeer, for appellant.

Withey & Freeman, of Flint, and D. G. F. Warner, of Lansing, for appellee.

FELLOWS, J. The testimony in this record in many particulars is irreconcilable. We shall not attempt to detail it, but will content ourselves with a statement of the facts we are satisfied its preponderance establishes. Plaintiff at the time of the hearing of the case in the court below was 72 years old. At the age of 21 he married the defendant, then 16 years old. Neither was possessed of any property at the time of the marriage. He was an ignorant laboring man, and was unable to read, write, or figure. For a number of years they lived at Imlay City, in Lapeer county. Four children were born to them there, one of whom is now deceased. Work for common laborers was not plentiful at Imlay City, but we are satisfied that plaintiff worked whenever he could obtain employ-

ment. Defendant also worked out when they lived there. He attempted to obtain a home by buying on a contract, but does not seem to have been able to keep up his payments. Over 20 years ago he came to Flint seeking employment and secured it with the Grand Trunk as a section hand. In a few weeks he sent for his family. They moved into a building before that used as a meat market, but which was cleaned up so that it could be used for a residence. The rent was \$5 per month. Later this property was bought for \$450 on a contract. The manner in which the title to this property together with other property later purchased on contract for \$85 was taken and who paid for the property and the improvements furnishes the subject-matter of this litigation.

A house was built on the land first purchased on Saginaw street; a brother-in-law of plaintiff donating considerable of the work. The old, remodeled meat market was moved on the other property on Tenth street, and, as we understand the record, another comparatively cheap house was also put on the Tenth street property. None of the houses were expensive; all were cheaply constructed. The phenomenal growth of Flint, however, had so enhanced the value of these properties that at the time of the hearing of the case in the court below they were worth approximately \$20,000, largely due to their location.

In the land contracts and in the deeds defendant's name alone appeared. Plaintiff testifies that he always supposed until the difficulties arose between them which caused their separation that the papers were drawn up to him and his wife. We are satisfied he is telling the truth. Defendant admits that the purchases were made in her name, and that she did not say anything to her husband about it. We are also satisfied that after the parties moved to Flint plaintiff turned over to defendant his wages, and that he worked practically all of the time. He spent little on himself. The only clothes he bought were work clothes. He drank some, but not excessively. He earned from \$1.35 to \$1.50 per day when at work for the Grand Trunk, and at other times he received higher pay. Both were frugal and industrious, and defendant worked out some, took in boarders, and finally the property and the improvements were all paid for. Plaintiff received \$100 from a man in Imlay City upon surrendering a land contract and \$150 from his father's estate. Defendant admitted on cross-examination that \$235 of this was turned over to her, although she attempted to modify this in other parts of her testimony; she also admits that as a general thing he gave her his wages. Her testimony shows her to be the dominating one of the family. During all the years after they moved to Flint

plaintiff turned over to her practically all the money he received from all sources in the honest belief that he was paying for property the title to which was in him and his wife, in the honest belief that it belonged to them both.

We need not determine who was to blame for the separation. It will suffice to say that their marital relations terminated one day when defendant struck plaintiff with a washboard and he left and she filed a bill for divorce. He then learned for the first time that the accumulations of a lifetime were all in the name of the defendant. Later he took up his abode in one of the houses on Tenth street. Upon defendant's attempting to oust him by proceedings before a circuit court commissioner this bill was filed, in which he seeks to have his rights in the real estate determined and to restrain defendant from disposing of the property.

[1] To this action defendant interposes a defense upon the facts and also a legal defense. She insists as matter of fact that she paid for all these properties and for all the improvements. As we have already indicated, we are persuaded that the plaintiff's claim on the facts has the support of the great preponderance of the proof. The trial judge, who saw and heard the witnesses, so found, and we are convinced he was right. There is no doubt defendant is a hard-working woman. She worked out and took in boarders, but that her earnings alone or in any considerable amount paid for these properties we very much doubt. But beyond that the properties were paid for and improved before Act 196, Public Acts 1911 (section 11478, C. L. 1915) took effect, and when the wife's earnings belonged to the husband. In re Mayer's Estate, 210 Mich. 188, 177 N. W. 488, 10 A. L. R. 773.

[2] This brings us to the legal defense. Counsel for defendant invokes the statute of uses and trusts, and insists that it precludes the plaintiff's right to relief. Section 11571, C. L. 1915, provides:

"Sec. 7. When a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

But this section does not stand alone. The ninth section of the statute of uses and trusts, being section 11573 C. L. 1915, provides (we italicize the important words):

"Sec. 9. The preceding seventh section shall not extend to cases where the alienee in the conveyance shall have taken the same as an absolute conveyance in his own name, *without the knowledge or consent of the person paying the consideration*, or when such alienee, in violation of some trust, shall have purchased

the lands so conveyed, with moneys belonging to another person."

We have already found that the plaintiff paid the consideration, and that defendant took title in her own name without his knowledge or consent. In the early case of Fisher v. Fobes, 22 Mich. 454, this court considered both of these sections. Mr. Justice Cooley, who wrote for the court, after quoting from section 7, said:

"This provision, however, must be understood as applicable only to those cases in which the deed has assumed the form it has by consent of the party furnishing the consideration. It has no application to a case where one has taken a deed in his own name in fraud of the rights of another, nor to a case where, though no fraud was designed, the conveyance has been made to some person other than the purchaser without his consent. The purpose is to preclude parties from asserting equitable interests in land where they must rest upon parol evidence, in opposition to the written instruments of title, which have been made with their consent and approval. If, therefore, it shall appear that complainant assented to the conveyance to Stillman Goodenough, without demanding or receiving any written declaration or other evidence of a trust in his own favor, no such trust can be declared, however clearly it may appear from the parol evidence that the transaction was entered into for his benefit, and that, between the parties, it was understood that the title was to be held in trust for him. If he has trusted himself entirely to the good faith of Goodenough, and suffered an arrangement to rest in parol which the statute declares shall be evidenced by writing only, it will not be in our power to relieve him even if we were disposed so to do.

"It has already been seen that there is no direct evidence of any understanding between complainant and Goodenough as to who was to be made the grantee in Patchin's deed, and we must therefore see what legal inferences are deducible from the situation of the parties, or may fairly be drawn from the facts which appear. The following facts, as we have before said, are unquestioned: (1) That in the arrangement Goodenough acted as agent for complainant; (2) that he was intrusted with the whole management of the negotiation with Patchin; and (3) that it was distinctly understood between him and complainant that the conveyance made by Patchin was to be for the benefit of complainant. Supposing this to be the whole of their understanding, the duty of Goodenough was plain. It was to have the conveyance made directly to complainant, or, if made to himself for any other person, then to have a trust in favor of complainant distinctly declared in the conveyance, so that it might be legally enforced; and if he failed to have conveyance made in proper form for the protection of complainant's interests, he would have been chargeable with constructive fraud, and a court of equity would have given complainant the proper relief."

So in the instant case defendant was the agent of plaintiff and was intrusted with the business, and the purchase was made for the

benefit of both, for a home for them both. We need not find that defendant actually intended to perpetrate a fraud on her husband. What she did operated as a constructive fraud. In the case of *Uhl v. Weiden*, 122 Mich. 638, 81 N. W. 571, one Herrington, a real estate dealer, negotiated the purchase of the property for Mr. Uhl. In order to show that he was doing a large business he took title in his own name without Mr. Uhl's knowledge or consent. He intended to and did deed to Uhl. But before Mr. Uhl's deed was recorded Herrington's creditors levied on the premises. This court there said, speaking through Mr. Justice Hooker:

"By taking title to himself, Herrington perpetrated a legal fraud upon Uhl, though it appears to have been by no design to wrong or injure him."

See, also, *McCreary v. McCreary*, 90 Mich. 478, 51 N. W. 545; *Connolly v. Keating*, 102 Mich. 1, 60 N. W. 289; *Linsley v. Sinclair*, 24 Mich. 380; *Judd v. Judd*, 192 Mich. 198, 158 N. W. 948, 160 N. W. 548.

The plaintiff having paid the consideration, and the title having been taken in the name of the defendant alone without his knowledge or consent, the case falls within the exception provided for in section 9 of the statute of uses and trusts.

Counsel for defendant insists that this case is controlled by *McNamara v. Langguth*, 196 Mich. 776, 165 N. W. 661, and *Fleming v. Dalton*, 201 Mich. 294, 167 N. W. 893. In both of these cases we held that plaintiffs had not made out a case. In both cases the wives were deceased, and the husbands could not testify. In the instant case the parties were both alive, both testified, both gave their version of the transaction, and, as already indicated, plaintiff made out his case by a preponderance of the proofs.

[3] *Waterman v. Seeley*, 28 Mich. 77, is also relied upon by counsel. That case holds that, where money is paid to a wife or child, there is a presumption that it is a gift or an advancement. No doubt there is such a presumption, but it is a rebuttable one. An interesting case is that of *Adlard v. Adlard*, 65 Ill. 212. In that case the plaintiff, a laboring man, earned large wages as an ornamental painter and grainer. He turned over his wages to his wife, who purchased six pieces of property, taking title in her own name. The court found that as to two of the pieces of property plaintiff knew and consented that title be taken in her name and refused relief as to these two pieces, but granted relief as to the balance. Speaking of the presumption noted in the *Waterman* Case, the court said:

"It is, no doubt, as argued by appellant's counsel, a natural presumption that a husband, placing his money in the hands of his wife, to

be invested in her name, intends it as a specific provision for her exclusive benefit; yet such a presumption would be unreasonable when a husband, a day-laborer, deposits with his wife his daily, weekly, or monthly earnings as he receives them, with a view, as they accumulate, to a permanent investment, leaving such investment to her own judgment, retaining nothing in his own hands, and making no provision for his own future."

From what has been said it follows that the decree of the court below which recognized the rights of both parties in this property should be affirmed. Plaintiff will recover costs of this court.

SAVAGE v. EMBREY. (No. 76.)

(Supreme Court of Michigan. Oct. 7, 1921.)

1. Seduction $\Leftrightarrow$ 24—Evidence held sufficient to go to the jury.

In action for damages for seduction of plaintiff, evidence that she was persuaded to yield because of defendant's wiles, artifices, and inducement, *held* sufficient to make a case for the jury.

2. Seduction $\Leftrightarrow$ 1—Not constituted by illicit intercourse only.

Where illicit intercourse is induced simply to gratify a lustful passion on the part of both, seduction is not committed.

3. Seduction $\Leftrightarrow$ 1—Term defined.

"Seduction" may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have, and do have, that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Seduce—Seduction.]

4. Judgment $\Leftrightarrow$ 199(3)—Refusal to enter judgment non obstante veredicto held not error.

In an action for the seduction of plaintiff, in view of facts of the case a refusal to enter a judgment for defendant non obstante veredicto *held* not error.

5. Seduction $\Leftrightarrow$ 16—Declaration in action for seduction held sufficient.

Although the declaration used general language where specific allegations would have been more appropriate, since it informed defendant of the case he would be expected to meet, it was sufficient.

Bird and Moore, JJ., dissenting.

Error to Circuit Court, Kent County; Willis B. Perkins, Judge.

Action by Ila L. Savage against Harvey L. Embrey. From judgment for plaintiff, defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

H. Monroe Dunham, of Grand Rapids (Cummins & Nichols, of Lansing, of counsel), for appellant.

Dilley, Souter & Dilley, of Grand Rapids, for appellee.

FELLOWS, J. Plaintiff recovered a judgment of \$2,000 in the Kent circuit court for seduction. Defendant upon this writ of error seeks its reversal upon two grounds only: That plaintiff did not make a case of seduction by her testimony, and that her declaration was insufficient. Upon the argument of the case I was impressed that defendant's first contention was correct. But a careful examination of this record, a comparison of it with records in other cases in this court in which it has been held that liability was established, an examination of the decisions of this court where the question has been involved, has persuaded me that plaintiff has made a case for the jury when we keep in mind the rule that upon a motion to direct a verdict for defendant, the testimony and legitimate inferences that may be drawn from it most favorable to plaintiff must be accepted.

[1] Plaintiff was 21 years of age at the time of the alleged seduction. She had been brought up at Shelby in Oceana county, where she attended school. It is claimed she was backward. She did not graduate from school until after she was 20 years old. She worked in a telephone office there for a while, when she came to Grand Rapids and obtained employment as telephone operator at the Pantlind Hotel. Here she met defendant, a traveling man 40 years of age. She had never kept company with boys, and except on one occasion when a man took her to dinner and to a show, the defendant was the first to pay her attention. Defendant had occasion to use the telephone and thus became acquainted with plaintiff. He invited her to go out to dinner with him, which invitation she accepted. After dinner they went to a show, and then defendant took her to her rooming place. There he embraced and kissed her and told her how much he thought of her. This was in the latter part of February. Defendant's business kept him in Grand Rapids for about a week, and on three or four evenings during the week he took her to dinner and to shows. On (probably) the third of the occasions when defendant entertained plaintiff, he solicited intercourse, which she refused. Defendant's business took him to Ludington for a few days. Upon his return to Grand Rapids he renewed his attentions to plaintiff. She testified to several occasions when he took her to dinner and to shows, both before and after his trip to Ludington. It is her claim that on each of these occa-

sions he told her he loved her and embraced and kissed her when they arrived at her home. On some occasions he solicited intercourse, which was refused. Once he asked her to go with him to another hotel in the city and stay all night, suggesting that they register as man and wife. Defendant's business in and about Grand Rapids being completed, he left for his trips on the road, but took up and continued a correspondence with her for some time. The earlier of the letters were destroyed by defendant, but later ones were produced and offered in evidence. They may not fall within the category of love letters, but in them he generally addressed her as "Dear Ila," and concludes "with love."

In the forepart of April defendant called plaintiff on long distance telephone from Detroit; told her he would be in Grand Rapids that evening on the 9:50 train; asked her to meet him and stay downtown with him that night. She refused the suggestion to stay downtown, but did meet him at the train. They first went to a nearby hotel. Defendant there told her he had registered as man and wife and asked her to go up to the room with him. This she refused to do, and he went up alone. When he came down they went out and got some ice cream, he continuing his solicitations that she go to his room with him. She testifies that he said to her that he should think that after he had thought so much of her as to come clear from Detroit to see her that she ought to do a little something for him. She finally yielded and went to his room, where they had intercourse. The next afternoon they went to her room, where they again had intercourse. Plaintiff became pregnant and a child was born. Defendant in bastardy proceedings pleaded guilty and made a financial settlement with the county authorities for the support of the child.

There was no promise of marriage, but plaintiff claims that defendant's repeated protestations of love were false and were made to secure her downfall, but that she at the time believed and relied upon them to her ruin; that she had become very fond of him and had confidence in him. She testifies:

"He embraced me and he told me he thought a great deal of me, and that is as far as he went. I believed him. I had no reason to believe otherwise. At the time of my first intercourse with Mr. Embrey, I had come to think a great deal of him. He expressed his love to me at various times. I believed him. I didn't see him after this occasion in my room. That was the last. I became pregnant but did not realize it until in August in the hospital."

It is the theory and claim of plaintiff's counsel that plaintiff was a simple-minded country girl, in no way world-wise; that defendant, an experienced man of the world, by his false protestations of love, his arts and wiles con-

tinued over a period of two months, both when with her and by correspondence, had obtained her confidence and love, and that she at the end of that time yielded her person to him by reason of the arts, persuasion, and wiles practiced by defendant which were calculated to have and did have the effect upon her of causing her to submit to his sexual embraces, and that sufficient appears in the testimony to entitle her to take the verdict of a jury. Defendant, on the other hand, while offering no testimony himself but basing his claim on the testimony of the plaintiff, insists that the intercourse was the result of a mutual desire, and at most brought about by persuasion only, which it is claimed is not the equivalent of the arts and wiles necessary to bring the case within the definition of seduction.

[2] Illicit intercourse alone does not constitute the crime of seduction. Where it is induced simply to gratify a lustful passion on the part of both, the offense is not committed.

[3] "Seduction may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have, and do have, that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused." *People v. Gibbs*, 70 Mich. 425, 38 N. W. 257.

In this case it was said by Chief Justice Sherwood, speaking for the court:

"The 'seducing and debauching of the unmarried female' was the crime for which the respondent was being tried. It consisted of the means used by him to induce this young girl to yield and surrender to him her chastity and her virtue; and such means always include all the acts, artifices, influences, promises, enticements, and inducements, calculated, under all the circumstances of the case being considered, to accomplish that object; and all testimony having any tendency to establish any of these should be admitted when offered to prove the criminal conduct. We find nothing in the testimony received going beyond this.

"In all such cases, the age, experience, artfulness, and blandishments of the offender, and the youthfulness, innocent, guileless, and confiding nature of the injured party, will always be found to enter largely into the consideration of the acts of the parties involved in the investigations; and the largest latitude consistent with safety should be allowed in taking the testimony having any tendency to develop the material facts in the case. A proper regard for the protection of female virtue, and the welfare of society, can never require less. * * *

"A false promise of marriage, under our statute, is not a necessary element in the influence exerted through the wiles, artifice, and deception used by the seducer in taking advantage of the guileless simplicity and confidence of a young girl, and leading her from the path of virtue, in depriving her of her chastity, and accomplishing her ruin; but any other subtle

device or deceptive means, involving the same moral turpitude, used by him in accomplishing the same criminal result, is all that is necessary to constitute the crime. The quality of the means used, rather than the kind, is that which characterizes the act, and brings it under the condemnation of the law."

In *Stoudt v. Shepherd*, 73 Mich. 588, 41 N. W. 696, this court, speaking through Justice Campbell, said:

"This court recognized, what we conceive to be the recognized doctrine of experience, that seduction may be accomplished by means of influence and persuasion intended to reach, and actually reaching, the result, which do not necessarily involve either a promise of marriage or pecuniary advantage; and that such effectual persuasion which is the active cause of it may be as distinct a grievance as the more venal representations, which appeal to covetousness more than to excited feeling."

In *Watson v. Watson*, 53 Mich. 168, 18 N. W. 606, 51 Am. Rep. 111 (a case which was before this court on three other occasions, see 47 Mich. 427, 11 N. W. 227; 49 Mich. 540, 14 N. W. 489; and 58 Mich. 507, 25 N. W. 497), it was said by Chief Justice Cooley:

"It was urged by the defendant that on the evidence of the plaintiff the action could not be maintained, because as she claimed, the intercourse was accomplished by force, and was therefore not seduction, but rape. But the plaintiff's evidence did not make out a rape; it made out only that her will was overcome by the defendant's superior will, which had controlling influence because of the parental relation which he had assumed towards her."

We shall not quote farther from the cases. The following, together with the records in several of them have been examined: *People v. Millsbaugh*, 11 Mich. 278; *People v. Brewer*, 27 Mich. 134; *People v. Clark*, 33 Mich. 112; *Lewis v. People*, 37 Mich. 518; *People v. DeFore*, 64 Mich. 693, 31 N. W. 585, 8 Am. St. Rep. 863; *People v. Gould*, 70 Mich. 240, 38 N. W. 232, 14 Am. St. Rep. 493; *Hallock v. Kinney*, 91 Mich. 57, 51 N. W. 706, 30 Am. St. Rep. 462; *Becker v. Mason*, 93 Mich. 336, 53 N. W. 361; *People v. Bressler*, 131 Mich. 390, 91 N. W. 639; *People v. Smith*, 132 Mich. 58, 92 N. W. 776; *Greenman v. O'Riley*, 144 Mich. 534, 108 N. W. 421, 115 Am. St. Rep. 466; *Velthouse v. Alderink*, 153 Mich. 217, 117 N. W. 76, 18 L. R. A. (N. S.) 587, 15 Ann. Cas. 1111; *People v. Adams*, 162 Mich. 371, 127 N. W. 354; *People v. Turton*, 192 Mich. 331, 158 N. W. 870. None of them are out of accord with the excerpts quoted.

[4] While counsel on both sides have cited cases from other jurisdictions which have been examined, we do not deem it necessary to discuss them. This court has been called upon to consider such cases altogether too frequently and the law is pretty well settled in this state. Our own cases must control. Their examination and particularly those in

which the records are available is convincing that plaintiff by her testimony has made a case for the jury under the former holdings of this court. It is true that she was 21 years old and that girls of that age in overwhelming number would not have succumbed to defendant's blandishments. But there is color to the claim that she was backward and indisputably she knew little of men; her mother was dead, and she doubtless had never been warned of the pitfalls constantly ahead of young womanhood. Defendant was a man of experience, a man of the world; his oft-repeated protestations of love were false, his attention and pretended evidence of affection for her were for a base purpose and constituted those arts, wiles, and persuasions noted in the cases. The facts in this case differ in shade from other cases, differ in degree from other cases, but they were for the jury, and we cannot say they were insufficient as matter of law. Courts of last resort do not blaze the trail that may be safely followed by men such as defendant in their pursuit of sexual pleasure. That which would accomplish the ruin of one girl of 21 would fall far short accomplishing its purpose with hundreds of others of the same age. The jury saw the plaintiff, heard the story of her shame and the means used by defendant to accomplish her downfall. They were able to judge of her experience, whether she was sophisticated or otherwise, and it was for them to consider her experience, whether she was as worldly-wise as her age would indicate she naturally would be, whether she was backward as claimed, whether she yielded her virtue only because of defendant's false protestations of love, his arts and wiles and persuasions, or because of inherent desire. The trial judge was not in error in refusing to direct a verdict or in refusing to enter judgment for defendant non obstante veredicto.

[5] We think the plaintiff's declaration was sufficient as against the objections urged. While in some regards it used general language where specific allegations would have been more appropriate, it was sufficient to inform defendant of the case he would be expected to meet. In some regards the proofs did not measure up to the allegations of the declaration, but no question of variance is before us.

The judgment will be affirmed.

STEERE, C. J., and STONE, CLARK, SHARPE, and WIEST, JJ., concurred with FELLOWS, J.

BIRD, J. (dissenting). At the conclusion of plaintiff's testimony in this case, defendant requested a directed verdict on the ground that a case of seduction had not been made. I think this motion should have been granted. It is true that it is not always easy to determine just what conduct will

constitute seduction, but if we are going to say that defendant is guilty of seduction, we should be able to point out the acts which make him so. If the acts as shown in this case constitute seduction, then all cases of fornication outside of commercialized vice are seduction. Courts have gone a great ways and have strained the rule in order to protect young girls, but there is no young girl involved in this case. Plaintiff was a grown woman, 21 years of age, and a graduate of the Shelby high school. She had had experience as a telephone operator in Shelby and nearly six months' experience as a telephone girl in a cosmopolitan hotel. She made a date with defendant to go to dinner with him before she saw him and before he had seen her. She explained to him over the 'phone how she was dressed so he would know her on the street or at the entrance of the hotel. She met him in pursuance of this appointment, and both appear to have been mutually attracted. She went to dinner with him and afterward to the theater. The third or fourth time after she saw him she submitted to his embraces. She does not claim that he made her any promises; in fact, she states that he made her no promises. He said nothing about marriage; he neither enticed nor deceived her, and she does not say that he flattered her. He did urge her to have sexual intercourse with him, but it has been held that coaxing or persuasion to have sexual intercourse is not "seduction by artifices." *Breon v. Henkle*, 14 Or. 500, 13 Pac. 389. The testimony shows this was simply a case where two unmarried people met by accident and were sexually attracted to each other. This attraction was supplemented by opportunity and they improved the opportunity. It was fornication, but was not seduction. These acts present a far different question than does a case where a man gains the love of a young girl and then by the aid of promises and artifices uses it to gratify his sexual promptings.

In considering a similar case, the Oregon court said:

"An action for obtaining property fraudulently cannot be maintained without proof of facts calculated to deceive a person of ordinary prudence; and how can a female a long way beyond girlhood claim to have been defrauded of that which every womanly instinct of her nature prompts her to set the highest value upon by 'flattery, false promises, artifice, urgent importunity, based upon professions of attachment,' unless they are of such a character as are calculated to mislead an ordinarily prudent and virtuous minded woman?"

"The individuality of the female sex has been materially advanced during the past few years; their knowledge of the world has been greatly improved, and their legal capacity enlarged. The notion that they belong to the weaker sex is only entertained by the credulous and unsophisticated. They are not easily beguiled,

and should be held to a reasonable responsibility, and if allowed to maintain an action for their own seduction, and demand a large compensation for their loss of character, should be required to prove something more than mere importunity as the means through which it was accomplished." *Breon v. Henkle*, supra.

The facts as related by plaintiff do not make defendant guilty of seduction. No act of defendant is related which would bring him within any definition of seduction, unless it is her statement that he made love to her. She explains upon cross-examination that she meant by the term "love" that he told her how much he thought of her. This element has in some cases been held sufficient to establish seduction, but in most of those cases the girl yielded only after a prolonged period of love making and not after a few days of flirtation, as occurred in this case. The record does not disclose any such love making during the few days they were acquainted as to justify using it as a basis for an action of seduction. The plaintiff is indeed unfortunate, but this furnishes no reason for doing violence to the rules of law. The judgment should be reversed.

MOORE, J., concurred with BIRD, J.

HARLEY et al. v. HARTFORD FRUIT GROWERS' & FARMERS' EXCH. (No. 90, June Term.)

(Supreme Court of Michigan. Oct. 7, 1921.)

1. Appeal and error §673(2), 757(1)—Assignment of error not considered where record and brief did not show the facts.

On appeal in an action against a fruit growers' and farmers' exchange for price of packed apples, an assignment that verdict should have been directed for defendant on the ground that defendant's charter and by-laws did not permit it to purchase fruit outright that had not been run through and packed in its warehouse was without merit, where the charter could not be found in the record or briefs and no reference was given to the number or year of the act under which defendant was incorporated.

2. Witnesses §398(3)—Defendant bound by cross-examination of plaintiff.

In an action by nonmember against a fruit growers' exchange to recover purchase price of packed apples sold to defendant, where defendant on cross-examination of plaintiff asked if he knew any other nonmember who had sold apples to defendant, to which he replied in the affirmative, and on being asked whom, stated one person, defendant was bound by such answer and could not call the person named by plaintiff to the stand to testify whether or not he had sold apples to defendant; there being no showing that a sale to defendant would

be ultra vires or that plaintiff had knowledge of a by-law to the effect that defendant could not handle apples not packed in its warehouse.

3. Agriculture §6—By-law of exchange held not to apply to nonmember.

A by-law of an incorporated fruit growers' exchange, to effect that "all fruit sold by the association, except small fruits, such as cherries, berries, and grapes, shall be packed in the company's warehouse," was adopted for the regulation of members only, and did not apply to a nonmember selling packed fruit to the exchange.

4. Appeal and error §1052(5)—No error in excluding by-law in view of verdict that plaintiff had no knowledge thereof.

In an action by a nonmember against an incorporated fruit growers' exchange to recover purchase price of packed apples sold to defendant, there was no reversible error in not permitting defendant to introduce in evidence a by-law of the exchange, where the court instructed that, if plaintiff had knowledge thereof, verdict should be for defendant, and the jury found in favor of plaintiff on the question of knowledge of the existence of the by-law.

5. Evidence §271(13)—Statement of defendant's agent held inadmissible as self-serving.

In an action against an incorporated fruit growers' exchange to recover purchase price of packed apples alleged to have been sold to defendant, where defendant claimed that its representative only undertook to obtain a car for plaintiff in which to ship his fruit, and did not purchase the fruit, held, that court properly refused to permit defendant to introduce in evidence a conversation between defendant's representative and station agent in which the defendant's representative stated that the car was for plaintiff, being a self-serving statement.

Error to Circuit Court, Van Buren County; L. Burget Des Voignes, Judge.

Action by Lee Harley and another against the Hartford Fruit Growers' & Farmers' Exchange. Judgment for plaintiffs, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

W. J. Barnard, of Paw Paw, for appellant.
Glenn E. Warner and T. J. Cavanaugh, both of Paw Paw, for appellees.

BIRD, J. Plaintiffs claim they sold 710 bushels of Dutchess apples to defendant in August, 1919, at \$2.25 a bushel, and delivered the same to the defendant in a railroad car at Hartford; that afterwards they received \$400 on account thereof leaving a balance of \$1,197.50. They sue to recover this balance.

The defendant is said to be a corporation.

Its method of operation is to receive, pack, and sell the fruit of its members, and at the end of the season it deducts 5 per cent. of the gross income for services and prorates the balance among its members. Growers of fruit, who are not members, may put their fruit through the exchange, but they are charged 10 per cent. on gross receipts. Neither one of the plaintiffs was a member of the exchange. The exchange is managed by Miss Conway, and it is defendant's contention that it never purchased plaintiffs' apples, but that Miss Conway assisted plaintiffs and acted as their agent in making sale of them. This was the only issue tried out. The jury accepted plaintiffs' version and gave them a verdict for the full amount of their claim plus the interest thereon.

[1] 1. Defendant requested a directed verdict because its charter and by-laws did not permit it to purchase fruit outright that had not been run through and packed in its warehouse. Nowhere in the record or briefs are we able to find what its charter is, and no reference is given to the number or year of the act under which it was incorporated. There was no proof which would permit us to say, as a matter of law, that plaintiffs had knowledge of the by-law referred to by counsel. For these reasons we shall decline to consider this assignment.

2. Upon direct examination of the plaintiff, he was asked if he knew of circumstances where the defendant had purchased fruit outright of people who were not members of the exchange. He replied that he had known of such instances. Upon cross-examination he was asked to name one person who was not a member from whom defendant had purchased fruit outright, which had not been run through the warehouse, and he named a Mr. Doyle. Defendant then sent out and got Mr. Doyle, but the trial court would not permit him to contradict plaintiff on that question on the ground that it was a collateral question. We are unable to agree that the testimony was collateral. One of the hardest urged defenses was that the company lacked the power to purchase fruit outright, where it had been packed in the orchard, as plaintiffs' had been packed. Plaintiffs' counsel undertook, by his question to his client, to show, as a matter of practice, that defendant had done so, thereby opening the way to sail around defendant's objection that it had no power to do it, and had not done it. The testimony was admissible as it went directly to one of the vital contentions of defendant and should have been admitted.

3. Defendant offered in evidence one of its by-laws, as follows:

"All fruit sold by the association, except small fruits, such as cherries, berries and grapes, shall be packed in the company's warehouse."

This by-law was competent as tending to show the manner in which the business of defendant was conducted and bore upon the question of Miss Conway's authority to purchase them. If, after showing this, it could have been brought home to the knowledge of the plaintiffs, it would have charged them with notice that Miss Conway had no authority to purchase the apples outright without being run through defendant's warehouse. *Hallenbeck v. Powers, etc., Co.*, 117 Mich. 680, 76 N. W. 119; *Rundell v. Farmers' Co-operative Elevator Co.*, 210 Mich. 642, 178 N. W. 21.

4. Miss Conway, the manager, testified she took a buyer by the name of Hinds to plaintiff, and that he and plaintiff made an arrangement whereby Hinds was to sell the apples, and that plaintiff, who was sick at the time, instructed them to go to the station and order a car for him. Upon cross-examination of the station agent, the trial court would not permit him to state whether Miss Conway stated for whom she was ordering it. We think it was material and admissible for the purpose of showing that Miss Conway carried out the orders of the plaintiff. He had constituted her as his agent to order the car, and it was important to know whether she ordered it for him or for the defendant. It bore directly on the good faith of the claim plaintiffs were making that they sold the apples outright to defendant.

5. The question is raised that the claimed agreement between plaintiffs and the defendant was void because within the statute of frauds. This point is not well taken because the contract from plaintiffs' standpoint was an executed one.

Many other errors are assigned. They have been examined, but we do not find any reversible error in them.

For the errors pointed out, the judgment must be reversed and a new trial granted. Defendant will recover its costs of this court.

FELLOWS, J. [2] I do not agree with Justice BIRD that this case should be reversed. Taking up first the question considered under the second heading of his opinion, involving the rejection of the testimony of Mr. Doyle: The record does not disclose that the contract, if made as claimed by plaintiff, was ultra vires of the corporation. Mr. Justice BIRD so concludes in what he says under 1, and in this I agree. The question of ultra vires was not in my judgment involved in the case. The issue was single and was squarely this: "Did defendant purchase plaintiffs' apples?" Such being the issue, it was unimportant and a collateral matter whether defendant purchased apples of Mr. Doyle or any one else, or whether it had ever made such a contract as is here involved before or since the transaction in

question. Plaintiff was not asked in his original examination whether he knew of the purchase of fruit outright from nonmembers of the exchange. It was only after a grueling cross-examination by defendant's counsel that plaintiff's counsel on redirect examination asked him about this and then for the purpose of clearing up the cross-examination. Defendant's counsel again took him up on further cross-examination and asked him to name one person, and he named Mr. Doyle. This was purely a collateral matter, and counsel was bound by his answer. *People v. Williams*, 159 Mich. 518, 124 N. W. 555; *People v. Lipszinska*, 212 Mich. 484, 180 N. W. 617.

[3, 4] I do not construe the by-law quoted by my Brother as affecting in any way the dealings of the company or its right to deal with outsiders. This was a by-law adopted for the regulation of its members and no doubt they were bound by it. But plaintiff was not a member. Such fruit as was sold by the association for its members was to be packed in the company's warehouse, but I do not think this prohibited the company from buying apples packed or unpacked. But be that as it may, my Brother places his opinion on the basis that it was proper to prove the by-law first and then introduce evidence showing that it was brought home to plaintiff. One difficulty I find in following my Brother in this is that Miss Conway did not claim that she showed plaintiff Harley this by-law; in fact, she says she did not. What she claimed was that she told him the by-laws would not permit them to handle fruit through the exchange that was packed in the orchards. Plaintiff denied that she told him any such thing. The trial judge accepted the construction of the by-laws contended for by defendant's counsel—that it prohibited the purchase of fruit from outsiders as this transaction was conducted—and charged the jury that if Miss Conway did so inform the plaintiff he could not recover. This was repeated several times during the charge, from which I now quote:

"And if you find from the evidence in this case that the witness Miss Conway called the attention of the plaintiff Harley, in their negotiations at the time these apples were purchased, and informed him at said time that she could not purchase his apples if packed by him, under the rules of the corporation, then I charge you that plaintiff had notice of such authority and he could not recover in this case.

"You will remember that it is the claim of Miss Conway that she told him she could under no circumstances purchase apples that were packed outside of their packing house, and unless they went through their packing house. It is the claim of the plaintiff that no such talk was had at all and that he had no knowledge of that fact. Now, if you find that she did say that to him, then, under the law, he would

be placed on his guard to know exactly what her authority was; and in this case the court charges you that if she did inform him of that fact the plaintiff cannot recover."

The charge was much more favorable to defendant than it was entitled to. The jury by their verdict has found that plaintiff did not have notice or knowledge of the by-law. It was therefore under these circumstances unimportant that its exact language was not read to the jury. The substance of it was testified to. And all that Miss Conway claimed was that she told plaintiff Harley what its substance was. This he denied, and the jury believed him. It is therefore unimportant what construction should be put upon it.

[5] Defendant sought to prove a conversation between the station agent and Miss Conway which took place when neither of the plaintiffs was present and offered to prove what Miss Conway then told the agent in the absence of plaintiffs. This was a self-serving statement, hearsay pure and simple, and the trial judge did not err in excluding it.

I am unable to find any reversible error in the case. I think the judgment should be affirmed.

STEERE, C. J., and MOORE, WIEST, STONE, CLARK, and SHARPE, JJ., concurred with FELLOWS, J.

MULKINS v. MULKINS. (No. 35.)

(Supreme Court of Michigan. Oct. 8, 1921.)

1. *Divorce* §27(8)—Evidence insufficient to show husband charged wife with immoral conduct.

In wife's action for divorce on ground of cruelty, her testimony that husband, angry at her dancing with other men, told her that "he wasn't going to be second, * * * and said I was out of my place and doing things I should not do," held insufficient to show that husband charged wife with immoral conduct.

2. *Divorce* §130—Evidence held not to prove cruelty of husband.

In wife's action evidence held insufficient to prove cruelty on part of husband as ground for divorce. .

Appeal from Circuit Court, Ingham County, in Chancery; Charles B. Collingwood, Judge.

Suit by Flossie B. Mulkins against Jesse Mulkins for divorce. Bill dismissed and plaintiff appeals. Affirmed.

Argued before STEERE, C. J. and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Jason E. Nichols, of Lansing, for appellant.
Cummins & Nichols, of Lansing, for appellee.

STEERE, C. J. As grounds for divorce plaintiff charges in her bill of complaint that during their married life defendant was guilty of repeated and extreme cruelty to her directly and also by consorting with lewd women. Upon the hearing she offered no evidence to sustain the latter charge, which was manifestly abandoned. No acts of personal violence are charged or claimed.

Defendant's answer makes direct denial of all her charges of misconduct, with no recriminating allegations, and asks dismissal of her bill of complaint.

The case was heard in the Ingham county circuit court in chancery on pleadings and proofs taken in open court, resulting in denial of divorce and dismissal of plaintiff's bill. She urges on appeal that her evidence establishing the essential facts of repeated and extreme cruelty is unimpeached and practically undisputed, which entitled her of legal right to the relief asked, and the trial court erred in arbitrarily ignoring the same.

The parties to this suit were married in the city of Mason, Ingham county, on June 1, 1910. Plaintiff was then about 18 years of age, and defendant six years older. No special disparity is shown in their condition in life, educational attainments, or social rank. He was a laboring man, a tenant farmer in the vicinity of Mason, where she lived with her mother, who was a widow with seven children in indicated modest circumstances. Their married life while together was spent on farms near Mason which he worked as a tenant, the last four years upon the so-called Alfred Clark farm, from where she left him on March 12, 1920.

In the communities where they lived together and were known they apparently acquired a respectable standing. None of their former neighbors criticized their characters or domestic relations, or spoke ill of them. They are shown to have participated in the social events of their communities, especially dances, which, as plaintiff tells it, seem to have particularly furnished the forum for defendant's acts of extreme cruelty.

Defendant is shown to have been a hard-working farmer attentive to his home and business, who provided well for his wife according to their circumstances. Aside from the charges of abusive language and imputations of infidelity, which he denies, plaintiff testifies to no grievance of significance against her husband. On cross-examination she replied;

"I have no positive evidence he was with other women. Mr. Mulkins has worked hard; so far as I know, he has been attentive to business. He supported me as well as most tenant farmers support their wives."

Alfred Clark, an apparently disinterested witness who owned the farm upon which they spent the last 4 years of their married life together, and who spoke kindly of both, stated he was at their home and around the premises considerably while they were there; that plaintiff at first had a horse and buggy and later an automobile to drive, and they had a "comfortable home as renters"; told of defendant cheerfully leaving his work at fixing fence a half mile from home to hitch up the horse for his wife; noted that she seemed to be away from home "quite a lot," but he could not say how much; regarded defendant as an industrious, hard-working man, and thought he treated his wife "well as any man."

Plaintiff's grounds of divorce, which she stated strongest in general terms without specifications, can perhaps best be outlined in her own language at commencement of her direct examination as follows:

"He was always accusing me of things I was not guilty of. I took it he was jealous. He said he was not, but I never went to town or anywhere but what I was accused of doing something wrong. He kept up those groundless accusations until our final separation. He was that way all through our married life. It was never one person, but every man that looked at me. He was always thinking of something wrong. He never had any occasion for accusing me wrongfully as he did do."

As the law is not satisfied with generalizations, evidence of specific facts and circumstances was essential to establish her case, and she was particularly interrogated along that line by her own and defendant's counsel. While most ready with her accusing generalizations, she was able to recall and relate but three claimed instances of extreme cruelty during the ten years they lived together, two of which are charged in her bill of complaint, and called by her "about the two worst occasions." Both took place, over two years before she left her husband, at dances which they attended, one in the Onondaga town hall and one at Tompkins Center. Defendant denies her version of those events, as to which she has the burden of proof, but, even as she tells them, his language, while reprehensible, does not accuse her of any act of immorality.

[1] They went to the Onondaga dance with her aunt and uncle. His charged extreme cruelty on that occasion arose over her not waiting his return from getting shaved to give him the customary first dance due to an escort, and he found her dancing with others when he arrived. He was displeased about it, and admittedly belittled himself by his angry reproaches. She testified he swore aloud at her in the presence of others who heard him, including her uncle and aunt. None of them gave evidence to support this charge. He admitted the incident, but denied

swearing at his wife; said he "was mad about it and told her I wouldn't play second fiddle to anybody." Asked to repeat what he said that night, she replied:

"Well, he said he wasn't going to be second and cursed and swore at me. * * * He swore at me and said I was out of my place and doing things I should not do."

What he said, as she related it, did not charge her with any immoral conduct. Taken at its worst, his profane and foolish outburst over her ignoring his claimed prerogative soon blew over and was apparently not then regarded by either as of serious significance. He soon dropped the subject and participated with her and others in the festivities of the dance until it was over, so far as disclosed. They thereafter lived and went to dances together as before for two years or more.

The Tompkins dance incident was a similar manifestation by him of silly irritation with an indicated jealous impulse over the attentions shown his wife by two young men he had not met, who were introduced to her by friends and danced with her. His vulgar reflections to her on their conduct as she tells them were reprehensible in the extreme, but were directed against them and did not charge her with any infidelity or improper conduct, or even with relegating him to second fiddle.

The third and last specific act of extreme cruelty while they lived together which she relates as the culminating affront shortly before she left him involved his treatment of her in the presence of her mother. They at that time had an automobile, which she drove, and was away with it during the day. She tells the story as follows:

"He was drawing beans for Mr. Weaver. He told me to call for him at Weaver's about 5 o'clock. So I took the machine and took Mrs. Weaver down to Mother's, in Mason, then got back to Weaver's a little after 5, and he comes out to the machine. We had the curtains on, and he didn't know Mother was in there on the back seat, and he says, 'Where in hell have you been roaming around all the afternoon? I thought you would be here after me,' and those were his words, and I was innocent of wrong."

Defendant does not deny this charge, but seeks to excuse the incivility on the ground he was annoyed by the long wait and did not know his mother-in-law was there, to whom he attempted to excuse himself. The mother-in-law said his remarks made her feel bad, as she thought he was mad because she was there, but he did not see her when he said it; that then she cried, and when he saw her he said, "Don't feel hard, because I didn't mean it."

Defendant appears to have been on friendly terms with his mother-in-law, who speaks kindly of him, but gives a tragic account of

how he "lost his head" in one of his frantic efforts to get his wife back after she left him, in part as follows:

"He went to Jackson to work, and he came back and kept begging Flossie to live with him. When she told him she would not live with him, he stooped down to his suit case and opened it and took out a razor, and she jumped and grabbed him. She says, 'For God's sake don't do that!' And I says, 'Jesse, if you are going to take your own life or ours, for God's sake don't do it in my house.' She grabbed the razor and dropped it into an open drawer and ran out doors for fear he would attempt his life. We got her back in the house, and he went into all shapes you can imagine. She was frightened, and he would call us, and threw himself in all shapes you ever saw, and showed himself, and then I says, 'Jesse, help me; help me to get this girl up before she dies.' And he took her in his arms and helped me to bring her to. Then I says, 'What were you going to do with that razor?' And he says, 'My God, Mother, I have lost my head; what will I do? I have lost my head.' That is just what he said to me, and he knows he did it, and I didn't know what to do. I never saw—Jesse never got out of temper, never misused her in the world but once outside this occurrence, and that was the time she was telling you what took place in the automobile."

From this it appears that plaintiff's own mother when called by her as a witness against defendant gives him a clean sheet for conjugal kindness to her daughter during the ten years they lived together with the one exception of getting mad and scolding her in rather ungentlemanly language because she kept him waiting for her at a neighbor's after his day's work longer than he liked. The significance of her narrative of his losing his head in an ill-starred theatrical demonstration with a razor when his wife refused his appeal for her to return and live with him again rests in the fact she is not shown to have been alarmed for her own safety, but "ran out of doors for fear he would attempt his life," after dropping the razor into a conveniently open drawer readily available to him had he really meant business with it; but he promptly acceded to his mother-in-law's request to refrain from killing himself or anybody else in her house, helped her get his wife back into the house, and in response to further appeal "took her in his arms and helped bring her to," instead of helping her to widowhood, according to his original program, as his demonstrations had led her to anticipate. Though perhaps disappointing, his conduct on that occasion cannot be legally classed as extreme cruelty.

[2] Aside from her story of these specific instances before she left him, and another coarse demonstration of anger and jealousy at a dance after she had refused to live with him and then excused herself from accepting his request for a dance, in which his profanity was directed against a man with whom

he thought she danced too often, her case rests on her sweeping generalities. No testimony is given by other witness legally approximating acts of extreme cruelty by him, and there is testimony by other witnesses that he was indulgent, used her well, and was especially attentive and kind to her when sick.

Other matters in the case from which it is claimed inferences may be drawn and motives inferred need not be discussed. The learned circuit judge who originally heard the case had these parties and their witnesses before him with direct opportunity to see and hear them, observe their manner of testifying, apparent candor or lack of candor, and other possible aiding incidents to correct conclusions from oral testimony not always apparent from the printed page. A careful review of this record leads us to like conclusions, and we find no occasion to disturb the decision appealed from.

The decree dismissing plaintiff's bill of complaint is affirmed, without costs.

PANGBURN v. SIFFORD et al. (No. 94.)

(Supreme Court of Michigan, Oct. 7, 1921.)

1. Contracts §31—Writing not necessary, unless required by positive law.

When the minds of the parties have met, when an offer has been made by one and accepted by the other, a contract is entered into, and unless required by some positive law it need not be reduced to writing, to be binding on the parties.

2. Frauds, statute of §115(4) — Purchaser need not sign memorandum of sale, where obligation simply to pay price.

Under Comp. Laws 1915, § 11977, where the purchaser's obligation is simply to pay the purchase price, the memorandum of a sale, to bind the parties, need not be signed by him.

3. Vendor and purchaser §187—Provision for forfeiture of part payment on failure to pay balance held waived.

A provision in a memorandum of sale of land for a forfeiture of a down payment if the balance be not paid within 30 days, although usual in all land contracts, is rarely enforced, unless the contract itself makes time the essence thereof, and was waived by a vendor, where, with his knowledge, his agent, on being advised that vendee was ready to close the deal, fixed a day after period of time provided had expired to do so.

Bird, J., dissenting.

Appeal from Circuit Court, Cass County, in Chancery; L. Burget Des Voignes, Judge.

Action by John L. Pangburn against Floyd Sifford and another. Decree for plaintiff, and defendants appeal. Modified and affirmed.

Argued before STEERE, C. J., and MOORE, WREST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

James H. Kinnane and E. Bruce Laing, both of Dowagiac, for appellants.

Hendryx & Mosier, of Dowagiac, for appellee.

SHARPE, J. [1] Agreements, unless arrived at by correspondence, are the result of oral negotiations. When the minds of the parties have met, when an offer has been made by one and accepted by the other, a contract is thereby entered into. Unless required by some positive law, it need not be reduced to writing in order to be binding upon the parties.

Defendants, through Davidson, their authorized agent, offered to sell the property in question to plaintiff for \$2,500, with a down payment of \$25 and balance within 30 days. Plaintiff, after examining the premises, accepted this offer and paid the \$25 to Davidson. All the essentials of a contract were agreed to. As thus made, however, it is declared by our statute of frauds (3 Comp. Laws 1915, § 11977) to be void "unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the * * * sale is to be made." To comply with this requirement, Davidson prepared the memorandum in question and the defendants signed it. On being so notified by Davidson, the plaintiff at once took steps to raise the money to make the additional payment. This fact was known to defendants, as the officers of the loan association visited the premises and made an appraisal thereof. Defendants were thus informed that plaintiff regarded the transaction as a binding contract of purchase and sale.

The defense rests on the claim that plaintiff, not having signed the memorandum or otherwise accepted it in writing, could not have been compelled to perform. In what way could he relieve himself from doing so? All that he promised to do was to pay money, and there is no law requiring such a promise to be in writing to be enforceable. The writing does not purport to be an offer to sell real estate, requiring acceptance by the purchaser. It is a memorandum of a sale theretofore made. It was prepared to meet the requirement of the statute. The contract, as evidenced by the writing, was not an option agreement. The \$25 was not paid to secure plaintiff the option to purchase at any time within thirty days; but, as stated in the memorandum, it was "a part payment on the property."

[2] In my opinion, a contract, binding upon both parties, was consummated and could be enforced by either party against the other. The confusion, if there be such, in the au-

thorities, arises from the failure to bear in mind that there is no statute on which plaintiff could rely as a defense to a suit brought to recover the balance of the purchase price in the event of a breach on his part. A different question would be presented if the memorandum provided that he should execute a mortgage back for a part of the purchase price, as an agreement on his part to do so would be within the requirement of the statute. The question is not a new one in this court. We have many times held that the omission of the vendee to sign the memorandum does not relieve him from liability to pay the balance of the purchase price. A review of these decisions seems justified.

In the early case of *Holland v. Hoyt*, 14 Mich. 238, the holding is well stated in the syllabus as follows:

"There is nothing in the statute of frauds which precludes recovery for the price of land actually conveyed, whether the agreement for the price is written or verbal."

In *Scott v. Bush*, 26 Mich. 420, 12 Am. Rep. 311, it is said:

"The law does not require the purchaser to sign the agreement, and he is liable, therefore, upon the written contract, though his own assent is verbal."

In *Burke v. Wilber*, 42 Mich. 327, 3 N. W. 861, the court said:

"The statute of frauds, as held in *Holland v. Hoyt*, 14 Mich. 238, does not require the agreement of a vendee to pay purchase money to be in writing."

In *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814, the court points out the distinction when the purchaser is required to do anything other than to make the payment of money. If a mortgage is to be given back as part of the purchase money, this could not be enforced, as it is within the statute, being an agreement relating to lands.

In *Mull v. Smith*, 132 Mich. 618, 94 N. W. 183, the defendant submitted the following written offer:

"Forty acres for \$650. Mortgage \$250. Leaves balance \$400. Will take cash \$375 for my interest in place."

Mull accepted this orally and paid \$100 down. Smith signed the following:

"I agree to give Mr. E. M. Mull a warranty deed of the Burns farm upon payment of \$275, subject to mortgage of \$250."

He also signed the following receipt:

"\$100.00.

"Received of E. M. Mull one hundred dollars to apply on payment of Burns farm."

Some time after Smith tendered Mull a deed and demanded payment of the \$275. Mull refused to pay, and, assuming that the

contract was void under the statute, sued to recover the \$100 paid by him. The court said:

"Our statute does not make all contracts for the sale of land void. It excepts those where the contract itself, or some note or memorandum thereof, is in writing and signed by the vendor. When the contract itself is in writing and signed by both parties, the writing is the contract. When the memorandum of the oral contract is in writing and signed by the vendor, it is not the contract, but a memorandum, which makes it binding upon him if accepted by the vendee. This is valid evidence of the contract. * * * Here, then, was a valid contract for the sale of land. Defendant is proven to have made it by his writings signed and delivered. The plaintiff is shown to be a party to it by oral proof of his acceptance of defendant's memoranda, and payment of \$100 upon it. He cannot recover the \$100 as money paid for his use."

This opinion is quoted from approvingly in the recent case of *Ogooshevitz v. Sampson*, 211 Mich. 180, 178 N. W. 642.

The syllabus in *Smith v. Mathis*, 174 Mich. 262, 140 N. W. 548, reads:

"Having accepted the memorandum signed by the vendor, the purchaser was bound by the instrument, even if he did not, as claimed by the vendor, sign the writing until a later date."

In *Bushman v. Faltis*, 184 Mich. 172, 150 N. W. 848, it was claimed that the instrument lacked mutuality and was unenforceable, because not signed or accepted in writing by the lessee. The court said:

"The failure of the lessee to sign this instrument, it is now conceded, is not material, and no point is made of it by the appellant. *Smith v. Mathis*, 174 Mich. 263, 140 N. W. 548; *Mull v. Smith*, 132 Mich. 618, 94 N. W. 183."

In *Walsh v. Oakman*, 199 Mich. 688, 165 N. W. 737, the memorandum was signed by the vendor alone. A \$200 down payment was made. The vendor filed a bill to have the contract declared invalid and the record thereof removed as a cloud on his title. One of the claims of plaintiff was thus stated:

"Plaintiff further claims that the said paper is merely an offer, which he revoked before it was accepted by said Oakman; that a check was given for the down payment, which was not legal tender, and therefore no payment on said land; that said paper does not satisfy the statute of frauds."

By cross-bill the vendee asked specific performance. It was held "that the contract, or memorandum thereof, was sufficient to constitute a good and valid contract," and specific performance was decreed.

In *Tattan v. Bryant*, 198 Mich. 515, 165 N. W. 778, cited by Mr. Justice BIRD as sustaining the claim that the agreement was an option contract, the memorandum was signed by both parties. No payment had been made thereon until after the vendor had

advised the vendee that "the deal is therefore declared off." The holding that the writing was but an option rested on the language employed therein. It was but an offer to sell on certain terms and conditions, and these had not been complied with at the time of the withdrawal of the offer by the vendor. As none of the above cases was in any way referred to, we apprehend that they were not considered applicable to the facts there presented.

The case of *Wilkinson v. Heavenrich*, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708, in my opinion, is in no way controlling. The action was for damages for breach of a contract of hiring. It was based on a memorandum signed by the defendants only, in which they agreed to pay plaintiff a stipulated wage for three years. As pointed out by Mr. Justice Stone in *Smith v. Mathis*, supra:

"The decision was based upon another section of the statute of frauds, which requires the writing to be signed by the parties to be charged therewith. We have sought to show that, in the case of the sale of real estate, the statute only requires the contract or memorandum to be signed by the vendor."

Hollingshead v. Morris, 172 Mich. 126, 137 N. W. 527, 41 L. R. A. (N. S.) 310, also relied on, was decided on facts entirely different from those here presented. The action was brought for damages for breach due to the vendor's refusal to convey. In the opinion, written by Mr. Justice Moore, it is said:

"There are four important facts that stand out unquestioned in this case: First, that the defendant had sold the property to Mr. Shapiro before Mr. Doying ever received any communication from defendant; second, that no written acceptance was shown to the defendant before he notified both Mr. Keyes and Mr. Hollingshead that he had sold the property; third, that no written acceptance was delivered to him or tendered to him before he revoked his offer to sell; fourth, no money was tendered to him, to apply on the contract, before he revoked his offer to sell."

In disposing of the case it was said:

"In the absence of any payment by Mr. Doying, or the delivery of any written acceptance signed by him, how can it be said Mr. Doying is bound to perform upon his part, so as to make the contract mutual?"

[3] The failure of the plaintiff to make the additional payment within the 30 days may well be said to have been due to the action of defendants' agent, Davidson, who, on being advised within such time that plaintiff was ready to close the deal, fixed Saturday, the day after such time had expired, to do so. He sent word to Mr. Sifford to come to his office at that time, and, when he did not appear, telephoned to his house and otherwise tried to find him. Mr. Sifford was down town, knew of the arrangement as made by Davidson, but did not go to his office. While

the writing provides for a forfeiture of the \$25 if the balance be not paid within the 30 days, such a provision is usual in all land contracts, but is rarely enforced unless the contract itself makes time the essence thereof. Performance within the time was waived by Davidson, defendants' agent, with Mr. Sifford's knowledge and apparent consent. The binding effect of such a waiver and the rule of law applying to such forfeitures are so fully considered by Mr. Justice Stone in the recent case of *Waller v. Lieberman*, 214 Mich. 428, 183 N. W. 235, that I do not further discuss them.

The conclusions reached by the trial court and the decree rendered, granting specific performance, were fully justified by the proofs.

The decree will be modified, by inserting the words "November 1, 1921," in the place of "ten days" in the provision for payment and delivery of deed, and, as thus modified, is affirmed, with costs to plaintiff.

STEERE, C. J., and CLARK, FELLOWS, MOORE, WIEST, and STONE, JJ., concurred with SHARPE, J.

BIRD, J. (dissenting). This bill was filed by plaintiff to compel defendants to convey to him a lot in the city of Dowagiac. The trial court made a decree enforcing the agreement of the parties, and defendants have appealed.

Defendants listed their house and lot with Davidson & Van Antwerp, real estate brokers, with instructions to sell the same for \$2,500. The offer coming to the attention of plaintiff, he looked the premises over and advised the brokers he would purchase it for that sum, and paid thereon \$25. Defendants gave him the following receipt:

"Dowagiac, Michigan, February 18, 1920.

"Received of J. C. Pangburn twenty-five (\$25.00) dollars as part payment on the property located at 205 Oak street, Dowagiac, Michigan, which I have this day sold to said Pangburn, through Davidson & Van Antwerp, brokers, for the sum of twenty-five hundred (\$2,500) dollars, we to furnish abstract of clear title and warranty deed within thirty (30) days. Said Pangburn is hereby receipted to for the above twenty-five (\$25) dollars as earnest money, and to apply on the said twenty-five hundred (\$2,500) dollars purchase; balance of twenty-four hundred and seventy-five (\$2,475) dollars to be paid on or before thirty (30) days, or, if not paid, this twenty-five (\$25) dollars to be forfeited. Possession to be given on or before March 20, 1920.

Marie Sifford.
"Floyd Sifford."

Following this the abstract was recertified and arrangements were made by plaintiff with a local building and loan association to secure a portion of the money. Plaintiff announced to the brokers, before the expiration of the 30 days, that he was ready to close the deal. The brokers fixed March 20th as

the date for executing the conveyance and notified defendants. Defendant Floyd Sifford went down street Saturday evening, March 20th, but did not go to the brokers' office. On Monday, March 22d, plaintiff claims a tender of \$2,475 was made by him and a deed demanded. Defendant Floyd Sifford replied that he could do no business with him. This suit was then begun to enforce the agreement. The hearing resulted in a decree granting the prayer of plaintiff's bill.

The position of plaintiff is that the parties made an oral agreement for the sale of the premises, and that the receipt subsequently made was written evidence of the agreement which satisfied the statute of frauds; that the deal was not closed within the 30 days, but plaintiff had announced his readiness to close it before the expiration of the 30 days; that Saturday evening was fixed by the brokers as a convenient time for defendant, as he was employed in the stove plant.

Defendants argue that the agreement was nothing more than an option given by defendants, that it was not accepted and paid for within the time specified in the agreement, and therefore no rights accrued to the plaintiff thereunder.

1. There is considerable discussion between counsel whether the agreement was a contract for the sale of the premises or an option. It is true there is more or less language made use of in the receipt, which is more suitable to a contract than to an option; but the real test by which it must be determined is whether both parties are bound by the agreement; whether there is a mutuality of contract. If defendants were obliged to sell and plaintiff to buy, then it is a contract. The receipt was not signed by plaintiff. Therefore we conclude that he could purchase the premises or not, as he saw fit. This makes the agreement a unilateral option contract. This is made plain by the recent case of Tattan v. Bryant, 198 Mich. 515, 165 N. W. 778.

2. The question then arises whether the unilateral contract ever became a bilateral contract. Plaintiff's testimony shows that he accepted the option orally, but is this enough to convert the option into a contract which would bind both parties? It appears to be settled in this state that, to convert an option for the purchase of real estate into a bilateral contract, one of two things must be done: Either the consideration must be paid, or a written acceptance must be made. This question is discussed at some length in 27 R. C. L. 327. It is there said in part:

"According to the view taken in some cases, where a general written offer to sell land is made, the acceptance of the offer, to render the contract binding on the vendor, must be either in writing, so as to render the purchaser subject under the statute of frauds to an action for its enforcement, or the acceptance must be accompanied with a tender of the pur-

chase money, where the terms of the offer require cash payment, as a mere promise, which cannot be enforced either at law or in equity, is not a sufficient consideration for the promise of the vendor to convey. In other cases, however, it is held that, unless the offer requires a written acceptance or the payment of the purchase money at the time of the acceptance, an oral acceptance is sufficient in so far as the liability of the vendor is concerned, especially if no objection to the form of the acceptance is made by the vendor."

This court has gone along with the first class mentioned in the foregoing, as will be seen by an examination of *Wilkinson v. Heavenrich*, 58 Mich. 574, 28 N. W. 139, 55 Am. Rep. 708. The variance on the question in the courts is mentioned by Mr. Justice Champlin, who wrote the opinion, and cases are cited by him supporting each rule. His conclusion is as follows:

"I shall not attempt a reconciliation, where reconciliation is impossible; but, as the question is new in this state, the court is left to adopt such view as appears to rest upon principle. It is a general principle in the law of contracts, but not without exception, that an agreement entered into between parties competent to contract, in order to be binding, must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. *Hopkins v. Logan*, 5 M. & W. 241; *Dorsey v. Packwood*, 12 How. (U. S.) 126; *Ewins v. Gordon*, 49 N. H. 444; *Hoddesdon Gas Co. v. Haselwood*, 6 C. B. (N. S.) 239; *Souch v. Strawbridge*, 2 M., G. & S. 808; *Callis v. Bothamly*, 7 Wkly. R. 87; *Sykes v. Dixon*, 9 Ad. & El. 693; *Addison on Contracts*, § 18; *Parsons on Contracts*, 449; *Utica, etc., R. Co. v. Brickerhoff*, 21 Wend. (N. Y.) 139 (34 Am. Dec. 220); *Lester v. Jewett*, 12 Barb. (N. Y.) 502."

In *Hollingshead v. Morris*, 172 Mich. 128, 137 N. W. 527, 41 L. R. A. (N. S.) 810, a 30-day option was given in writing by defendant Morris on certain Toledo real estate. The optionee, Doying, indorsed his acceptance in writing on the option, and the fact that he had done so was communicated to defendant Morris by telephone, but the written acceptance was never delivered to Morris, and he never saw it until after suit was begun. Morris replied to Doying that he had sold the property. Suit for specific performance was begun, and the question was raised whether the option had ever been legally accepted. It was held that no legal acceptance of the option had been made, because there was neither an acceptance in writing nor a payment of the consideration. The case of *Wilkinson v. Heavenrich*, *supra*, was cited and quoted from.

James, in his work on Options, discusses the question and notes the division of the state courts on the question. He places Mich-

igan among those states that hold that it is necessary to pay the consideration or accept the option in writing, and cites the cases of *Wilkinson v. Heavenrich*, supra; *Goodspeed v. Wiard Plow Co.*, 45 Mich. 322, 7 N. W. 902; *Solomon Mier Co. v. Hadden*, 148 Mich. 488, 111 N. W. 1040, 118 Am. St. Rep. 586, 12 Ann. Cas. 88. James on Option Contracts, § 415.

3. It is conceded in the instant case that no written acceptance of the option was made. It is claimed, however, that a tender was made of the consideration on March 22d. The circumstances of the tender were testified to by Mr. Davidson, as follows:

"Q. Up to that time you had never tendered any money? A. No, sir. Why, I told him there we were all ready, which we were—all ready. We had the money up there in the office.

"Q. Did you ever tender any money at any time? A. Yes, sir.

"Q. Did you ever exhibit any money? A. I did not lay it out and count it out to him.

"Q. Did you hold it up? A. I had a roll in my hands like that, and says, 'We are ready to settle with you.'

"Q. You had then the \$2475, did you? A. I had \$800 in money and the Loan Company's check for the balance of \$1,700.

"Q. From whom did you get the check? A. Mr. Bilderback.

"Q. It was not cashed? A. No, sir.

"Q. This was about Wednesday? A. I should think so.

"Q. When you came up there to make that tender, it was for the purpose of compelling Sifford to go through with the deal, wasn't it? A. Why, give him the opportunity, anyway."

This testimony falls short of showing a legal tender. It shows that Davidson had only \$800 in currency and had a check for the balance, and does not even show that the check was indorsed to the defendant. If plaintiff desired to make an effective tender, he should have tendered money, as that is the sole medium of payment (26 R. C. L. 636); the general rule being that, where a sum of money is to be paid, a tender by check, either simple or certified, is not a sufficient legal tender, the reason assigned therefor being that a check is not lawful money (*Hall v. Appel*, 67 Conn. 585, 35 Atl. 524; *Neal v. Finley*, 136 Ky. 346, 124 S. W. 348; *Collier v. White*, 67 Miss. 133, 6 South. 618; *Sharp v. Todd*, 38 N. J. Eq. 324).

We think the testimony as a whole falls to show that there was any consideration paid or that the option was accepted in writing. Under these circumstances, we must hold that there was no act upon the part of the plaintiff which converted the unilateral contract into a bilateral contract, and therefore, under the rule established in this state, the contract was not enforceable, because not mutually binding.

There is still the further question as to whether what was done was done within the

life of the option; but in view of our conclusion on the main question this becomes immaterial and will not be discussed.

The decree must be reversed, and the bill dismissed, with costs to the defendant.

CITY OF DETROIT v. DETROIT UNITED RY. (No. 21.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Street railroads ⇐28(2)—Ouster authorized on expiration of franchise.

The common council of Detroit under the charter of the city has power to exercise control over the use of its streets, and to direct institution of suit to oust a street railway company from the streets as to which its franchises from the city had expired.

2. Municipal corporations ⇐85—Direction by common council of suit to oust street railway administrative, and so properly by "resolution"; "ordinance."

Action by the city council of Detroit, amounting merely to a direction to the corporation counsel to institute suit to oust a street railway company from streets as to which its franchises had expired, is an exercise of administrative power, rather than of legislative power, no declaration by the council being necessary to terminate any rights, and so, under the city charter, need not be by "ordinance," a permanent continuing regulation, but is properly exercised by a "resolution," an act of a temporary character, not prescribing a permanent rule of government.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ordinance; Resolution.]

3. Municipal corporations ⇐116—Resolution for suit to oust railway not repealed by ordinance as to fares.

Resolution of Detroit common council, directing suit by corporation counsel to oust a street railway company from streets as to which its franchises had expired, was not repealed by ordinance adopted at same session fixing maximum car fares.

Appeal from Circuit Court, Wayne County, in Chancery; Harry J. Dingeman, Judge.

Suit by the City of Detroit against the Detroit United Railway to oust it from streets as to which its franchises had expired. From an order denying a motion to dismiss, defendant appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Donnelly, Hally, Lyster & Munro, of Detroit (Stevenson, Carpenter, Butzel & Backus and Hinton E. Spalding, all of Detroit, of counsel), for appellant.

Clarence E. Wilcox, Corp. Counsel, of Detroit, for appellee.

STONE, J. This case is in this court upon the appeal of the defendant from an order denying a motion to dismiss the case. After spending much time in the examination and consideration of the numerous provisions of the charter of the city of Detroit, the action of the council, and the authorities involved, we have reached the conclusion that the learned circuit judge made a proper disposition of the case. We here insert his opinion as follows:

"On July 30, 1918, the following resolution was introduced in the common council of the city of Detroit by Alderman Bradley:

"Resolved, that the corporation counsel be and is hereby instructed to institute proceedings forthwith for the purpose of securing judgment of ouster against the Detroit United Railway in all streets or parts of streets where its franchises have expired, in accordance with a decision of the Fort Street Case; and further,

"Resolved, that Richard I. Lawson, who successfully fought the Fort Street Case for the city of Detroit, be retained as special counsel for the city to prosecute the aforesaid legal proceedings."

"Referred to committee on public utilities.

"On August 6th, the committee on public utilities reported favorably on the resolution, excepting as to the employment of special counsel, which was left to the judgment of the corporation counsel. This report was unanimously adopted by the common council on August 6, 1918.

"On August 9th, at a special meeting, the following resolution was adopted by the common council:

"By Alderman Glinnan:

"Whereas, the street railway franchise of the Detroit United Railway, or its predecessor in title, and the right to operate street railways upon the following streets and portions of streets in the city of Detroit have expired by limitation: (Here follows description of streets the same as set forth in bill of complaint.)

"Whereas, the said Detroit United Railway, by reason of its continued occupancy of the streets of the city of Detroit, after the expiration of its franchises, has become, and is a trespasser, and it has thereby created, committed and continued a nuisance in the said streets of the city of Detroit, which may be abated at any time by the properly constituted legal authorities of said city, and if it continues to occupy and operate cars upon said streets upon which it has no rights or privileges, such occupancy and operation is by the sufferance of the city of Detroit, and subject to the legal impositions and restrictions of the city of Detroit by reason thereof:

"Now, therefore, be it resolved, and the common council of the city of Detroit especially declare, that all right and title on the part of the Detroit United Railway to such franchises and tracks maintained thereunder, in the said streets above mentioned wherein the franchises have terminated by limitation, are occupied and operated by the said Detroit United Railway by sufferance only, and without the express or implied consent of the city of Detroit.

"And it is further resolved, that the said city of Detroit, through its legally constituted officers, take immediate steps to terminate the

rights of the Detroit United Railway therein, and pending such action impose proper legal and reasonable restrictions and impositions upon the said Detroit United Railway by reason thereof.

"Be it further resolved, that the corporation counsel be instructed to take immediate steps to enforce the rights of the city of Detroit in regard to such streets, wherein such franchises have expired by limitation and repossess itself of the same."

"Immediately following the adoption of the last foregoing resolution the council adopted an ordinance commonly known as the 'Kronk Ordinance.' By this ordinance it was sought to fix and establish maximum rates of fare which could be charged by any one operating a street railway in Detroit, the fare being fixed at 5 cents, or six tickets for 25 cents, with universal transfers, and covered franchise as well as nonfranchise lines. It also provided for the sale and use of eight tickets for 25 cents during certain hours of the day, commonly known as workingmen's tickets. The validity of this ordinance was questioned by the filing of a bill seeking an injunction in the District Court of the United States for the Eastern District of Michigan. A demurrer was filed to the bill. The court upon the hearing denied the application for injunction and dismissed the bill of complaint. Upon review, the Supreme Court of the United States reversed the judgment of the District Court. In determining the matter upon review, the Supreme Court was bound to take the allegations of the bill as true, and held that these allegations, for the purpose of the demurrer, sufficiently alleged violation of the Constitution of the United States, by the passage and enforcement of the ordinance. It therefore ordered the District Court to hear the application for the temporary injunction, and to proceed to hearing and determination of the case upon the merits. On August 27, 1918, following the instructions contained in said resolutions of August 6 and August 9, the corporation counsel instituted the present suit, alleging that by reason of the expiration of franchises in the streets named, the right of the company to occupy same had ceased, but that the company continued to occupy the streets under the claim that the public convenience required it to continue its operation, and disputed the right of the city to control it.

"The case is now before the court on a motion to dismiss, and the questions presented were summarized on the argument as follows: (1) Has the common council power under the charter, to exercise control over the use of the streets of the city? (2) Should the authority of the present suit have been by ordinance, and not by resolution? (3) Was the resolution, if valid, repealed by the passage of the Kronk ordinance?

"1. Has the common council control over the use of the streets of the city? In other words, has the council control over who shall use or occupy the streets of the city? Section 28, article 8, of the Constitution provides: 'No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits without the consent of the duly constituted authorities of such city, village or town-

ship; nor to transact a local business therein, without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.'

"Section 12 (g), page 21, of the Revised Charter provides: 'To provide for the management and control of all property, including streets, alleys and other public places, belonging to the city, dedicated to its use, or under its jurisdiction; to make provision for its protection, preservation and improvement; and to authorize the construction of public buildings, buildings for public assemblages and necessary works of public improvement.'

"Section 1, page 139, Public Utilities: 'The common council shall have the general control of all persons, partnerships, associations or corporations operating within the city any public utility on, above or beneath the surface of the highways, streets, alleys and other public places for wires, poles, pipes, tracks or conduits.'

"A general right to control would include the right to control the use, and under the provisions quoted, the local authorities may control within reason, the use of their streets for any purpose whatsoever, not inconsistent with the state law. Such a right probably exists under the police power without any express authorization. *People v. McGraw*, 184 Mich. 233, 150 N. W. 836; *Brennan v. Recorder of Detroit*, 207 Mich. 35, 173 N. W. 511; *People v. D. U. R.*, 207 Mich. 143, 173 N. W. 396.

"2. Was the authority to institute this suit required to be expressed by an ordinance rather than by resolution? The answer turns upon the question whether the substance of the resolution was legislative or administrative in its character. Under the decision of the Supreme Court of the state of Michigan, in the so-called Fort Street Case (*Detroit v. Detroit United Ry.*) 172 Mich. 136, 137 N. W. 645, the court found that the Detroit United Railway was a continuing trespasser in the street where its franchise has expired. This case was reviewed and affirmed by the Supreme Court of the United States. 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056. I do not believe any official declaration of the common council was necessary to terminate the claimed rights of the Detroit United Railway upon these lines where its franchise expired. It was only necessary to institute proper judicial proceedings for the purpose of securing a removal from the streets of the property of the company. In other words, it was only necessary that the council direct the performance of an administrative act by an administrative official, namely, the corporation counsel, and this certainly could be done by resolution. *Common Council v. Engel*, 207 Mich. 106, 173 N. W. 547. The resolution passed by the council is, in my judgment, nothing more or less than a recital of the past expiration of franchise rights. I think the language of the resolution should be interpreted as merely a recital of past occurrences and the existing conditions, rather than as an affirmative declaration of the council terminating a then existing right. If it is so construed, the resolution is nothing more or less than a direction to the corporation counsel to institute necessary judicial proceedings on behalf of the city.

"3. Did the Kronk ordinance rescind the resolutions of August 6th and August 9th? No provision in the ordinance expresses any intention of repealing or rescinding the resolutions. Any such result would have to follow as a matter of implication. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. *City of Detroit v. Detroit United Railway*, 172 Mich. 153, 137 N. W. 645. There is serious doubt whether the Kronk ordinance is valid, in view of the cases of *city of Kalamazoo v. Circuit Judge*, 200 Mich. 146, 166 N. W. 998; *Traverse City v. Railroad Commission*, 202 Mich. 575, 168 N. W. 481, and *City of Kalamazoo v. Titus*, 208 Mich. 252, 175 N. W. 480. Whether the ordinance be valid or invalid, the answer to the question presented, it seems to me, resolves itself into one of intent. What was the intention of the legislative body in adopting the resolutions of August 6th and August 9th, the latter being immediately followed by the Kronk ordinance? The resolution of August 9th, which is controlling in so far as it modifies the earlier one of August 6th, clearly shows the intention of the council to have been that steps be taken to terminate defendant's rights in the streets where the franchises had expired, 'and pending such action' that proper legal and reasonable restrictions and impositions be imposed. This resolution was immediately followed by the enactment of the Kronk ordinance, by which it was sought to impose restrictions in the use of the streets by fixing the maximum rate of fare, etc. The council had the right to assume that a year or more would probably elapse before such ouster proceedings, if begun immediately, could be heard and finally terminated in the courts, and it extended to the railway company, whose rights in the streets had expired, the privilege of remaining there and operating its railway system, pending such determination of the contemplated proceedings, upon the terms prescribed by the ordinance. There is nothing inconsistent in the position taken by the council in this respect. It is true that the language of the United States Supreme Court, in the case of *Detroit United Railway v. City of Detroit*, 248 U. S. 429, 39 Sup. Ct. 151, 63 L. Ed. 841, would indicate that the passage of the Kronk ordinance was a new grant of power to the defendant to occupy the streets and operate its railway system. It must be borne in mind, however, that the only question before that court was whether the ordinance violated the federal Constitution. The United States Supreme Court did not have before it the resolution of August 9th, which indicates that it was intended by the council that whatever rights were conferred by the adoption of the Kronk ordinance should continue pending the determination of the ouster proceedings. The motion to dismiss is denied."

[1] 1. But little need be said further upon the first proposition. In our opinion the question presented is fully answered in the so-called Fort Street opinion (172 Mich. at page 158, 137 N. W. 654):

"The conclusion to be drawn from our determination of the different propositions discussed is that the contractual relations between these parties ended upon the expiration of the franchises, and all rights in the defendant company to occupy the city streets, and maintain and

(184 N.W.)

operate a street railway thereon, then terminated, and defendant thereafter became a trespasser; that complainant has the absolute and unquestioned right at any time to compel the defendant company to vacate the streets upon which these franchises have expired, and to require it to remove its property therefrom within a reasonable time, and, if necessary for that purpose, to enforce its rights by a writ of assistance from this court."

[2] 2. Was the procedure by resolution in accordance with the requirements of the charter? Under section 11 (page 20 of the Revised Charter) it is provided that the powers and duties of the council shall be both legislative and administrative in character. Under section 17, page 24, it is provided that:

"All matters of legislation shall be presented, considered and enacted by the council in the form of ordinances."

Section 10 of chapter 2 of the same title permits the electors of the city to force to a popular vote substantially any ordinance passed by the common council. It is this right of referendum that defendant claims it should have the right to invoke, which does not apply to a resolution. Section 12, at page 20, provides that the legislative powers and duties of the council shall be as follows:

"(g) To provide for the management and control of all property, including streets, alleys and other public places, belonging to the city, dedicated to its use, or under its jurisdiction; to make provision for its protection, preservation, and improvement; and to authorize the construction of public buildings, buildings for public assemblages and necessary works of public improvement."

This section contains subdivisions from the letter (a) to the letter (t), and is followed by this language:

"Administrative Powers.

"Sec. 13. The administrative powers and duties of the council shall be as follows:

"(a) To confirm assessment rolls and to sit as a board of review to hear and determine appeals from assessments;

"(b) To approve all contracts to which the city or any board or commission thereof is party, except as herein otherwise provided, all bonds given to insure the faithful performance of any work for the city, and all annual reports of city officers and departments made to the council as herein required;

"(c) To audit and allow or reject claims and accounts against the city, except as herein otherwise provided; and

"(d) To have such other administrative powers and perform such other administrative duties, as are prescribed by law or this charter."

From the foregoing it does not follow that every act of the council is legislation. Many of the duties enumerated are clearly administrative in nature and do not require ordinances to accomplish the results required.

This fact is recognized in section 18 (page 24), where it is provided that:

"Every ordinance and every resolution or proceeding of the council except such resolutions and proceedings as relate to the matters set forth in paragraphs (a), (b), and (c) of section 12, shall be presented to the mayor for approval."

In section 12, subdivision (g), one of the enumerated legislative powers is exercised by resolution. Paragraph (e), relative to budget, is wholly administrative (although classed as a legislative duty), and could not be affected by ordinance. *Detroit Common Council v. Engel*, supra. Many other matters which involve control of streets, etc., are administrative, and have always been properly accomplished by the adoption of a resolution. *Mannel v. Detroit, etc., Railway*, 139 Mich. 106, 102 N. W. 633.

The status of defendant with reference to the streets where its franchise had expired was fixed. Its relation was as defined in the *Fort Street Case*. No declaration of the council was necessary to terminate any rights. The resolutions of the council were administrative in character, and were merely a direction to its legal department to institute a lawsuit. They were, in our opinion, no more legislative in character than any instruction by the council to start suit to recover unpaid taxes, or any form of debt owing to the corporation, or any other kind of a legal proceeding. An ordinance has been defined to be a permanent continuing regulation, while a resolution is an act of a temporary character, not prescribing a permanent rule of government. See 28 Cyc. 848, and note 2.

[3] 3. It should be stated that the Kronk ordinance was adopted at the same session of the council that passed the resolution of August 9th. They are not in conflict, and should be considered together. In the case of *Detroit United Railway v. City of Detroit*, 248 U. S. 429, 39 Sup. Ct. 151, 63 L. Ed. 341, the ordinance was attacked on two grounds: (1) That it impaired the obligation of the company's existing contracts. (2). That it was confiscatory, and hence deprived the company of property without due process of law. The opinion of the court concluded as follows:

"In our view, the allegations of the bill, for the purposes of the demurrer sufficiently alleged violations of the Constitution of the United States, in the action of the city, in passing and enforcing the ordinance in controversy. The District Court should have entertained the bill, heard the application for temporary injunction, and proceeded to a hearing and determination of the case, in due course."

The case was reversed and remanded. What the result may be upon the hearing does not appear. That may be an additional

reason why this case should be heard upon its merits.

An answer to the argument of defendant's counsel that under the above Kronk ordinance decision, and the Denver Water Case, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, new rights were given (which would be inconsistent with an intent to oust the company), is found in the more recent decision of the United States Supreme Court in the Municipal Railway Election Case (Detroit United Railway v. City of Detroit), decided February 28, 1921, and reported in 255 U. S. 171, 41 Sup. Ct. 285, 65 L. Ed. —. In that case Mr. Justice Day, speaking for the court, said:

"Rights to remain in the streets are also claimed under the so-called Kronk ordinance, which was before this court in Detroit United Railway v. Detroit, 248 U. S. 429, 39 Sup. Ct. 151, 63 L. Ed. 341, in which this court, while reaffirming the principles laid down in Detroit United Railway Co. v. Detroit, supra, found that the city had not up to that time availed itself of the right to compel the removal of the tracks in streets where the company had no franchise, but had passed an ordinance looking to the continued operation by the company of the street railway system for a limited period, and that while it acted under this ordinance there was the equivalent of a grant to operate during its life, entitling it to a fair return, that the ordinance by its express terms provided for its amendment or repeal, and that, unless amended or repealed, it should remain in force for the period of one year. We do not perceive how that ordinance can now give rights to the company in the streets where the franchises have expired."

In our opinion the motion to dismiss was properly denied, and the order denying the motion is affirmed, with costs to the plaintiff.

WOOD v. VROMAN. (No. 84.)*

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Appeal and error §927(7)—Proofs viewed most favorably to plaintiff on defendant's motion for directed verdict.

In ascertaining whether the court should have directed a verdict for the defendant, the Supreme Court must consider the proofs submitted in the light most favorable to plaintiff's claim.

2. Physicians and surgeons §18(9)—Whether physician was negligent held for jury.

In action against physician for malpractice, the question of whether the loss of plaintiff's eye was due to the action of the defendant in wiping pus from ulcer on lower lid of eye across that part of the eye from which steel had been removed, leaving open sore, and as to whether such action was malpractice, held for the jury.

3. Physicians and surgeons §18(9)—Identity of pus analyzed as that coming from plaintiff's eye held for the jury.

In action for malpractice, in which it was claimed that defendant physician was negligent in wiping pus from ulcer on plaintiff's lower eyelid across open sore on eyeball in which a witness testified to having made an analysis of pus claimed to have come from plaintiff's eye, the question of the identity of the pus analyzed as that which had come from plaintiff's eye held for the jury.

4. Physicians and surgeons §18(9)—Degree of proof required to submit malpractice to jury.

In action for malpractice, plaintiff was not required in order to have case submitted to jury to prove malpractice to an absolute certainty, but was required merely to establish the facts from which such an inference might fairly have been drawn by the jury.

5. Master and servant §354—Compensated employee not estopped to sue physician for malpractice.

Employee was not estopped by reason of recovery of compensation from employer, on theory that loss of eye was caused by injury received while at work, from recovering damages from physician for loss of eye, on theory that loss was due to malpractice, and was not the resultant injury of accident received during employment, and therefore was not an injury for which he was entitled to compensation, under Comp. Laws 1915, § 5468.

6. Master and servant §373—Compensable injury by malpractice defined.

To render employer liable under Compensation Act for malpractice of physician, the injury must result from the necessary efforts to relieve from the consequences of the original injury received during employment.

7. Damages §59—Compensation paid patient by employer not considered in awarding damages for malpractice.

In action against physician for loss of eye caused by physician wiping pus from ulcer on lower eyelid across sore on eyeball from which a piece of steel which had been blown in eye during employment had been removed, the jury, in awarding damages, could not consider compensation awarded plaintiff by his employer on theory that loss of eye was due to the piece of steel which had blown in eye.

8. Damages §59—Physician cannot relieve himself from liability for malpractice by showing patient has received compensation from source other than joint tort-feasor.

Physician guilty of malpractice cannot relieve himself from liability by showing that the patient has received compensation from any other source except through payment by joint tort-feasor.

9. Evidence §547—Testimony as to treatment expert witness would have used inadmissible.

In action for malpractice against a specialist, another specialist who had testified that he might have used the same solution used by defendant in treatment of plaintiff's eye, with

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes
*Rehearing denied December 22, 1921.

additional treatment, might have been asked whether such treatment evidenced the degree of skill and knowledge possessed by specialists in that line in the light of present scientific knowledge, but might not be asked as to what additional treatment he would have used.

10. Physicians and surgeons $\Leftrightarrow$ 14(4)—Physician required to use same degree of skill and knowledge as is possessed by other specialists.

A physician holding himself out as an eye specialist was obligated to use that degree of skill and knowledge possessed by other specialists in the light of the present day scientific knowledge.

11. Physicians and surgeons $\Leftrightarrow$ 18(10)—Refusal to charge that injury must have been caused by negligence charged held error.

In action for malpractice, refusal to instruct jury that plaintiff was required to prove that the injury resulted from the negligence charged held error.

12. Evidence $\Leftrightarrow$ 265(9)—Affidavit by employee seeking compensation persuasive evidence of cause of injury in action for malpractice.

In action for loss of eye, claimed to have resulted from negligence of defendant physician in wiping pus from ulcer in eyelid across open sore in eyeball from which piece of steel had been extracted, an affidavit made by the patient in claiming compensation from the employer held persuasive evidence as an admission on his part as to the cause of the injury, though not conclusive.

Error to Circuit Court, St. Clair County; Harvey Tappan, Judge.

Action by Peter M. Wood against Mason E. Vroman. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

Moore & Wilson and Lincoln Avery, all of Port Huron, and Lodge & Brown, of Detroit, for appellants.

John B. McIlwain, of Port Huron, for appellee.

SHARPE, J. The plaintiff in 1916 was an employee in an automobile repair shop operated by Beard, Campbell & Co. at Port Huron. He had at that time but little sight in his left eye, owing to an injury theretofore received. On July 31st, while testing ignition, some particles of dust and a piece of steel were blown into his right eye. He tried to remove them with a handkerchief he carried in the hip pocket of his one-piece suit, but did not wholly succeed. A similar, but unsuccessful, effort was made by a fellow workman named McLeod. Plaintiff testified that no tears formed in his eye as a result thereof, just a scratching sensation; "it did not bother me to speak of at all; didn't pain nor cause any tears to come to speak of. no

tears running out of my eyes or down my cheeks; I had no idea there was anything wrong with my eye that afternoon; I didn't know there was anything in my eye; I didn't know what made it scratch though."

About five hours after he went to see Dr. Fraser, an eye specialist, but did not find him in his office. He had his eye examined by Dr. Heavenrich, a general practitioner, who officed with Dr. Fraser. It is plaintiff's claim that Dr. Heavenrich told him he could see nothing in the eye, but gave him a wash to use therein. Plaintiff testified: "The next morning when I went to Dr. Vroman's office I was not suffering pain only just the scratching when I closed my lids." He further testified that Dr. Vroman, after looking in his eye, said he could "see it," and, with a small instrument, at once removed a particle of steel; that the scratching sensation was then gone; that the doctor then said to him, "You have a bad ulcer there on your eyelid; I guess I better open that;" that he did so, and, after rolling some absorbent cotton "into a little lead pencil like shape," wiped it across his eye, thus putting the pus from the ulcer into that part of the eye from which the steel had been removed; that this caused him great pain, which continued after he went home, and resulted in the ultimate loss of the eye a few months thereafter. The defendant denies that he found or opened an ulcer on plaintiff's eyelid, and insists that the loss of plaintiff's eye was due to the infection carried into it by the particles of dust and steel or that reached it from the hands or handkerchiefs of the plaintiff or his fellow workmen in their efforts at removal.

The full proceedings relative to the payments received by plaintiff from the insurance company by whom his employer was protected are not in the record, but it appears that he has been paid \$900 on account of his injury, and a tender was made to him of \$10. making full payment of compensation, at the rate agreed upon of \$10 per week, for the loss of an eye. In a receipt dated September 21, 1916, plaintiff acknowledged receipt of \$10 "on account of injuries suffered by me, on or about the 31st day of July, 1916, while in the employment of said employer."

The record also contains a compensation agreement entered into between plaintiff and the Travelers' Insurance Company, under which plaintiff was to receive compensation "at the rate of \$10 per week during the period of disability," the injury being described thus:

"While employed in his usual duties, injured received several pieces of steel in the right eye causing severe inflammation and irritation of the right eye."

After receiving \$900 and refusing to accept a further proffered payment of \$10, plaintiff

began this suit against Dr. Vroman, claiming damages for his unskillful conduct in wiping the pus from the ulcer over the "fresh wound" in his eye, thereby infecting it and causing the blindness which followed. This suit was begun on July 29, 1918, three days before the right of action therefor would have been barred by the statute of limitations.

On October 23, 1918, nearly three months thereafter, the plaintiff wrote the following letter:

"To the Industrial Accident Board, Lansing, Mich.—Gentlemen: In my own behalf I beg to offer as evidence in the closing of my case, *Peter M. Wood v. Beard, Campbell & Co.*, the deposition of myself as taken by Ben Shepard is true as far as it goes, but it represents their side of the case, and I wish a fair trial as intended by our state Legislature, when the Workmen's Compensation Law was enacted. First, as I will prove later on the law intended to compensate for injury in proportion to the permanency of the disability to earn his weekly wage. Total disability resulting from an injury was to be compensated with not to exceed ten dollars per week for not to exceed four hundred weeks.

"If a man lost a leg and died as the result of the loss of the leg, he would receive compensation for death. If a man lost a hand and died from the results of the loss of that hand, he again would receive compensation for death and not just the loss of the hand. If a man received an injury to his eye and as a result an affection of the brain caused death which resulted from the injury to the eye, he would again receive compensation for death and not merely for the loss of the eye. That is to say, from the wording of the compensation law it is very evident that the intent of the law was to compensate for the resultant effects of such injury received. As the result of the injury I received to my eye I am totally disabled and therefore come under section 9 of the Compensation Law.

"In the *Weaver v. Maxwell* case the Travelers take it upon themselves to seek protection for the employer by a clever interpretation of the question as to what degree the first employer was responsible for the total injury to Mr. Weaver, and by a simple mathematical calculation they subtracted one eye from the first employer and left one for the other employer to be responsible for. One little fact they forgot to do was to take consideration of the fact that one eye was worth one thousand dollars by the wording of the law and two eyes are worth four thousand dollars. Now we will carry out the calculation which the Travelers started, but apparently chose to neglect to work out to a finish and prove. By subtracting the value of one eye, or one thousand dollars, from the value of two eyes or four thousand dollars, we have remaining a result amounting to three thousand dollars. This is not a bit unfair, as it is an undisputed fact that the loss of the remaining eye is of infinitely more harm of loss than the first eye. Again, I say I am asking for compensation for total disability which resulted from the loss of my right eye and the remaining sight of my left eye. The Travelers drew a parallel with the *Weaver* Case and try to forget that a man was totally disabled by the last accident which resulted in total blindness.

"It may appear evident from the closing questions of my deposition that I now have as much sight in my right eye as I had in the left previous to my last injury; but that is merely the result of a lack of information, as in fact, to be more explicit, I cannot see even the largest objects unless between me and the light. A hand may be passed so close to my face as to touch me and yet but for my sense of hearing I would not be aware of it.

"It is evident that the compensation law was evolved for just such a case as mine, because as is evident in my case the employer is trying to avoid the payment of a just claim. The Travelers will no doubt again claim that they are only seeking justice; but inasmuch as one thousand dollars for one eye was the stipulated amount and four thousand dollars was also the stipulated amount for two eyes then who should receive the remaining two thousand dollars as calculated by the attorneys during the *Maxwell* Case. For the law was undoubtedly very plain as to its intentions. Apparently this phase of the case has not been brought to the notice of the Supreme Court. Beyond a doubt four thousand dollars is the sum stipulated for total disability, and I am disabled as all reports show. I have already received one thousand dollars and I am now petitioning that the Industrial Accident Board find me worthy of at least two thousand dollars more according to the disability clause, section 9 of the Compensation Law.

"Perhaps more evidence of my disability is necessary. During the time I was in the employ of Beard, Campbell & Co. I received twenty dollars per week, and had three distinct offers of thirty dollars per week to go elsewhere. This shows my earning ability at the time of my injury, and I could now secure a position paying me the same or better wages if I could see enough to get around without aid from others. This then is my ability. Now as the result of my eyesight I cannot get a job at any price. The examining board at Port Huron just told me the other day that I was useless and placed me in class five. What is the cause of this difference in ability? Just the result of the loss of my eyesight at Beard, Campbell & Co. for which the Travelers are claiming to have fully paid me according to law.

"In the *Maxwell v. Weaver* Case decision the way was left clearly open to my case in its most prominent point, to wit: If a man lost only one eye he could receive compensation for one eye or the amount of one hundred weeks, but if he suffered any further loss he should receive in proportion. I lost the sight which I enjoyed in both eyes and most all of my entire ability to earn my living for myself and family, and I emphatically demand that I be accorded the compensation according to article nine of the compensation law.

"Respectfully yours, Peter M. Wood.

"State of Michigan, St. Clair County—ss.:

"Peter Wood, being duly sworn, deposes and says that the statement to which this notary is attached is a true statement of the facts as they are in every detail.

"Peter M. Wood."

"Subscribed and sworn to before me this 23d day of October, A. D. 1918. Frank B. Hayward, Notary Public in and for St. Clair county, Michigan.

"My commission expires December 4, 1918."

At the conclusion of the proofs the defendant moved for a directed verdict for the following reasons:

- (1) No proof of defendant's negligence.
- (2) No expert proof that the loss of plaintiff's eye was probably due to any act of defendant.
- (3) Plaintiff received compensation for the loss of his eye under the Workmen's Compensation Act.
- (4) Jury should not be permitted to speculate or conjecture on the cause of the loss of plaintiff's eye.
- (5) No competent proof that defendant wiped pus across an existing opening or wound in plaintiff's eye.

This motion was denied. The case was submitted to the jury, who found for the plaintiff in the sum of \$12,000. The defendant here reviews the judgment entered thereon by writ of error. We will consider the assignments under the headings and in the order discussed by defendant's counsel in their brief.

1. *Refusal to Direct a Verdict.*—(a) Was there proof of malpractice? Counsel contend that to justify submission to the jury on such a charge there must be competent evidence of sufficient lay facts upon which to base expert testimony, followed by such expert testimony tending to show that defendant was guilty of improper practice and that plaintiff's injury resulted therefrom.

[1, 2] In disposing of this assignment, we must consider the proofs submitted in the light most favorable to plaintiff's claim. We have already referred to the testimony of the plaintiff as to what occurred in the defendant's office when the piece of steel was removed, and, as he claims, the ulcer was opened and the pus therefrom drawn across his eye. In addition thereto, he testified that when the steel was removed the defendant asked, "How does that feel?" and he said, "That feels fine;" that immediately following the wiping of the pus across his eye he felt a burning sensation and said, "What the dickens did you do, Doctor? that burns like pepper;" that he was unable to continue at his work because of the tears in his eyes; that his right eye continued to smart and burn until he went home at night; that he suffered during the night, and the next morning, being unable to see the defendant, he called on Dr. Fraser, another eye specialist in Port Huron. Dr. Fraser testified that he found the eye "greatly inflamed; the sclera or white part of the eye was engorged badly, and there was a great deal of congestion or swelling in the membrane lining the lids, and the patient was complaining of a great deal of pain." He applied an antiseptic solution. The next day he again examined the eye and thought there was no possibility of saving its sight. He was asked, and, over the objection of defendant's counsel, answered, as follows:

"Q. If about half past 10 o'clock on the morning of the 1st, pus from an open pustule on the eyelid had been allowed to come in contact with a fresh wound on the cornea of the eye, setting up an infection, and that infection had not been arrested, would that be sufficient to account for the condition you found Mr. Wood in the next morning on the 2d. A. I think it would.

"Q. Supposing there is a fresh wound on the cornea of the eye, and the physician, with knowledge of that fact, has occasion to open a pustule on the under lid of the eye, from which pus is discharged; what does good practice require, on the part of the physician, to see that the pus does not come in contact with the fresh wound? A. Why, in that case the eye should be protected so that the pus from the pustule that you speak of would not come in contact with any part of the eye, and should at once receive a strong antiseptic solution so that infection would not be transferred to any other part of the eye.

"Q. Supposing a fresh wound exists on the cornea of the eye from which a piece of steel has just been removed by the physician, and he then opens a pustule on the lower eyelid, which discharges pus, and in order to remove the pus he takes a piece of cotton batting and rubs the pus off across the eyeball and over the fresh wound; what do you say as to that being good or bad practice? A. We would not consider that good practice."

Counsel insist that there was no evidence of "a fresh wound" in defendant's eye at the time he claims the pus was drawn over it. Plaintiff testified, and there is no dispute about the fact, that the piece of steel had just been removed from the eye. That this would leave a wound is, we think, apparent. We find no testimony in the record to the contrary. Several of the doctors spoke of the place from which the steel was removed as a "wound" and a "wounded spot." There was positive testimony that pus from the ulcer was injected into the eye by the defendant, and that pain, tears, and redness of the eye followed. Dr. Moffatt was asked what the early symptoms of an infection so set up would be, and answered in part, "Pain, an increasing flow of tears, redness in the eye." He also testified:

"I don't know whether or not I took a sample of the discharge; but I received some of the discharge from the eye of which I made an analysis of it and found two germs present in the pus called staphylococci and streptococci, of which the streptococci is the more malignant, and it might be found in pus from a pustule on the eyelid."

A motion to strike out this testimony was made after it appeared on his cross-examination that he did not recall whether he took the sample from the eye. As to this Dr. Fraser testified:

"I had Dr. Moffat make an analysis of the pus that was coming from his eye, and subsequently he advised me of what he found."

[3] We think that there was no error in refusing to strike it out for lack of identity. At most, it presented a question for the jury.

It is urged that under the evidence the infecting germs may have been introduced into the eye from the dirt blown into it, from the hands or handkerchiefs of the plaintiff or his fellow workmen in their efforts to clean it out, or in the discharge from the pustule, and that the jury should not have been permitted to guess or speculate about it; that the duty devolved on plaintiff to show by a preponderance of the proof that the infection came from the pus in the sty. It was the claim of plaintiff, contradicted, it is true, by Dr. Heavenrich, that there was no inflammation in the eye, no pain, "only just the scratching when I closed my lids," up to the time of the opening of the ulcer by the defendant. Dr. Moffatt testified that—

"It ordinarily takes 12 hours or longer in the case of a well, healthy man for symptoms of an infection of this character to show themselves. * * * The infection would not be likely to manifest itself until about 12 hours later; * * * that under ordinary circumstances that takes about 12 hours' time."

He further testified;

"Assuming that up to the period of 20 hours there had been no pain, no increased flowage of tears, no perceptible inflammation or swelling, the probabilities would be that serious infection did not exist."

[4] The plaintiff was not required to prove to an absolute certainty that the infection was caused by the introduction of the germs in the pus. He was required to establish facts from which such an inference might fairly have been drawn by the jury. That the infection might have been due to another cause was a matter of defense. We cannot say that the proofs left the matter so uncertain as to preclude the submission of the question to the jury.

Without quoting or referring to any other evidence, we think this sufficient to justify the submission to the jury of the question whether the loss of plaintiff's eye was due to the action of the defendant in wiping the pus from the ulcer across that part of the eye from which the steel had been removed and whether such action was malpractice on the part of the defendant.

(b) Was plaintiff's claim barred under the Workmen's Compensation Act?

Defendant's counsel rely on section 15 of part 3 (2 Comp. Laws 1915, § 5468), which reads as follows:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid un-

der this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

They also call attention to the following language of Mr. Justice Ostrander in *Brabon v. Gladwin, etc., Co.*, 201 Mich. 697, at page 708, 167 N. W. 1024, 1026:

"If the employee has the right either to sue his employer at law or to take compensation under the statute, and he sues and later files a claim for compensation, the action at law will abate, because by the terms of section 5488, above quoted, in filing his claim he has released to his employer all demands at law."

The application of the statute and of the rule as stated is made dependent upon the right of the employee to enforce compensation under the act. The argument of counsel on this branch of the case is grounded largely on the claim that plaintiff had such right. To determine this question, we must examine the claim for which he now sues and the evidence offered to support it. The declaration alleges that the operation to remove the particle of steel "was quickly and successfully performed, and plaintiff at once became relieved of the pain he had been suffering from it and had the complete and full use of his eye, which otherwise was in a normal condition"; that, at defendant's suggestion, plaintiff thereafter consented to the defendant's removing a small ulcer on the lower lid of plaintiff's right eye; that defendant thereupon "opened the said ulcer, on doing which a quantity of pus flowed from it; defendant thereupon unskillfully, carelessly, and negligently, in order to remove the pus took a piece of cotton batting and rubbed the pus across the ball and pupil of the eye, rubbing it in contact with the fresh sore in the pupil, from which the piece of steel had been removed;" that the pus set up an infection, resulting in the loss of the eye. The testimony of the plaintiff to sustain this claim has been already stated.

This court has, on several occasions, decided that the liability under our Workmen's Compensation Act (Comp. Laws, §§ 5423-5495) rests solely upon contract. *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49; *Dettloff v. Hammond, Standish & Co.*, 195 Mich. 117, 161 N. W. 949; *Crane v. Leonard, Crossette & Riley*, 214 Mich. 218, 183 N. W. 204. Money received under a contract may not be considered in a suit for damages for a tortious injury, though it may have afforded compensation for the loss sustained.

[5, 6] There is no question but that plaintiff now seeks to recover for the same loss (that of his right eye) for which he has been paid compensation by the insurance company. It is true that he obtained such payment by representing that the loss of his eye was

caused by the injury received while at work in the factory. But the doctrine of estoppel has no application. Counsel for the defendant concede that an "estoppel is binding only on the parties to a transaction or their privies." Even though we concede, as counsel claim, that "the employer is liable for resultant injuries which include an alleged act of malpractice," plaintiff's claim is not based on any such resultant injury. To render the employer liable in such a case, the injury must result from necessary efforts to relieve from the consequences of the original injury. In other words, the immediate agency causing the loss of the eye must be one which the first injury rendered it essential to employ. The plaintiff makes no claim that infection was introduced by the defendant while removing the steel from the eye or in its after treatment on account of such removal. His right to recover is based on the claim that after the defendant had completed the work of removing the steel he then, with plaintiff's permission, opened the pustule on the eyelid, and, while removing the pus therefrom, wiped it across that part of the eye from which the steel had been removed, thereby causing the infection which resulted in the loss of the eye.

[7, 8] It is said that plaintiff is permitted a double recovery for the same loss. While it is true that under his own testimony he recovered compensation from the insurance company to which he was not in law entitled, this could not be considered by the jury in its award of damages. In *Smith v. Battjes Fuel, etc., Co.*, 204 Mich. 9, 169 N. W. 943, the right of an employer to a credit for moneys received by the claimant from a physician for alleged malpractice in the treatment of the injury for which compensation was asked was denied. If the defendant was guilty of the tort complained of, he may not relieve himself from liability by showing that plaintiff had received compensation on account thereof from any other source, except through payment by a joint tort-feasor. *Perrott v. Shearer*, 17 Mich. 48; *Baylis v. Cronkite*, 39 Mich. 413; *People ex rel. Curtiss v. Colby*, 39 Mich. 456; *Hagan v. Railroad Co.*, 86 Mich. 615, 49 N. W. 509; *Peter v. Chicago, etc., R. Co.*, 121 Mich. 324, 80 N. W. 295, 46 L. R. A. 224, 80 Am. St. Rep. 500; *U. S. Casualty Co. v. Bagley*, 129 Mich. 70, 87 N. W. 1044, 55 L. R. A. 616, 95 Am. St. Rep. 424.

2. *Admission of Evidence.*—In the cross-examination of Dr. Fraser by defendant's counsel, he was asked about a lotion which the defendant afterwards testified he put into plaintiff's eye after removing the steel and gave him for subsequent use, and testified that it "would be a very good prescription." On redirect examination he was asked by plaintiff's counsel:

"You heard the prescription which Mr. Lodge read to you and asked you about. Would you

apply a solution of the kind referred to by Mr. Lodge to a streptococcus infection of the eye?"

Over defendant's objection that the treatment of physicians could not be thus compared, the witness answered:

"I might have used that solution with additional treatment."

[9, 10] He was then asked, and over objection permitted to testify, what additional treatment he would have used. This was clearly error. While the defendant held himself out as a specialist in the treatment of the eyes, the test as to whether his treatment was proper should not have been based on what Dr. Fraser would have prescribed. The defendant was obligated to bring to the discharge of his duty that degree of skill and knowledge possessed by physicians who are specialists in the light of present day scientific knowledge. 30 Cyc. 1571. Dr. Fraser, who was also an eye specialist, might have been asked as to whether the treatment prescribed evidenced the exercise of such skill and knowledge on the part of the defendant, but he should not have been permitted to state the treatment he would have used. See *Hitchcock v. Burgett*, 38 Mich. 501; *Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561; *Farrrell v. Haze*, 157 Mich. 374, 122 N. W. 197; *Miller v. Toles*, 183 Mich. 252, 150 N. W. 118, L. R. A. 1915C, 595; *Sherwood v. Babcock*, 208 Mich. 536, 175 N. W. 470; *Whitesell v. Hill*, 101 Iowa, 629, 70 N. W. 750, 37 L. R. A. 830, and note. This answer was particularly damaging to the defendant owing to the fact that the hypothetical question put to Dr. Fraser, heretofore quoted, assumed that "the infection had not been arrested," and the testimony of Dr. Moffatt that "the question as to whether there are serious results from an infection of the eye depends upon the treatment and also upon the resistance of the individual." The jury might have concluded that the loss of plaintiff's eye was due to the negligence of the defendant in not having prescribed some different treatment.

3. *Requests to Charge.*—Defendant's ninth request to charge was:

"The plaintiff cannot recover if you find that defendant was guilty of negligence in any other respect than this one particular respect, for plaintiff has only claimed that defendant was negligent in this one respect, and he must prove such negligence as he has claimed or defendant will be entitled to your verdict of not guilty."

[11] While in the general charge the court instructed the jury that to find for the plaintiff they must be convinced from the proofs "that the infection complained of was thus caused solely by the negligent act" of the defendant in wiping the pus from the pustule into the open wound in plaintiff's right eye, we are impressed that this request should have been given. Dr. Fraser had been per-

mitted to testify that he would have prescribed a different treatment for the eye after the operation than that used by the defendant. This request called the attention of the jury directly to the fact that no other element of negligence than that charged would justify a verdict in plaintiff's favor.

The defendant's tenth request reads:

"By a preponderance of the proofs, as used in this connection, is meant an overbalancing of the proofs; the production by plaintiff or the existence in the case of such an amount of testimony as overbalances; the testimony tending to prove defendant's negligence in this one respect overbalancing the testimony tending to prove his freedom from such negligence."

The court instructed the jury:

"I instruct you that the burden of proof rests upon the plaintiff to establish his claim for damages by a preponderance of evidence received, that is to say, it is his duty to produce the greater weight with more convincing effect, that is, in your mind to establish the essential fact that Dr. Vroman was guilty of negligence in treating his eye, and that such negligence was the proximate and sole cause of the loss of plaintiff's sight in his right eye."

Counsel claim that in view of the testimony of Dr. Fraser the jury might well have inferred from this language that, if the defendant was negligent in his treatment of the eye after the operation, the plaintiff might recover. In the request the attention of the jury was called to the fact that there must be a preponderance of the proofs supporting the particular act of negligence charged. The request should have been given.

The real issue presented was: Did the defendant open the pustule on the lid of plaintiff's eye and draw the pus therefrom across that part of the eyeball from which the steel had been extracted? The plaintiff testified that he did; the defendant that he did not. To entitle the plaintiff to recover, the jury must answer this question in the affirmative. The court so instructed them, saying:

"That is, you are to determine from the proofs, the surrounding conditions, and the evidence of the experts whether the destructive infection originated because Dr. Vroman introduced the poisonous infection into the wound, if you find this to be true, on the eye, as the plaintiff charges."

The defendant preferred the following request:

"If the plaintiff, in connection with the payment of the compensation to him under the Workmen's Compensation Act, claimed or represented or accepted compensation on the ground that the sight of his right eye had been lost because of the entrance of the substance into his eye, and not because of the malpractice of the defendant, as he now claims, then you may consider such fact as an admission against his present claim, and you must then

take this circumstance into consideration as one of the circumstances of the case in making up your verdict."

[12] This request called the attention of the jury directly to the claim made under oath by the plaintiff to the Industrial Accident Board nearly three months after this suit was begun, that the loss of his eye was due to the injury received in the factory. The letter in the nature of an affidavit, heretofore quoted, was a sworn statement of plaintiff totally inconsistent with the claim here made, and we think the jury should have been expressly instructed that it might be considered by them as an admission on his part as to the cause of the injury. The fact that such a claim, as to the cause of the loss of his eye, was made by him under oath, while not conclusive against him as an estoppel, was persuasive as evidence, and, when requested by the defendant, the attention of the jury should have been particularly called to it.

For the errors pointed out, the judgment is reversed, with costs to appellant, and a new trial ordered.

VON HOENE et al. v. BARBER et al. (No. 53.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Trial $\S$ 11(3)—Transfer from equity to law allowed in a proper case on defendant's motion.

Transfer to the law side, which Comp. Laws, $\S$ 12351, provides shall be forthwith made if at any time it appear that a suit commenced in equity should have been brought as an action at law, may be had on defendant's motion; and is not limited to a case where plaintiff applies therefor.

2. Vendor and purchaser $\S$ 338—Case for equity held not made by complaint for vendee's lien, etc., not showing absence of remedy at law.

Complaint alleging that plaintiffs contracted to purchase buildings, making a payment thereon, induced by defendants' false and fraudulent representations that the material was brick, as distinguished from veneer, and praying that defendant's answer come to account with plaintiffs, that plaintiffs be decreed to have a vendee's lien for the amount so paid, their damages and costs, execution therefor, and general relief, does not state a case for equitable relief, it not being made to appear that plaintiff has not a complete and adequate remedy at law, nor averred that defendants are not abundantly able to pay any judgment that may be obtained.

Sharpe and Clark, JJ., dissenting in part.

Appeal from Circuit Court, Wayne County, in Chancery.

Suit by Jenny May Von Hoene and another against William R. Barber and others. From an order transferring the case to the law side of the court, plaintiffs appeal. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

Rood & Visscher, of Detroit, for appellants.

Arthur E. Koch, of Detroit, for appellee William R. Barber.

Walter M. Nelson, of Detroit, for appellees Barbara Theille, Edward Griesbach, and Adela Griesbach.

MOORE, J. This is a chancery proceeding originally commenced against defendants Barber and Theille. Later the other defendants were allowed to intervene. On January 12, 1921, the following order of the circuit judge was filed:

"At a session of said court held in the Wayne County Building, Detroit, Wayne county, Michigan, on the 6th day of December, 1920. Present: Hon. Howard Wiest, Circuit Judge.

"This cause having come on to be heard upon the bill of complaint of the plaintiffs, the answer of the defendants, the petition by way of interventions of Edward and Adela Griesbach, and the answer thereto of the plaintiffs, and the court having examined the contract admitted by all parties to have been executed with reference to the subject-matter, and the court having heard the statements of counsel for the respective parties to this cause, examined their briefs, and, being informed in the premises.

"It is adjudged and decreed that the plaintiffs in this cause have no vendee's lien upon the property in the bill of complaint described as follows: Lot No. 465, St. Clair Park subdivision of the city of Detroit, county of Wayne, and state of Michigan, and known as Nos. 615 and 617 Emerson avenue. And the claim of the plaintiffs to a lien thereupon is wholly disallowed.

"It is further adjudged and decreed that, in the bill of complaint of the plaintiffs, and their answer to the petition of the interveners, and in the pleadings, there is no averment or averments which confer upon this court any chancery jurisdiction, and in accordance with the statute in such case made and provided, said cause may be, and the same hereby is, forthwith transferred from the chancery to the law side of this court, there to be proceeded with, after such alteration in the pleadings as shall be essential, as though the original chancery cause had been set for trial and proceeded to trial after an adjournment to allow necessary amendments.

"It is further ordered that, on or before January 25, 1921, the plaintiffs shall make such changes in the bill of complaint as they shall deem necessary to constitute a declaration against such of the defendants as they desire to sue upon the law side of this court, and that within five days of the service of such a declaration upon said defendants, or their respective attorneys, they shall respectively plead thereto."

The case is brought here by appeal. The claim of appellant is stated as follows in the brief of counsel:

"To recapitulate our argument, we ask that the decree of the court below be reversed, and the case set for hearing, and the petition of the interveners be dismissed: (1) Because the interveners have no standing either by common law nor under our statute; (2) because if entitled to remain in court they cannot be heard to object to the propriety of this proceeding; (3) because the plaintiff's case is one in which they are entitled to equitable relief, and can have adequate redress only in a court of chancery."

Groups 1 and 2 may be considered together. The lower court was evidently of the opinion that the order of intervention was authorized by the following:

"In an action either at law or in equity, any one claiming an interest in the litigation may, at any time, be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." C. L. 1915, § 12362.

Counsel now say that the intervener cannot question the propriety of the main proceeding. The order allowing intervention was made November 13, 1920. No motion was made to transfer the case to the law side of the court until December 6, 1920. This motion was made not only by the interveners, but was also made by defendant Barbara Theille. It is unnecessary to decide whether the motion to transfer the case could be made by the interveners alone, because one of the original defendants made the motion also.

[1] The section of the statute involved is 12351, C. L. 1915, which reads in part:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, * * * it shall be forthwith transferred to the proper side."

If the transfer was properly made upon the motion of defendant Theille, as we think it was, it would carry the entire case to the law side of the court. It is urged that the transfer should be made only upon the application of the plaintiff. This contention overlooks the fact that, when a defendant is a party to a litigation, he is just as much interested in having it finally decided as is the plaintiff. The contention also overlooks the interest the public has in having its courts freed from the necessity and expense of two or more lawsuits, when one will answer every purpose.

The language of the statute is broad enough to safeguard the rights of all parties interested in the litigation. The language is clear, explicit, and unambiguous, and should be given effect.

[2] Can the plaintiff have adequate redress

only in a court of chancery? It has already appeared that the trial court was of the opinion that there was no averment or averments in the pleadings which would confer upon the court chancery jurisdiction. The bill of complaint is not contained in the record. There does appear therein what purports to be an abstract thereof. Shorn of its legal verbiage, it is stated that defendant Theile employed defendant Barber to sell certain real estate in Detroit. We quote:

"To induce the plaintiffs to purchase said premises, represented to the plaintiff Jenny Von Hoene, on November 13, 1919, that he was so employed that the two-family flat on the said premises was what is known as solid brick as distinguished from brick veneer, well knowing that the plaintiffs desired only to purchase a solid brick; that the plaintiffs relied upon these representations, were induced thereby to agree to purchase, and paid the said Barber \$500 on the purchase price, and that the said building was a brick veneer, and not a solid brick building, whereby the plaintiffs were defrauded, and prayed that the defendants' answer come to account with the plaintiffs; that the plaintiffs be decreed to have a vendee's lien for the amount so paid, their damages and costs, and have execution therefor, and for general relief, attaching a copy of the preliminary contract as an exhibit."

It is not made to appear that plaintiff has not a complete and adequate remedy at law, nor is it averred that defendants Barber and Theile are not abundantly able to pay any judgment that plaintiffs may obtain against them.

The order of the trial judge is affirmed, with costs.

STEELE, C. J., and STONE, FELLOWS, and BIRD, JJ., concurred with MOORE, J.

SHARPE, J. (dissenting). I concur with Mr. Justice MOORE in holding that there are no sufficient allegations in the bill of complaint to confer jurisdiction on a court of equity. See *Detroit Trust Co. v. Old National Bank*, 155 Mich. 61, 118 N. W. 729; *Laubengayer v. Rhode*, 167 Mich. 605, 133 N. W. 535. I do not think, however, that the trial court had any power or authority to make the order transferring the cause to the law side of the court against the objection of the plaintiff. The statute providing for such transfers (3 Comp. Laws 1915, § 12351) reads as follows:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, or if it appear that an action commenced on the law side of the court should have been brought in equity, it shall be forthwith transferred to the proper side, and be there proceeded with, with only such alteration in the pleadings as shall be essential."

This is a new section added to our practice laws by the judicature act (section 2, chapter 11, Act No. 314, Public Acts 1915.) The bill as introduced in the Legislature was prepared by a commission of eminent attorneys appointed by the Governor pursuant to the provisions of Act No. 286, Public Acts of 1913. In referring to this section in their report, the commission said:

"We propose that actions that have been brought on the wrong side of the court may be transferred to the right side, and be proceeded with instead of being dismissed, thus rendering the beginning of a new action unnecessary."

In the commentary on the changes in practice made by this act, prepared by Mr. A. M. Cummins, a member of the commission, published as part 1 of Cummins & Beecher's edition of the act, in referring to this section, it is said:

"If the plaintiff mistake his remedy and bring suit at law when he should have sued in equity or vice versa, the suit need not fail, but shall be transferred to the proper side, and be there proceeded with, there being only such alterations in the pleadings as shall be essential."

This section has been referred to in the following decisions of this court: *Schook v. Iron Circuit Judge*, 192 Mich. 103, 158 N. W. 217; *Flint v. Le Heup*, 199 Mich. 41, 165 N. W. 626; *Toles v. Duplex Power Car Co.*, 202 Mich. 224, 168 N. W. 495; *Courtney v. Youngs*, 202 Mich. 884, 168 N. W. 441; *City of Iron Mountain v. Waterworks*, 206 Mich. 537, 173 N. W. 612; *Lake Superior Foundry Co. v. Circuit Judge*, 209 Mich. 380, 176 N. W. 409. In the *Toles* Case, an appeal was taken from a decree dismissing plaintiff's bill. This was affirmed by this court. The opinion concluded:

"In view of the provision in section 2, c. 11, of the judicature act, * * * the case is remanded for such further proceedings as may be desired by plaintiff, and granted by the trial court, in harmony with the statute and this opinion."

In the *Iron Mountain* Case, it was said:

"The chancery decree appealed from will therefore be set aside, with costs to defendant, and the case remanded to the trial court for transfer to the proper side under authority of section 12351, 3 Comp. Laws 1915, if requested, with such further proceedings as parties may desire and the court determine."

The italics in both quotations are mine. The opinions were written by the present Chief Justice, and suggest, if they do not decide, that the order of transfer shall be made only if asked for by the plaintiff. In the *Foundry Company* Case, we held that a trial court should not transfer a law case to the chancery side of the court, against the objection of plaintiff, when, under its proofs,

a case had been made out for submission to the jury.

The question now presented is, May the trial court, on his own initiative, or on motion of a defendant, when satisfied that the plaintiff has not, by his bill of complaint or his proofs, made out a case for equitable relief, over the protest and objection of the plaintiff, transfer the cause to the law side of the court? I am of the opinion that the statute should not be so construed. It is true that it does not in express terms state that the order shall be made on the application of the plaintiff, but I am persuaded that this was the legislative intent. The purpose of the statute is apparent. It enables a plaintiff, who has mistaken his remedy, to seek the aid of the other side of the court without beginning another action. It frequently happens that an attorney is in grave doubt as to the proper proceeding to be brought to secure the relief he seeks for his client. He finally decides and files a bill in equity. The trial court disagrees with him holding that his remedy is an action at law. Is not the plaintiff entitled to have his bill dismissed and take the judgment of this court by appeal? By an order of transfer, the plaintiff must try his case in a court which, in his opinion, has no jurisdiction to hear it. The more orderly procedure, and that which I think was contemplated in the enactment of the statute, is to permit the plaintiff to stand on his case as made. From the resulting directed verdict and judgment entered thereon or decree dismissing his bill, he may secure a review in this court.

While, as before stated, the act does not in express language provide that the transfer must be made on the application of the plaintiff, I think no violence is done to the generally accepted rules of interpretation and construction of statutes in so holding. The general scope and purpose of the section must be considered and the legislative intent obtained therefrom. The rule is thus stated in *Endlich on Interpretation of Statutes*, § 295:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words; sometimes by altering their collocation, or by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction * * * that the modifications thus made are mere corrections of careless language, and really give the true intention."

This language is quoted approvingly in *Attorney General v. Detroit United Railway*, 210 Mich. 227, 254, 177 N. W. 728, 1023, as is also the following from the opinion of Chief Justice Shaw in *Commonwealth v. Kimball*, 24 Pick. (Mass.) 366, 370:

"When the words are not precise and clear, such construction will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute; and where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the Legislature, to avoid such conclusion."

The following from the opinion of Mr. Justice Christlancy in *Whipple v. Judge of Saginaw Circuit*, 26 Mich. 342, is also instructive:

"But the primary object of all interpretation or construction of statutes is to ascertain the real intention of the Legislature; and no specific or artificial rules of interpretation can be of any value which do not contribute to this end."

The order made should be set aside, and the case remanded, for such further proceedings as may be taken by plaintiff not inconsistent with this opinion. In view of the fact that the order was made at the suggestion of the trial court, and that this reversal involves a question of practice, no costs will be allowed.

OLARK, J., concurred with SHARPE, J.

GUTT et al. v. WALTER'S ESTATE. (No. 21.)

(Supreme Court of Michigan. Oct. 8, 1921.)

1. Witnesses $\S$ 131—Opposite party statute inapplicable to will contests.

The "opposite party" statute (Comp. Laws 1915, § 12553), as to competency of witnesses, is inapplicable to will contests.

2. Wills $\S$ 384—Erroneous ruling that contestants were incompetent witnesses prejudicial.

Erroneous ruling that contestants were incompetent is prejudicial error, though what their testimony would be does not appear; the court also preventing the development thereof.

3. Evidence $\S$ 555—Nonexperts must testify to facts prior to opinion of mental incompetency.

Before nonexperts may give an opinion that testator was mentally incompetent, they must testify to some facts inconsistent with sanity.

4. Wills $\S$ 324(3)—Execution with knowledge of contents and without fraud in procuring signature question for jury.

As against motion for directed verdict, held, testimony for contestants entitled them

to go to the jury on the question whether deceased executed the instrument as and for her will, with knowledge of its contents and free from fraud in procuring her signature.

5. Wills §324(3)—Contestants' testimony of execution without knowing instrument was a will negatives claim of undue influence.

Contestants' testimony that deceased did not intelligently execute the paper, but signed it without knowing she was executing a will, negatives their claim of undue influence, so that refusal of submission to the jury of that issue is proper.

Error to Circuit Court, Wayne County; George P. Codd, Judge.

From order of probate court admitting to probate the alleged will of Anna Walter, deceased, August Gutt and others, contestants, appealed to the circuit court, where verdict was directed against them, and they bring error. Reversed, with new trial

Argued before STEERE, C. J., and MOORE, FELLOWS, WUEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Harry J. Lippman, of Detroit (Ralph W. Liddy, of Detroit, of counsel), for appellants.

Edwin R. Monnig, of Detroit (Frank A. Martin, of Wilton Junction, Iowa, of counsel), for appellee.

FELLOWS, J. The admission to probate of the will of Anna Walter by which practically her entire property was given to a daughter, Anna Schonfield, is contested in this proceeding by the remaining five children of deceased on the usual grounds of mental incompetency and undue influence, and the further ground that her signature to the will was procured by the fraudulent representations that it was an instrument executed for the purpose of preventing the heirs of her deceased husband taking her property from her and that she executed the will in ignorance of its contents. At the close of the contestants' proof the trial judge directed a verdict against them. The assignments of error are numerous, and need not all be discussed. Such facts as are necessary to an understanding of the case will be stated as we proceed.

[1, 2] The trial judge upon the objection of proponent's counsel refused to permit one of the contestants to testify to facts equally within the knowledge of deceased upon the theory that such testimony was prohibited by section 12553, C. L. 1915. In this the trial judge was in error. We have repeatedly held that the "opposite party" statute is not applicable to will contests. *Brown v. Bell*, 58 Mich. 58, 24 N. W. 824; *Schofield v. Walker*, 58 Mich. 96, 24 N. W. 624; *Lautenshlager v. Lautenshlager*, 80 Mich. 285, 45 N. W. 147; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *In re Dailey's Es-*

tate, 180 Mich. 478, 147 N. W. 520; *In re Doty's Estate*, 212 Mich. 346, 180 N. W. 608. In this court counsel for proponent claim that this ruling does not constitute reversible error, as the questions asked should have been excluded on other grounds. The record, however, discloses that the witness was being asked some preliminary questions when the objection was made. The trial judge not only sustained the objection, but also prevented contestants' counsel from further perfecting the record by directing the witness to leave the stand. Later, when the question came up again, the jury was excused, and contestants' counsel was quite severely reprimanded for attempting to put in testimony of contestants inhibited by the former ruling. We do not know what these contestants' testimony would be; their counsel were prevented from asking questions to develop it. Under our decisions they were competent witnesses, and it was reversible error to exclude their testimony.

[3] We shall not detail the testimony on the question of mental incapacity. Viewed in its most favorable light, it did not take this question to the jury. *Hibbard v. Baker*, 141 Mich. 124, 104 N. W. 399; *Blackman v. Andrews*, 150 Mich. 322, 114 N. W. 218; *In re Williams' Estate*, 185 Mich. 97, 151 N. W. 731; *Leffingwell v. Bettinghouse*, 151 Mich. 513, 115 N. W. 781; *In re Doty's Estate*, supra, and authorities there cited. Nor was there error in the holding of the court that certain witnesses had not testified to sufficient facts to justify them in expressing an opinion that testator was mentally incompetent. Before nonexpert witnesses may be allowed to give such opinion, they must testify to some facts inconsistent with sanity. *Hibbard v. Baker*, supra.

It becomes necessary that we should detail some of the testimony upon the question of whether there was sufficient to take to the jury the question of whether the testatrix executed the will with knowledge that it was a will, of its contents, or whether she executed it, supposing it was a paper for another purpose. There was testimony that deceased had said that her property should be equally divided among her children. The scrivener who drew the will was not produced as a witness. It was executed in the office of Dr. Hagen, and he and a Mrs. Lalkinsky were the subscribing witnesses. Dr. Hagen had not a definite recollection of all the details, but does testify to due execution of the will. Mrs. Lalkinsky, who says she had known deceased many years, says she was called to Mrs. Schonfield's home by Mrs. Schonfield. She found Mrs. Walter there. She asked her to be a witness to a will for Mrs. Schonfield, saying that she was the only one who had helped her;

that the others had not. The deceased, Mrs. Schonfeld, and Mrs. Lakinsky went to Dr. Hagen's office, where he read the will over to Mrs. Walter in English, and it was there executed. This witness on cross-examination made several contradictory statements upon material matters. Contestants produced numerous witnesses, whose testimony tended to show that testatrix could not understand English. If this testimony was true, and its credibility was for the jury, there is a failure of evidence that the will was ever read to testatrix in a language she could understand.

There was testimony tending to show that, when deceased would be riding with other relatives, she would request them not to drive by the Schonfeld home, as she was afraid to have Anna see her with them. She was invited to a Christmas dinner by one of her daughters, but did not come; when later asked why she did not come, she said Anna would not let her come. Anna's husband was the executor of the will of Mr. Walter, who died some three or four months before the will in question was made. Both Mr. and Mrs. Walter had been married before, and each had grown-up families. By Mr. Walter's will his widow was given the income of certain real estate, which at her death went to his children. Mrs. Walter complained that she was unable to get this income. She said that when she went there after money Mr. Schonfeld would tell her to get out, that he had no money. There is testimony that he intimated to one of the other sons-in-law that she would have to be placed in Eloise.

The will in question was executed the latter part of February, and there is testimony from one of her sons-in-law, a Mr. Newman, that shortly after this she came to their house about some paper she had signed. We quote from his testimony:

"* * * It must be some time the last of February or March when she came over and told us about the paper that they had been taken away from her.

"Q. Who said that? A. Mr. and Mrs. Schonfeld had taken her somewhere to sign papers, and that they were afraid that the heirs on the other side would take her home away from her.

"Q. Did she say who it was had made this paper? A. Why, she said Mr. Grosfeld had made it—had drawn up some paper about the house; and I asked her, 'Have you signed it?'

"Q. Some paper about the house? A. Yes, and I asked her—I said, 'Mother, have you made a will,' or 'signed a will?' and she said, 'No; I have not signed any will; I made no will.'

"Q. When was this conversation? A. It was along in the last of February or the first of March.

"Q. Of what year? A. The year she died. I asked her if she had signed a will, or made

a will, and she said, 'No; they took me over and said, if I did not sign this paper, that the other heirs could take the house away from me and leave me out on the street.' I said, 'Did you sign a will, mother?' and she said, 'No, I signed nothing; only they made me sign this paper, so that they could not throw me out of my home.'

While Mrs. Walter's statement was not evidence of the fact it was evidence of the state of her mind. Mr. Newman called Mrs. Schonfeld up and asked her if her mother had made a will, and she replied, 'No,' that her mother had made no will. In the following spring Mrs. Walter came to Mr. Newman's bringing with her a bundle of clothes and said she wanted to live with them. She remained there until her death, and there is testimony that she daily worried about a paper she had signed. A lawyer was consulted about getting it for her, but it seems he did not succeed. She finally became so worried that she frequently said that she would die if she could not get the paper, and in the fall she did commit suicide by poisoning. The day following her funeral Anna came to one of the sisters and cried, and said her conscience was troubling her; that her mother had made a will giving her the property, but that it should be divided equally among the children.

[4] When we consider the testimony in this somewhat voluminous record, some of which we have quoted, and some other, but not all, we have adverted to, having in mind, as we must have, the rule that, the verdict being directed against contestants, the testimony with its legitimate inferences most favorable to them must be accepted, we are constrained to hold that they were entitled to take the verdict of the jury on the question of whether the will in question was executed by the deceased as and for her last will and testament, with a knowledge of its contents and free from fraud in procuring her signature to it.

[5] As we have stated, the testimony of contestants tended to establish their claim that deceased did not intelligently execute the paper offered for probate. This testimony, we are persuaded, negatives their claim of undue influence. Manifestly, if the deceased signed the paper without knowing she was executing a will, it cannot be claimed that she was unduly influenced to will the property to her daughter Anna. We are not persuaded, upon the record as made, that the trial judge was in error in refusing to submit to the jury the question of undue influence.

For the errors pointed out, the judgment will be reversed, with a new trial. Contestants will recover costs of this court.

GOODMAN v. WOBIG. (No. 37.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Courts $\S$ 489(3)—State court has jurisdiction of suit for specific performance of contract to assign patent.

A state court has jurisdiction in a suit for specific performance of a contract to assign a United States patent.

2. Specific performance $\S$ 50, 89—Inadequacy of consideration and plaintiff's inability to perform contract to employ precludes specific performance of contract to assign patent.

In a suit for specific performance of a contract to assign a patent, where plaintiff had assigned his rights to the patent to others and had made himself unable to perform his agreement to employ defendant as plant superintendent, and, on repayment of advances by plaintiff out of the profits, to permit defendant to become a partner, and where defendant was not to be adequately rewarded for his patent, specific performance will not be granted.

Appeal from Circuit Court, Wayne County, in Chancery; Jesse H. Root, Judge.

Suit by Harry Goodman, in which the Meridian Motor Valve Company was substituted, against Fred H. Wobig. From a decree for plaintiff, defendant appeals. Reversed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

James H. Pound, of Detroit, for appellant.
Rockwell T. Gust, Stevenson, Carpenter, Butzel & Backus, and Benjamin & Betzoldt, all of Detroit, for appellee.

MOORE, J. This bill of complaint was filed to compel the specific performance of a contract. Plaintiff Harry Goodman is a mason contractor in Detroit. Defendant Fred H. Wobig was a manufacturer of motor valves. Mr. Goodman met Mr. Wobig about the first of September, 1919. Mr. Wobig interested Mr. Goodman in a proposition to purchase the machinery and equipment of the Meridian Machine Products Company, makers of motor valves. Negotiations were had for the purchase of the Meridian Machine Products Company, but nothing came of them.

It is claimed that after the proposition to purchase the property of the Meridian Machine Products Company fell through, Mr. Wobig advised Mr. Goodman that new equipment could be secured more advantageously than to purchase second-hand equipment from the Meridian Machine Products Company as originally intended, and that this was done. Mr. Goodman secured a small building in which their operations were conducted. It is claimed Mr. Goodman purchased equipment, dies, steel, and other ma-

terial with which Mr. Wobig experimented, developing a new welding process. During this period Mr. Goodman paid Mr. Wobig a salary of \$50 per week. It is claimed the investment of Mr. Goodman was, all told, about \$14,000. About February 4, 1920, the new process was so far perfected that a patent attorney was consulted and an application for a patent was made a little later.

It was thought best to have the agreement of the parties in relation to the business and the use of the new process in writing, and the office of a lawyer who had before this acted for Mr. Goodman was visited. The lawyer dictated an agreement to his stenographer. This was transcribed.

The parties remained an hour or more in the office, and Mr. Wobig made some objection to the form of the agreement. Mr. Wobig took away a copy of the contract as it then was. When the parties returned the next day, some changes had been made, and it is the claim that copies were given to each of the parties, and that the contract was read aloud to them, after which both of them signed each sheet of the contract. This was on the 19th of February, 1919.

Mr. Wobig took his copy of the contract home, and his wife objected to the contract, and both of them the next morning went to see Mr. Goodman and insisted upon the agreement being changed so as to conform to the understanding of the Wobigs. The parties are not agreed as to what occurred, but Mr. Wobig did not return to the plant to work, and this bill of complaint was filed on the 25th of February, 1920.

A hearing was had and a decree for specific performance was made. The case is brought here by appeal.

It is the claim of the defendant that the written contract was different from what the parties understood it was to be, and that it was hastily read to him, and that he did not understand its meaning when he signed it.

[1] Defendant's counsel contends that, because the subject-matter of the contract is a United States patent, the state court is without jurisdiction. This question has long been settled adversely to such a contention, both by the decisions of this court and the decisions of the Supreme Court of the United States. *Nichols, Shepard & Co. v. Marsh*, 61 Mich. 509, 28 N. W. 609. See *Marsh v. Nichols Shepard & Co.*, 140 U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. 413.

It may be well to quote the contract. It reads:

"This agreement, made and entered into this 18th day of February, A. D. 1920, by and between Harry Goodman, of Detroit, Mich., party of the first part, and Fred H. Wobig of the same place, party of the second part, witnesseth:

"Whereas, party of the first part has heretofore purchased the necessary machinery and equipment to equip a machine shop at No. 1731 Russell street, Detroit, Mich., of which said business, at the date hereof, said first party is the sole and absolute owner. Said business when ready, to be conducted, is to be under the name of the Meridian Motor Valve Company.

"And in the equipping and furnishing of said machine shop, the said first party has, to the date hereof, invested the sum of fourteen thousand dollars (\$14,000.00). And whereas, the said first party equipped said factory and machine shop, and entered into said business at the special instance and request of said second party, made on or about the 19th day of September, 1919. The said second party being an experienced machinist and mechanic, and a specialist in the manufacture of motor valves.

"And whereas, the said second party has, between the 19th day of September, 1919, and the date hereof, while working and employed by the party of the first part, and receiving wages during said time from first party, perfected a process for welding or amalgamating iron and steel, to be used in the construction and manufacture of motor valves.

"And whereas, the said party of the second part, has heretofore made application for United States patent for said process through Stuart O. Barnes, patent attorney of Detroit, Mich.

"And whereas the said party of the first part is desirous of hiring and engaging the said second party as superintendent of his plant, to have general charge of the production department, and to acquire an interest in the business of said first party, to wit, the Meridian Motor Valve Company, and the machinery equipment and assets thereto. Therefore it is mutually agreed by and between the parties hereto, as follows:

"Said first party hereby hires said second party as superintendent for his plant at 1731 Russell street, to be known as the Meridian Motor Valve Company, to have general charge of the production department, at a weekly salary of sixty dollars, or as shall be hereafter mutually agreed upon.

"Said second party may acquire a one-half interest in said business, equipment and assets upon the following terms and conditions, to wit: That if said second party shall faithfully perform this agreement, in all respects, and shall remain with first party until the event hereinafter set forth shall transpire. Then first party agrees that when first party shall have received from the net profits of said business, the amount of money that he (first party) has invested therein, to wit, the sum of fourteen thousand dollars, and other further sums, that he may hereafter be compelled to contribute in excess of the income from said business. Then, upon the happening of such event, viz., the receipt of said first party of the full amount so invested by him, as aforesaid, first party will then execute articles of copartnership between party of the first part, and party of the second part, in which said party of the second part shall be an equal partner with said first part, and have a one-

half interest in the business, equipment and assets, of the Meridian Motor Valve Company, as it shall be at that time. And shall thereafter be entitled to one-half of the profits, and shall be liable for one-half of the losses. Said second party agrees to hire to, and remain with first party until such time as he shall become a partner as hereinbefore provided.

"It is hereby mutually understood and agreed, by and between the parties hereto, and as part of the consideration of this agreement, that said first party shall have the full and exclusive use of the process for welding or amalgamating iron and steel, as now discovered and invented by party of the second part, and for which said second party has heretofore made application for United States patent, including the use of and right to said patent when issued, during the life of said patent. But no longer than the time that said first party shall remain in the manufacture of motor valves.

"It is further mutually understood and agreed by and between the parties hereto, that until said first party receives back in full his entire investment in said business out of the net profits of said business, that said second party is not and will not be considered as a partner therein, and will not be liable for any of the indebtedness of said concern or business.

"It is further understood mutually by and between the parties hereto, that if the said second party shall at any time in the future, upon paying to the said first party one-half of the amount that said first party has to that date actually invested in said business, less any profits that may have to that time been withdrawn by first party upon his investment, shall be entitled to become an equal partner in said business, including the plant, equipment and assets of said company, and that said partnership agreement, will be signed at such time.

"It is understood that all the benefits of this contract shall enure to the heirs, representatives and assigns of party of the first part.

"In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

"Harry Goodman. [L. S.]

"Fred H. Wobig. [L. S.]"

It is the claim of the defendant that the contract was not drawn as the parties had agreed the arrangement should be, and that he had no intention at any time to part with his title to the patent, and that as soon as he understood the effect of the contract he notified the plaintiff that he would not abide by its terms.

The contract was signed February 18, 1920. Notice was given to the plaintiff on the next day that defendant would not abide by its terms.

The bill of complaint was filed on February 25, 1920.

In 10 Ruling Case Law, p. 392, it is said:

"He Who Seeks Equity Must Do Equity.—Any one going into a court of equity and asking its aid, whether that aid be such as could be obtained in a court of law, or whether it be of a character obtainable only in a court of equity, submits himself to the jurisdiction of

the court, and in asking its aid subjects himself to the imposition of such terms as well-established equitable principles would require. This principle expressed in the form of the maxim, 'He who seeks equity must do equity,' is almost as old as the tribunal to which it applies, and since courts of equity refuse to recognize and protect equitable rights unless such rights are based on conscience and good faith, it may be regarded as one of the cardinal rules of equity. It pervades the entire field of equity jurisprudence."

A great many authorities are cited supporting the text.

In 25 Ruling Case Law, at page 214, it is said:

"A decree for the specific performance of a contract is not a matter of right, but rests in the sound discretion of the court. This discretion is not arbitrary or capricious but judicial, and is controlled by the established doctrines and settled principles of equity. The desired relief will be granted or withheld by the court upon a consideration of all the circumstances of each particular case, and no positive rule can be laid down by which the action of the court can be determined in all cases. If, however, all the necessary incidents and conditions are proven by satisfactory evidence, the relief should be decreed as a matter of right, and not as a mere favor. Broadly speaking, whenever a contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award damages for its breach. It has been said that there is a tendency on the part of American courts to lower or elevate the general standards as to the proof of contracts in accordance with the views of the chancellor concerning the justice of the plaintiff's cause. This latitude is implied in judicial statements that the granting of specific performance is an extraordinary power which is not to be exercised when in a given case it would be contrary to equity and justice to exercise it, and that it is discretionary with the court to grant or withhold specific performance in furtherance of justice or to prevent injustice."

Many cases are cited in the footnote.

[2] In the instant case there is no offer in the bill of complaint to hire the defendant as superintendent of the plant of the plaintiff at a minimum weekly wage of \$60. There is no suggestion that defendant shall have a royalty on the valves produced, or that he shall share in any way in the profits. Nowhere is it averred that plaintiff will perform his part of the contract. The record shows that as early as April 9, 1920, Mr. Goodman had assigned all his rights in the application for the patent, and the patent itself to the Meridian Motor Valve Company. It also shows there were three stockholders in that company, the plaintiff, Fred G. White, and Lawrence W. Scutter, each of

whom at the time of the trial owned 1,000 shares of stock. This situation would indicate that plaintiff had put it beyond his power to perform the agreement he made in the contract if he desired to do so.

The following provisions are contained in the decree:

"(b) That since beginning this suit, said application for patent by said Fred H. Wobig has been completed and filed in the Patent Office at Washington, D. C. That said application for patent was executed by said Fred H. Wobig on February 25, 1920; filed in the Patent Office at Washington, D. C., on March 6, 1920, and that the official number of said application is 363781.

"(c) That said Harry Goodman is entitled to an assignment of all the rights of said Fred H. Wobig, in and to said application for patent and the patent therefor when issued, and to the sole and exclusive use, right and benefits thereof.

"(d) That said Harry Goodman has heretofore, to wit, on April 9, 1920, duly assigned all his rights in and to said application for patent, and patent, when issued to the Meridian Motor Valve Company, a corporation duly organized under the laws of the state of Delaware, and that the said Meridian Motor Valve Company is now the legal owner of all the rights of said Fred H. Wobig in and to said application for patent, and the patent therefor when issued, and to the sole and exclusive use, right and benefits thereof. * * *

"(f) That the said Fred H. Wobig is and will be entitled to a reassignment of said application for patent, and the patent thereon when issued, if any is issued, at such time as the said Meridian Motor Valve Company, its successors or assigns, shall cease to remain in the manufacture of motor valves.

"(g) That said Fred H. Wobig, on the 20th day of February, 1920, voluntarily breached the contract with said Harry Goodman, under date of February 18, 1920, hereinbefore referred to, and that with the exception of the reservation of right, which said Fred H. Wobig has, in said patent referred to in paragraph F. The said contract is at an end, and that the said Fred H. Wobig has no further rights therein."

The parties to this litigation evidently regard the patent as a valuable one. Counsel for defendant characterize it in his brief:

"If this patent is a meritorious one, and if the results hoped for can be obtained as hoped and expected, then a fortune of fabulous proportions is the sure fruit of this union of different kinds of metal that will grow with the years, not only for the benefit of defendant, but of posterity as well. It is almost too good to be true. But I am told that it can be done, by men in whose knowledge of the use and transmutation of metals and workers of ability of metals I have confidence. And if it can be firmly and completely made at all, then it is bound to be a complete success ultimately. And I am informed that it has been done. It will make as much change in that portion of auto industry as the change from cogwheels

to a smooth iron rail, and from windlass and rope action to traction and trolley."

Whether this is a proper characterization of the value of the patent or not, the Patent Office evidently thought there was some merit in the process or the patent would not have been issued. If the decree is permitted to stand, the defendant is deprived of his patent without any provision being made that he shall be superintendent of the plant, without any provision that he shall share in the profits of the manufacture. In fact, he gets nothing in return for his patent. The result is so clearly against equity and good conscience that the decree should not stand.

The decree is reversed, with costs to the defendant, and plaintiff is relegated to any remedy he may have at law.

YOUNGS v. ADVANCE-RUMLEY THRESHER CO. (No. 23.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Sales $\S$ 38(2) — Representations as to threshing machinery doing work for which it was purchased held not to constitute fraud.

Representations by seller of threshing machinery that it would properly do the work for which it was purchased held not to constitute fraud, in the absence of a showing that the representations were not made in good faith, the representations being mere warranties.

2. Fraud $\S$ 50—Not to be presumed.

Fraud is not to be presumed, but must be proved.

3. Sales $\S$ 267—Written warranty controls.

Where written contract contained warranty and provided that the writing contained all the representations, conditions, and warranties agreed upon between the parties, the written warranty controls, all parol agreements being conclusively presumed to have been expressed therein.

4. Appeal and error $\S$ 889(3) — Supreme Court, in order to avoid retrial, will treat bill as amended.

In buyer's action for fraud, Supreme Court on appeal, after the facts have been fully developed, on holding that there was no fraud, but merely a warranty on the part of the seller, will treat the bill as amended, and the buyer's claim as predicated on the written warranty.

5. Sales $\S$ 287(6)—Buyer held entitled to rescind contract for breach of warranty.

Where sales contract containing written warranty gave buyer the right to return defective goods, if seller failed to remedy defect, and where buyer gave seller notice of an intention to return the goods, and was advised that seller would not accept a return, the buyer was entitled to rescind for breach of warranty.

6. Sales $\S$ 441(3)—Evidence held to prove breach of warranty.

Evidence held to prove that threshing machine would not do as good work as any other machine of the same kind, size, and rated capacity working under like conditions as warranted.

7. Sales $\S$ 391(8), 442(5)—Buyer entitled to rescission could recover purchase price paid with cancellation of notes, but not damages for loss of business.

Buyer rescinding sale of threshing machine for breach of warranty under provision of contract could recover consideration paid, and was entitled to cancellation of notes for balance of purchase price and mortgage executed to secure such notes, but could not recover his damages for loss of business during the seasons during which he used the defective machine.

Appeal from Circuit Court, Washtenaw County, in Chancery; George W. Sample, Judge.

Action by Bert Youngs against the Advance-Rumley Thresher Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS. STONE, CLARK, BIRD, and SHARPE, JJ.

Arthur Brown, of Ann Arbor (E. R. Sunderland, of Ann Arbor, of counsel), for appellant.

Lee N. Brown, of Ypsilanti, and Cavanaugh & Burke, of Ann Arbor (Henry C. Bogle, of Detroit, of counsel), for appellee.

SHARPE, J. In 1916, plaintiff purchased a threshing machine engine from the defendant. Later, in the same year, he purchased a grain separator, giving therefor his five promissory notes, aggregating \$989, secured by a chattel mortgage on the engine and separator. This separator did not do good work. Defendant made several ineffectual efforts to make it do so. The machine was finally returned to the defendant, and a new one furnished plaintiff. The negotiations to this end were consummated on August 29, 1917, by plaintiff's executing a written order for the new machine, which was accepted in writing by the defendant. It provided for a return of the machine purchased in 1916, the payment of \$6.60 in cash, and the giving of three promissory notes, one for \$50, due December 1, 1918, one for \$125, due December 1, 1917, and one for \$125, due December 1, 1918. The payment of these notes and those unpaid on the former machine, amounting in all to \$959, was secured by a chattel mortgage of same date on the engine and the new separator. There was attached to the mortgage the affidavit of plaintiff required by the statute. The contract thus made contained the following warranty:

"Said machinery is warranted to be well made and of good material, and with proper use capable of doing as good work as any other machine of the same kind, size, and rated capacity, working under like conditions, but any machine or part thereof not manufactured for or by vendor, or which is second-hand, rebuilt, or repaired, is not warranted, by statute or otherwise."

It also provided:

"There are no representations, warranties, or condition, express or implied, statutory or otherwise, except those herein contained and no agreement collateral hereto shall be binding upon either party unless in writing hereupon or attached hereto, signed by purchaser and accepted by vendor at its head office."

At the same time, plaintiff executed and delivered to the defendant the following writing:

"Satisfaction Certificate.

"Dated at Ypsilanti, Mich., Aug. 29, 1917.

"Received of Advance-Rumley Thresher Company, Inc., a corporation of La Porte, Ind., an exchange of separators per terms of order bearing even date herewith, in consideration of which I hereby acknowledge full satisfaction and settlement of all demands of any nature whatsoever against Advance-Rumley Thresher Company, Inc., or growing out of the purchase and sale or relating to certain machinery heretofore purchased from Advance-Rumley Thresher Co. [describing it], and expressly waive all counterclaims, set-offs and defenses against the collection of any note or notes given therefor or indebtedness relating thereto, and any renewal or renewals thereof, and I hereby acknowledge to owe Advance-Rumley Thresher Company, Limited, aforesaid for the purchase price of said machinery the sum of \$659, which sum I promise to pay with interest.

[Signed] Bert Youngs.

"Witness: E. D. Lanigan."

This machine was received in due time by plaintiff. He claims it did no better work than the former one. Several efforts were made by the defendant's employees to make it work properly, but, as plaintiff claims, without effect. Much correspondence passed between the parties. On September 18, 1917, plaintiff advised defendant by telegram that he had "ordered car will load separator soon as car is ready," to which the defendant replied on the following day:

"If you load separator you will do so at your own risk as we refuse to accept it. Wilcox will be there this afternoon."

On October 1st, plaintiff wrote that the changes made by Wilcox "failed to make this separator clean and save grain." Defendant's manager replied on October 3d, saying Wilcox would be at plaintiff's place again on the next day, and he had "entire confidence that he will be able to please you and that you will pronounce the machine A-1 before he leaves you." On October 30, 1917, plaintiff advised defendant that the machine

would not work, "is of no use to me," and asked for directions what to do with it. The defendant answered on November 3d, saying that when last seen running by their expert, Mr. Wilcox, it was doing good work, and assuring plaintiff that the machine was all right. The machine remained with plaintiff.

On January 17, 1918, plaintiff filed the bill of complaint herein. As amended, it sets forth the dealings between the parties as above stated. In paragraph 11 it alleges:

"That owing to the complete failure of the said separator and its equipment to perform its work properly, or at all, and the failure of the said defendant, its experts and agents, after due and proper notice, to remedy the defects of the same, the threshing season of the summer of 1916 was a great loss and damage of many thousand dollars to this plaintiff, and loss to him in the confidence and patronage of the many customers for whom he had attempted to thresh with said separator and its equipment, and this defendant [meaning plaintiff] through and by means of said failure largely lost his threshing patronage in said community."

After stating the ineffectual efforts of defendant to make the machine work in a proper manner, it alleges the refusal of defendant to exchange the same for a new machine unless plaintiff would pay in cash a note given on the original purchase, amounting with interest to about \$350. It further alleges that, owing to the "embarrassing and hopeless condition" in which plaintiff was placed, and the danger of losing the business he had theretofore carried on successfully, he was "obliged to yield and did yield to the promise of this defendant to purchase from it a new separator for the sum of \$1,350, upon the express conditions and representation; * * * that the said new separator was absolutely perfect; * * * that it had been tried out for three years; that he would guarantee it in every detail;" that after many trials, it being found that the machine would not work properly, he offered to ship it back to defendant, but was notified that defendant would not accept it. Plaintiff further alleges:

"That he was induced to sign and did sign said satisfaction certificate by the representation to plaintiff on the part of defendant that the said separator and its equipment * * * would perform satisfactorily and in a good and workmanlike manner, the purposes for which the same was purchased; * * * that said defendant knew that said plaintiff relied upon said representation; * * * that defendant made the representations knowing, or under circumstances by virtue of which it ought to have known, that said representations were false; and that * * * the inducement as aforesaid by said defendant of this plaintiff to sign said satisfaction certificate constituted a fraud upon this defendant [meaning plaintiff], and as such and because of the same should in a court of equity, be set aside and held for naught."

The relief prayed for was a cancellation of the satisfaction certificate and the notes and mortgage, and an accounting of the sums paid by plaintiff on both machines, and the losses sustained by him resulting from the failure of the machines to do good work, and that a money decree be granted plaintiff therefor.

Defendant's answer is a denial of all representations except those contained in the written warranties under which the machines were sold. It alleges that these written "warranties fixed exactly the obligations which defendant assumed in regard to said machines," and "that defendant has in every respect fully performed all of said warranties." By way of cross-bill, it sets up the facts incident to the giving of the chattel mortgage of August 29, 1917, alleges that the notes secured thereby are past due, and prays for foreclosure thereof.

The trial court found that "each and all of the allegations" of the bill of complaint "is and are true and fully sustained," and that plaintiff was entitled to the relief prayed for. The decree canceled the satisfaction certificate, and all the notes unpaid, set aside the chattel mortgage, dismissed the cross-bill, ordered defendant to pay the \$350 note paid to it by plaintiff when the new machine was purchased, and referred the matter of plaintiff's damages for loss of business during the seasons of 1916 and 1917 to a circuit court commissioner for computation. From this decree, the defendant has appealed.

[1, 2] 1. Was fraud alleged or proven? This is the first question discussed by counsel. We have set forth substantially all the allegations in the bill relating to the false representations on which plaintiff relies. These can well be stated by saying that defendant represented that the machine to be furnished and afterwards delivered would properly do the work for which it was purchased. This was no more than a warranty, and the record is barren of proof tending to show that, if such representations were made by defendant, they were not made in good faith. It appears from the record that the defendant is the second largest manufacturer of threshing machinery in this country. There is no proof that its officers and salesmen did not believe the machines furnished would work properly, but we think the claim made by the plaintiff that he was induced to give the order for the second machine and sign the satisfaction certificate, by reason of the fraudulent representations of the defendant, is entirely unsupported by the proofs. Fraud is not to be presumed, but must be proven. The record contains no proof even tending to show that any representations or warranties made by the defendant were not made in the utmost good faith.

[3] 2. Must the written warranty control? At the time plaintiff gave the order for the

separator on August 29, 1917, he knew the trouble he had had with the machine purchased in 1916. He was a thresher of 35 years' experience. If he desired a more specific warranty than that embodied in the order given by him and accepted by the defendant, he should have had it inserted therein. He makes no claim that he did not fully understand the written warranty or the provision that the writing contained all the representations, conditions, and warranties agreed upon between them. This court has many times held that an express warranty excludes any claim of an implied warranty, and that, when the contract is reduced to writing, all parol agreements or understandings of the parties are conclusively presumed to be expressed therein. *Hall v. Duplex Power Car Co.*, 168 Mich. 634, 135 N. W. 118; *Potter v. Shields*, 174 Mich. 121, 140 N. W. 500; *Linderman Machine Co. v. Shaw-Walker Co.*, 187 Mich. 28, 153 N. W. 34; *Gruber Co. v. Smith*, 195 Mich. 336, 162 N. W. 124; *American Varnish Co. v. Globe Furniture Co.*, 199 Mich. 316, 165 N. W. 1050. The rule is thus stated in *Bates Tractor Co. v. Gregory*, 199 Mich. 8, 165 N. W. 612:

"Where the parties to a contract reduce it to writing and agree as to what warranties said written contract shall contain, other warranties growing out of antecedent representations may not be imposed upon the vendor. * * * Representations in the nature of warranties antecedent to the contract cannot be urged as fraud in cases where the contract is in writing and contains specific warranties."

3. The written warranty: In plaintiff's brief, counsel say:

"We wish to emphasize here that, without going back of the express warranty contained in the order for machinery, plaintiff is entitled to relief."

Defendant's counsel, in reply to this claim, after quoting the warranty, say:

"There is not a word in the bill of complaint about any such warranty or representation as this, which the written contract contained."

[4] We may, however, and think we should, in order to avoid a retrial, as the facts were fully gone into, treat the bill as amended, and the claim of plaintiff as predicated on the written warranty. *Peacock v. Detroit, etc., R. Co.*, 208 Mich. 403, 175 N. W. 530, 8 A. L. R. 964; *Canning Co. v. Pere Marquette R. Co.*, 211 Mich. 326, 178 N. W. 851. Anticipating such action, counsel for the defendant urge that the breach of warranty would not authorize a rescission by plaintiff. They rely on *H. W. Williams Transportation Line v. Darius Cole, etc., Co.*, 129 Mich. 209, 88 N. W. 473, 56 L. R. A. 939, *Linderman Machine Co. v. Shaw-Walker Co.*, 187 Mich. 28, 153 N. W. 34, and *Rimmele v. Huebner*, 190 Mich. 247, 157 N. W. 10, to sustain this claim. The rule stated in the *Transportation Case*

and approved in the others does not apply when the contract itself authorizes a rescission. In *Kimball, etc., Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558, quoted from in that case, it was said:

"While a right to return property which does not answer the assurance is not always or generally expressed or implied in the warranty, yet if agreed upon it is in no way inconsistent with a warranty."

[5] Plaintiff contends that section 11900, 3 Comp. Laws 1915 (section 69 of the Uniform Sales Act), expressly provides for rescission in such cases. It is sufficient, however, to say that this contract contains a specific provision for rescission. After reciting the things which the vendee must do in case of defects in the machine or in the work which it does, it provides:

"If vendor fails to remedy the defect, purchaser shall have the right immediately to return the defective goods or parts in as good condition as when received by him, * * * and shall thereupon give vendor immediate notice of such return."

The fact that plaintiff gave notice of an intention to return and defendant advised him that it would not accept a return is not in dispute. If, then, there was in fact a breach in the terms of the warranty, the plaintiff was entitled to rescind. The warranty is quoted above. Defendant insists that there is no proof that the machine would not do "as good work as any other machine of the same kind, size, and rated capacity, working under like conditions." This must, of course, be read having in mind the kind of a machine and the purpose for which it was to be used. It was intended for use in threshing the grain grown by farmers on their farms. There is an abundance of proof that it did not do such work satisfactorily. Several of its parts were taken away by defendant's expert and replaced by others. One of the troubles was with the tailings elevator. It permitted the separated grain to pass over in the chaff and straw. E. D. Lanigan, the Michigan manager of the defendant, who resided at Battle Creek, who sent the experts to repair the defects complained of, in a letter to the plaintiff under date of September 10, 1917, after stating the report made to him by his expert, Mr. Wilcox, and advising him that they were sending him some new parts, said:

"The writer, you will remember, informed you that we had had some difficulty with the tailings elevator, which we felt that we had overcome by some changes we had made in it. We find that with these changes the elevator on the machines we have out running do very well, but we have since found that in wet grain that they were still causing some trouble, and had already arranged to make this new bottom head for the elevator before the receipt of your letter, or, in fact, before Mr. Wilcox got back. However, it takes some little time to get out

new drawings and patterns, but, as above stated, we have the job so nearly completed that we are satisfied we can take care of you the latter part of this week.

"As soon as the parts are ready, we will send them down, and send Mr. Wilcox back to install them, and see that you get good results with the separator.

"We want to assure you that we will positively see to it that this elevator is made to work properly without clogging up under ordinary conditions, and when we have taken care of these matters, as outlined above, we are confident you will be mighty well pleased with the machine."

As a witness he testified:

"Q. In your letter to Mr. Youngs with regard to the second machine you pointed out to Mr. Youngs certain things that were defective on the machine that he had no means of knowing at the time he purchased it, didn't you? A. Yes.

"Q. This machine as a matter of fact was largely an experiment with regard to that particular feature of it? A. In regard to that particular feature. * * *

"Q. And if these defects in the tailings elevator existed at the time as you now admit they existed, they must necessarily have had a serious effect on the satisfaction which he was able to give to his patrons in the threshing business? * * * A. They were if not taken care of. * * *

"Q. May I frame a question to you as to whether or not this particular method of operation on this machine was an experiment? Was it or was it not? A. I would say it was an experiment to a certain extent. * * *

"Q. Aside from these complaints made by Mr. Youngs, who else complained? A. There was a number of complaints received in regard to the tailings elevator; I would not be able to say how many; I have knowledge of three or four myself. * * * There was not sufficient opening to permit the tailings, particularly in damp grain, to get into the elevator in proper shape, and a change was made in the sprocket and bearing, and that was incorporated into machine that was shipped to Mr. Youngs. Finding that did not overcome the difficulty, a new head was designed and put in there."

The report made on September 11th by Mr. Wilcox, who had attempted to repair the machine, reads in part as follows:

"They started up, and I remained with the machine the balance of day; had a lot of trouble with tailings elevator, the chain breaking four times. Found there was nothing I could do to remedy the trouble until I returned to factory and got the parts ready."

[6] It is apparent from this evidence, as well as from the testimony of the several farmers who were sworn, all of whom had had some experience with threshers, that the machine was not doing good work. We think the trial court was justified in its finding that plaintiff had a right to rescind under the terms of the contract. The defendant is entitled to a return of the machine, and the

plaintiff to a cancellation of his notes and the chattel mortgage.

[7] 4. Plaintiff's damages: The views we have expressed preclude the consideration of any damage sustained by plaintiff prior to the purchase of the new machine. Any consideration paid by him therefor, as expressed in the contract of sale, should be returned, and, as before stated, his mortgage and notes should be delivered up and canceled. The \$350 payment was not paid as a part of the purchase price, but agreed to on the settlement as compensation for the use of the machine purchased in 1916.

We think the provision in the decree respecting other damages too broad. These must be confined to such as are allowable in cases of like nature. We are loath to lay down any rule respecting them in the absence of such specific proof as may be offered before the commissioner, and content ourselves with calling attention to the language employed in *Truman v. Threshing Machine Co.*, 169 Mich. 153, 135 N. W. 89, and the cases there cited, where the subject of damages in somewhat similar cases is considered.

The decree will be modified in accordance herewith, and as thus modified, affirmed, without costs of this court to either party.

DOUGLAS v. INSURANCE CO. OF NORTH AMERICA. (No. 70.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Insurance $\S$ 668(6)—Insured's testimony as to identity of car stolen with that insured held sufficient as against motion for directed verdict.

Though a misrepresentation as to the model and age of an automobile is one of a material fact, where defendant, in a suit on a policy insuring a 1915 car against theft, introduced no evidence that the factory number alleged was of the 1912 series, and plaintiff, though he threw no light on the discrepancy in numbers, testified positively that the car purchased was a 1915 model, bought from an agency which had it insured for the protection of both, that it was correctly described in the application, except as to number, and that it was his only car and the car stolen, a directed verdict for defendant was properly refused.

2. Insurance $\S$ 640(2)—Breach of warranty by insured not available without notice of special defense, as required by court rule.

Where defendant, in a suit on an automobile theft policy, did not attach to its plea of the general issue, as required by a court rule, a notice of a special defense of breach of warranty by insertion of the wrong factory number in the application, and offered no proof that the claimed misrepresentation as to number resulted in injury to it, it cannot rely on such defense.

3. Insurance $\S$ 558(6) — Adjuster's conduct held to waive proof of loss.

Where insurer's adjuster, on being notified by insured that his automobile had been stolen, promised to take care of him, took charge of the matter, examined the policy and other papers, made a record of the case from answers to questions asked of insured, and promised they would return the car or pay for it within 60 days, it waived subsequent tender of proof of loss.

4. Corporations $\S$ 433(1)—Question of agency for jury, if reasonably inferable from evidence.

Though agency cannot be proven by the statements, declarations, or admissions of the alleged agent, if there be in proof facts from which an agent's authority can be fairly and reasonably inferred, the question is for the jury; direct and positive proof, particularly in the case of corporations, which can act only through agents, not being imperative.

5. Insurance $\S$ 668(2)—Evidence held sufficient to take question of agency to jury.

In an action on an automobile theft policy, evidence that plaintiff, by direction of the agent who wrote the policy, went to an office with defendant's name on the door, where he met the man who the agent had told him was defendant's adjuster, that the latter, who was apparently in charge of the office, assured him he would take care of him and took charge of the case, and that defendant indorsed the adjuster's subsequent refusal to pay, together with the fact that he was defendant's attorney, but did not take the stand to explain or deny plaintiff's testimony, held sufficient to take the case to the jury.

6. Evidence $\S$ 77(6)—Failure to swear adjuster as witness justified unfavorable inference against insurance company.

In suit by insured, the fact that an adjuster, who was insurer's attorney, did not take the stand in explanation or denial of what he said or did while in defendant's office and apparently in charge of its business, justified an inference that his testimony would be detrimental to defendant.

Error to Circuit Court, Wayne County; John H. Goff, Judge.

Action by George Douglas against the Insurance Company of North America. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Frederick J. Ward and John B. Coughlin, both of Detroit, for appellant.

Harry O. Milligan, of Detroit, for appellee.

STEERE, C. J. In May, 1918, plaintiff, who lived in Detroit, bought a used Ford touring car from the "Studebaker people"

for \$250, paying \$110 down and signing the customary contract of purchase, with deferred payments, by which he agreed to pay the balance within six months and insure the car for protection of both parties as their interests might appear. He accordingly insured the car with defendant against loss by theft, fire, etc., in the sum of \$225 for a period of one year from May 31, 1918, and paid for his car in full within the prescribed six months.

He had possession and use of the car from the time of purchase until March 16, 1919, when, during his temporary absence from home, a thief broke into his locked barn and stole it. The theft was promptly reported to the police department by his wife and word sent to plaintiff, who returned that night and the next day first notified a man named Brown, who wrote the policy, as plaintiff testified, and whose name appears on its outside in typewriting. Brown told him to go to the company's adjuster, Fred Ward, in the Dime Bank Building. Plaintiff then went to the office of defendant on the Eleventh floor of the Dime Bank Building, where the name on the door was "The North American Insurance." The first person he met there was Frederick Ward, for whom he asked, and who, in answer, so identified himself. When told of the stolen car and shown plaintiff's policy, he said to plaintiff that he would take care of him, had the stenographer make out a sheet, and said they would advertise it. Plaintiff described the car and answered Ward's questions, laid his policy and license tag down before the stenographer, and answered her questions. After the paper was filled out and she told Ward she had it all down, he, as plaintiff testifies, "said they would either pay me for it—if they didn't find it in 60 days they would pay for it, and, if they did find it, they would replace it as good as it was when it was took."

After waiting 60 days, plaintiff called Ward up in relation to the matter, getting his number from the telephone directory, and Ward told him to go to the police garage on Beaubien street, which he did, but his car was not there. The next day plaintiff went to the office and saw Ward about it again, who then, as plaintiff testifies, "said I could not show that they owed me anything; he said there was a difference in the number—something about the number."

Failing to secure a settlement, as he claimed Ward promised, plaintiff put the matter in the hands of Harry C. Milligan, his attorney. Milligan testified that, when plaintiff left the policy with him for collection, he at once went to the office of Mr. Ward, whom he had known 7 or 8 years, and asked him why the company would not pay the money due on the policy; that Ward had the papers in the matter, a file of Douglas v. Insurance Co., and replied, "They won't pay it, be-

cause the man took out insurance on this car, and he gave us a number which covers a car built about 1912, whereas, as a matter of fact, he is trying to collect for a 1915 car;" that during the time witness had known Ward "he always maintained his law office with the Insurance Company of North America, or the Royal Indemnity Insurance Company"; that Mr. Ward's law office, when witness interviewed him, was next door to the insurance company. Frederick J. Ward is attorney of record for defendant in this case. No testimony was introduced by defendant.

Plaintiff's sales contract from the Studebaker people, his insurance policy, and automobile certificate of registration issued to him by the secretary of state were introduced in evidence. In the sales contract the car is described as a used Ford model touring car, "serial No. none, motor No. 895489." In the insurance policy, under the heading "Warranties," it is described as "model year 1915; trade name, Ford; type of body, touring; factory No. 1502461;" while in the certificate of registration it is described as a Ford touring car, "factory number 895489." In plaintiff's declaration it is described as a Ford touring car of the year 1915, "with engine No. 895-489." Of the apparent discrepancy in numbers, plaintiff testified that the Studebaker people filled the blank spaces in both the contract and application for insurance, obtained the policy, which they kept with the license card until his last note was paid; that the number on his license tag of 1919 was copied from that of the previous year by a party who filled out his application; that he never had but the one car to which the papers relate, until after it was stolen; he was not familiar with car numbers, knew nothing about how it was numbered, and had not examined the papers before it was stolen.

Defendant moved for a directed verdict at the close of plaintiff's testimony, on various grounds, particularly emphasizing this discrepancy in numbering, as to which it was said in its counsel's brief:

"The number identifies the car, and Ford car No. 895489 is a car of the 1912 series, which no insurance company would insure in 1918, when it was six years old."

[1] Undoubtedly a misrepresentation as to the model and age of a car is a misrepresentation of a material fact, for the value of a car is clearly related to the year of its issue; but in reply to the quoted statement of defendant's counsel plaintiff's counsel asserts in his brief:

"There is no testimony in the case that the above assertion is true, and the fact is that it is not true, and an inquiry at any Ford agency will prove that it is not true. This number was borne by cars made in the months of September or October, 1915. A reference to any book showing the engine numbers of

Ford cars will prove that in 1915 the numbers ran from 680,348 to 1028318."

Apparently neither party took the trouble to offer evidence as to the special significance of the Ford numbering, and unfortunately we find the record destitute of testimony to support of refute the conflicting assertions of counsel in the particular noted. Defendant introduced no evidence at all, and the testimony of plaintiff himself is substantially all the testimony in the case, and to be viewed in its most favorable light against directing a verdict for the defense. While ignorance of the contents of the warranty in the application he signed for insurance would not excuse him, and he throws no light on the claimed discrepancy in numbers, he testifies clearly and positively as to the car purchased, insured, and stolen, that it was a 1915 used Ford touring car bought from the Studebaker agency which applied to defendant and had it insured for protection of both, and that it was correctly described in the application, unless it be the number, it was the only car he had, and the car stolen from him as related.

[2] Defendant's five notices of special defense attached to its plea of the general issue relate entirely to plaintiff's failure to make proof of loss, inventory, appraisal, etc., within the required time. No notice was given of breach of warranty by a wrong number of the car or any reliance on a false number by defendant to its damage. If insertion of the wrong number in the application as complained of afforded a ground of defense, it was as breach of warranty, for which, under section 4 of circuit court rule 23, notice of special defense is required as follows:

"In a suit upon a policy of insurance, if the defendant shall rely, in whole or in part, upon a breach of any of the conditions, agreements, representations or warranties of the policy or application therefor, or upon the failure to perform or make good any promise, representation or warranty, or upon the failure to furnish any proof of loss, as required by the policy, there shall be added to the plea a notice plainly indicating the nature of the defense relied upon."

Not only was this special defense not pleaded but there was no proof offered that the claimed misrepresentation as to number resulted in any injury to defendant.

[3] Apparently the closest question in this case is that of agency, the authority of Attorney Ward to make the promises and refusals in behalf of the defense, sworn to by plaintiff. If the issue of his agency was supported by sufficient facts to carry the question to the jury, the special defense of failure to make proof of loss in time and manner prescribed in the policy fails. The jury found the agency established by a preponderance of evidence. Plaintiff went to Ward

as adjuster of defendant, notified him that the insured car had been stolen, and showed him the policy. Plaintiff testifies, and it is not denied, that Ward said, "I will take care of you," took charge of the matter, examined the papers, asked such questions and made such a record of the case as he saw fit, and then promised they would return the car or pay for it within 60 days, but later denied liability of the company and refused payment. Such conduct on the part of the company through its authorized agent renders it needless to tender, and waives subsequent proof of loss. *Joyce on Insurance* (2d Ed.) p. 1437; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 181, 17 N. W. 726; *Young v. Farmers' Ins. Co.*, 92 Mich. 68, 52 N. W. 454; *Morgan v. Illinois Ins. Co.*, 130 Mich. 427, 90 N. W. 40.

[4] Defendant timely objected to all testimony given by plaintiff as to Ward's agency, and later covered the question generally by moving to strike out all testimony directed to his authority to act as agent. Upon that contention it is urged that no evidence was produced of Ward's authorization by the company to act as its agent, and plaintiff's whole case is based on testimony of himself and his attorney as to what Ward said. *Ward v. Dunnebecke*, 184 Mich. 703, 151 N. W. 630, *Fisk v. Liverpool & London & Globe Ins. Co.*, 198 Mich. 270, 164 N. W. 522, and other authorities are cited to the rule that an agency cannot be proven by the statements, declarations, or admissions of an alleged agent standing alone. That general rule is well settled, and not questioned by plaintiff's counsel, who deny the evidence of Ward's agency is limited to his bare statements, and claim the proven facts and circumstances attending Ward's assumption of authority, when and as he did, in performance of the duties of an agent for the company, made a case for the jury under the general rule of permissible inferences and presumptions in such cases, thus stated in *Joyce on Insurance* (2d Ed.) p. 1092:

"If a person acts openly and notoriously in exercising the duties of a particular agency, and under such circumstances as imply knowledge of the company, the presumption attaches that he has the authority he thus claims to possess. * * *"

The difficulty of showing the agent's authority by direct and positive proof, particularly in the case of corporations which can only act through agents, is recognized, and such proof is not imperative. The existence and extent of an agency may be inferred from attending facts and circumstances, and if there be in proof facts from which an agent's authority can be fairly and reasonably inferred, the question becomes one for a jury. That subject is instructively discussed, with citations of many authorities, in 21 *Ruling Case Law*, p. 820. The trial court very fair-

ly submitted the question of Ward's agency to the jury, based upon the facts and circumstances proven, to which he called attention, saying:

"All those facts are to be considered by you in connection with the other proof, remembering all the time that the company will not be bound by the acts of Mr. Ward, unless he was their agent, and that his statements that he was the agent would not be sufficient proof of his agency."

[5] When plaintiff discovered the theft of his car he acted promptly, got in touch with Brown, whose name appeared on his policy, and who wrote it as plaintiff understood, and notified him of the loss. Brown directed him to see Ward, who was the adjuster, on the Eleventh floor of the Dime Bank Building. He went to that floor of the building, and into an office which had defendant's name on the door. It cannot be doubted that he went to defendant's office, for the purpose of reporting his loss and doing whatever was required of him to collect his insurance. The first person he met there was Ward, the man Brown had told him was the adjuster, who was apparently in charge of the office, answered his notice and inquiries with assurances he would take care of him, and proceeded in an authoritative manner to take charge of the case as related. While the statement of neither Brown nor Ward that the latter was the company's adjuster would prove his agency, they were at least assuring introductory incidents in connection with the place he went in his attempts to notify and do business with the proper agent of defendant, which would naturally allay any misgivings and lead him to give full faith and credit to what Ward did and said, without further investigation as to his authority.

[6] It would be permissible for the jury to consider, in connection with other facts and circumstances shown, that defendant has at least indorsed Ward's refusal to pay because of the discrepancy in number, that Ward, who is its attorney in the case and an available witness, did not take the stand in explanation or denial of what he is shown to have said and done while he was in defendant's office and apparently in charge of its business. Under such conditions it is competent for a jury to infer that he was not sworn as a witness by defendant because his testimony would be detrimental to it. *Dowagiac Mfg. Co. v. Schneider*, 181 Mich. 538, 148 N. W. 173; *Griggs v. Saginaw & Flint Ry. Co.*, 196 Mich. 258, 162 N. W. 960.

We conclude from an examination of this record as a whole there was sufficient testimony on the question of agency to take the case to the jury, and we are not prepared to say, as urged by defendant in its motion for a new trial, that the verdict is excessive, or

contrary to the evidence, as urged in defendant's motion for a new trial.

We find no reversible error in the case, and the judgment is affirmed.

SCHROEDER v. BERLIN ARCADE REAL ESTATE CO. et al.

(Supreme Court of Wisconsin. July 18, 1921.
Dissenting Opinion Oct. 8, 1921.)

1. Mortgages ¶138—Trust deed a mortgage.

A deed of trust securing bonds is a mere security for money advanced under the bond issue, and in legal effect is nothing more than a mortgage, and title remains in mortgagor.

2. Evidence ¶¶1—Housing conditions after war a matter of common knowledge.

It is a matter of common knowledge that after the war housing conditions were very oppressive, facilities to furnish homes were scarce, office space was at a great demand, rentals were raised in many instances far in excess of the requirements of the situation, numerous corporations and individuals became interested and engaged in the erection of tenement buildings, and that moneys to build homes were raised by the flotation of large bond issues.

3. Mortgages ¶¶151(1)—Legal rights not impaired by subsequent equity.

A fixed legal right under a mortgage cannot be impaired by any equity subsequently arising, except in case of operating expenses.

4. Mortgages ¶209—Trustee represents parties as provided in trust deed.

Powers of trustees under deeds of trust depend entirely upon the terms of the deeds, and in some respects they represent bondholders, in other respects the mortgagors, and in still other respects both bondholders and mortgagors.

5. Mortgages ¶¶112—Provisions not personal to party named as mortgagee.

The provisions of a mortgage are not personal to the party named in it as mortgagee, but are for the benefit and security of the real owner of the debt secured thereby.

6. Mortgages ¶298(2)—Trustee mere agent for bondholders in collecting interest.

Where bonds and interest thereon are made payable to trustee under trust deed, such trustee is an agent to receive the money and to distribute it among the bondholders on presentation of the bonds or the interest coupons, and a payment to the trustee, merely as trustee, cannot be held to be payment to the bondholders, unless made when and as prescribed by the terms of the bond.

7. Mortgages ¶209—Trustee agent of mortgagor and bondholders in registering bonds.

Bonds secured by a trust deed may be registered as to the payment of principal upon the books of the trustee, and in performing the

office of registrar the trustee represents both the mortgagor and the bondholders.

8. Mortgages $\S$ 209—Trustee represents mortgagor and mortgagee in rebuilding after fire.

Where trust deed requires fire insurance moneys to be paid to the trustee, who shall rebuild, the trustee, in paying the same to contractors in accordance with a certificate of an architect, represents both the mortgagor and mortgagee.

9. Mortgages $\S$ 209—Trustee in declaring mortgage due represents bondholders, but bondholders and mortgagor in collecting rents on taking possession.

A trustee in a deed of trust, in declaring the whole amount of the mortgage debt due by reason of some default on the part of the mortgagor, represents the bondholders, but where, upon conditions broken, he enters the premises and thereafter collects the rents, he is in that regard the representative both of the mortgagor and of the bondholders.

10. Mortgages $\S$ 209—Trustee held to represent bondholders and mortgagor in raising money to protect against forfeiture of mortgaged property.

Trustee in a deed of trust upon 99-year lease, in raising and borrowing money on the security of the lease and premises or upon a sublease for the purpose of paying off any sum due for interest, rental, insurance, taxes, or other charges payable by the lessee under the 99-year lease, acts both as the representative of the bondholders and of the mortgagor.

11. Mortgages $\S$ 209—Trustee in trust deed must be impartial.

It is incumbent upon a trustee in a trust deed securing payment of bonds to use the utmost good faith towards all parties in interest and act impartially for every person who has any rights in the estate.

12. Mortgages $\S$ 183—Bondholders not estopped by unauthorized acts of trustee in trust deed.

The real party in interest in the foreclosure of a trust deed securing bonds is not the trustee but the bondholders, and the bondholders cannot be estopped to deny priority of claims of others by reason of some unauthorized act of the trustee.

13. Mortgages $\S$ 209—Trustee's authority to subject trust deed to lease must be clear.

In order to authorize trustee in a trust deed to subject the trust deed to a lease subsequently made, the right must be contained in the provisions of the trust deed, either by express language or by necessary implication.

14. Landlord and tenant $\S$ 15—No attornment by tenant on assignment of rents to mortgagee.

An assignment by mortgagor of rents to mortgagee with notice to tenant, and payment by the tenant of rents to the mortgagee accruing under his lease, was not an attornment and did not establish the relation of landlord and tenant between the mortgagee and the tenant.

15. Mortgages $\S$ 151(1)—Assignments of rents of sublease to trustee did not affect lien of bondholders.

Assignment to trustee of rents under sublease, executed subsequent to the trust deed and before conditions broken, did not affect the lien of bondholders secured by the trust deed, in the absence of authority, by express language or necessary implication, in the trustee to subject the trust deed to the subsequent lease.

16. Landlord and tenant $\S$ 15—Trustee held to treat sublessee only as temporary tenant.

Where trustee under trust deed on condition broken took possession of premises and collected rents, held, that the collection of rents from a sublessee holding under a lease executed subsequent to the trust deed merely manifested intention of trustee to treat sublessee as a new tenant under a lease to expire upon the sale of the property under foreclosure proceedings, and not as a tenant under the original lease.

17. Mortgages $\S$ 426—Trustee on foreclosure not party individually unless impleaded.

A trustee foreclosing a trust deed cannot be considered a party as an individual unless he is impleaded in his individual capacity.

18. Mortgages $\S$ 209—Trustee liable for lack of diligence and abuse of discretion.

A failure to use reasonable diligence, or an abuse of his discretionary powers, renders a trustee under a trust deed personally liable to the party injured for the damages done.

19. Mortgages $\S$ 437—Trustee may be impleaded individually in foreclosure proceeding.

In foreclosure proceeding by trustee in trust deed, the court could have permitted the impleading of the trustee as an individual, even after the trial of the issues had proceeded for a period of two weeks, so as to enable an accounting and a final adjudication of issues presented by defendants, who claimed that the trustee had misappropriated funds, in view of St. 1919, §§ 2610, 2656a.

20. Interpleader $\S$ 1—Right to interplead discretionary.

The right to interplead under St. 1910, §§ 2610, 2656a, is discretionary with the court.

21. Appeal and error $\S$ 95—Order denying motion to bring in party not appealable.

An order denying a motion to bring in a person who may be a proper, but is not a necessary party, is not appealable.

22. Mortgages $\S$ 417—Trustee held authorized to foreclose on own motion.

Trust deed securing bonds held to give trustee power to foreclose of his own motion in certain cases, and to make it compulsory upon him to foreclose upon requisition of the bondholders and the furnishing of security, though bondholders retained right to waive certain defaults and to insist that trustee refrain from electing to declare the whole amount of the principal due and mortgagor to be in default.

23. Mortgages ¶105—Mortgagor of lease held not entitled to six months' notice of foreclosure.

Mortgagor under 99-year lease held not entitled to six months' notice of foreclosure of trust deed.

24. Mortgages ¶417—Trustee entitled to be subrogated to rights of bondholders to foreclose.

Trustee under trust deed who has advanced interest to bondholders and held the coupons as security for the advancements is entitled to be subrogated to the rights of the coupon holders to have the trust deed foreclosed.

25. Mortgages ¶463—Evidence held to show indebtedness to trustee.

In proceeding by trustee to foreclose a trust deed, evidence held to show a large indebtedness of the mortgagor to the trustee, warranting the foreclosure.

26. Mortgages ¶105—Agreement with bondholders under first trust deed did not inure to bondholders under second trust deed.

Obligation in first trust deed, wherein it was agreed that proceeds of first mortgage bonds should be used exclusively for the erection of a building, constituted an agreement between the mortgagor and the first mortgage bondholders, which in no manner inured to the benefit of second mortgage bondholders, in the absence of a contrary intent appearing in the deed.

27. Mortgages ¶411—Marshaling doctrine defined and applied to mortgage foreclosure.

The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not by his election disappoint a party having but one fund, and this doctrine should be applied in a proceeding to foreclose a first mortgage on a 99-year lease, rentals, etc., if there are two funds to satisfy the demands thereof.

28. Mortgages ¶411—Marshaling doctrine held inapplicable in proceeding to foreclose trust deed.

The doctrine of marshaling assets and securities was inapplicable in a proceeding by trustee to foreclose trust deed where the trustee had but one property out of which to satisfy the claim of the mortgage bondholders, except a claim arising for misappropriation of proceeds of first mortgage bonds and for misconduct of the trustee, as a paramount creditor cannot be compelled to exhaust in the first instance a mere personal remedy.

Eschweiler, J., dissenting.

Appeal from Circuit Court, Milwaukee County; E. T. Fairchild, Judge.

Action by Edward Schroeder, as trustee for bondholders, against the Berlin Arcade Real Estate Company and others. From an adverse judgment, various defendants take appeals. Affirmed.

This is an action brought by the plaintiff, as trustee for bondholders, to foreclose a cer-

tain mortgage in the form of a trust deed, executed by the defendant Berlin Arcade Real Estate Company (hereafter referred to, for convenience sake, as "real estate company").

The real estate company, in the year 1912, was the owner of a 99-year lease upon the following described real estate, to wit, lots numbered 14 and 15 in block numbered 12, in W. P. Young's subdivision, in the Thirteenth ward of the city of Milwaukee, Milwaukee county, Wis., which lease it held under and pursuant to an assignment from the Realty Investment Company, a corporation; the lease having been entered into on the 27th day of April, 1912, by and between Maria Niemann, of Milwaukee, Wis., and said Realty Investment Company.

On the 28th day of June, 1912, the real estate company executed a trust deed or mortgage on its leasehold interest, for the sum of \$125,000, to the plaintiff, Edward Schroeder, as trustee for bondholders, to secure the payment of 250 bonds; each bond being in the sum of \$500, and being numbered consecutively as Nos. 1 to 250, inclusive, bearing interest at the rate of 6 per cent. per annum, payable semiannually, in accordance with certain interest coupons thereto annexed, the principal of the bonds being payable, under the terms thereof, on the 1st day of November, 1917. This trust deed constituted a first mortgage upon the leasehold interest of the real estate company.

On the same day, to wit, the 28th day of June, 1912, a second mortgage or deed of trust was executed by the real estate company on said property, to the plaintiff, Edward Schroeder, as trustee for bondholders, for the purpose of securing the payment of 100 bonds, each for the sum of \$500, or a total of \$50,000. Said second trust deed or mortgage constituted a second mortgage upon said real estate, subject to said first mortgage for \$125,000.

The plaintiff continued to act as trustee under both of said mortgage bond issues until the 28th day of June, 1916, at which time he resigned as trustee under the second mortgage, and shortly thereafter commenced this action of foreclosure on the first mortgage or trust deed. Subsequently, and by proceedings duly had, the defendant Leonard Leidig was duly appointed by the court as trustee under the second trust deed or mortgage, and was made a party defendant to the foreclosure proceedings.

In and by the 99-year lease above referred to, executed by the said Maria Niemann to the Realty Investment Company, the said Realty Investment Company, its successors and assigns, agreed, under what is known as the third paragraph of said lease, to erect upon the leased premises within 5 years from the date of the lease a new business building of modern construction, not less

than four stories in height, at a cost of not less than \$75,000, and to insure and keep insured such building, when so erected and constructed, against loss or damage by fire, in the sum of \$30,000, in good and responsible fire insurance companies, the policies of insurance to be assigned and delivered to lessor and to be held by her as security for the faithful performance by the lessee of the terms and conditions of said lease. In and by said lease the lessee also covenanted and agreed that—

"The new building so to be erected shall be substantial, and shall in every respect comply with the laws, ordinances, and regulations, municipal or otherwise, that may govern the construction of the same, and shall save said lessor harmless of and from any loss or damage by reason of the construction of said new building, and by reason of any mechanic's liens or incumbrances of any kind or nature."

Said 99-year lease also contains what is known as the eleventh paragraph thereof, which provides as follows, to wit:

"It is understood and agreed that it will be necessary that the buildings and improvements now upon said lands be removed or demolished as hereinbefore provided, to make room for the new building to be erected by the lessee and that lessee may make alterations in any building from time to time, but shall not make such as will substantially depreciate the value of the building."

In other respects, said 99-year lease contains provisions of the usual and ordinary nature of documents of that kind.

The mortgages above referred to were executed for the purpose of raising money to pay in part the cost of the erection and construction of said proposed new building, and for other purposes.

Said first trust deed or mortgage, among other things, contains the following provisions, to wit:

"Now therefore, this indenture witnesseth that the mortgagor, for and in consideration of the premises and of \$1.00 received by it from the trustee, and in order to secure the due and punctual payment of the principal and interest of all of the bonds issued hereunder, and at any time outstanding, does hereby convey and assign unto the trustee, his successors and assigns forever, all its right, title, and interest in, to, and under said lease hereto annexed and marked Exhibit A, and to any and all future income, rents, and revenue from the lease, and leased property and any part thereof."

The habendum clause of said lease, among other provisions, contains the following:

"That until default shall be made and continued by the mortgagor in the payment of the principal or interest of any of the said bonds hereby secured as hereinafter provided, or until default shall be made and continued in respect to any act, thing, obligation, or agreement herein required to be done, performed, or

kept by it as hereinafter or in said lease provided, the mortgagor shall be permitted to possess, manage, use, and enjoy said property and the improvements, appurtenances, rights, and privileges, and to take and use the incomes, revenues, rents, and profits thereof as if this mortgage had not been made."

Said trust deed or mortgage also contains an agreement on the part of the real estate company to the effect that the leased premises shall be maintained, and shall not at any time during the continuance of the mortgage be torn down or removed without the consent of the trustee and all of the holders of the bonds issued under said first bond issue, and in the event of the destruction by fire or otherwise the said mortgagor will repair or rebuild the same forthwith, or erect a new building of equal value, to cost at least the sum of \$125,000, and that in the event that the mortgagor fails, within 90 days after the damage or destruction of the building, to repair or rebuild the same, it shall become lawful for the trustee, and it shall be his duty, upon a demand in writing signed by the holders of one-third of the bonds then outstanding, to enter and take possession of the demised premises, and exclude the mortgagor therefrom, and repair, rebuild, and replace the building upon said premises in as good condition as the building was before such damage had occurred, and to pay for the rebuilding and repair of said building out of the moneys received on the insurance loss.

In connection with the foregoing provisions with respect to the rebuilding and repair of the building upon the premises damaged or destroyed by fire, said trust deed or mortgage also contains the following provision, to wit:

"The mortgagor will, and the trustee may, in all things keep, observe, and perform all the covenants in said lease contained in respect to repairing, rebuilding, and replacing the building to be erected on said premises as in said lease provided to be done by the lessee."

The second article of the trust deed contains the following provision, to wit:

"The said mortgagor has contracted for the erection of a store and office building, to be known as the Berlin Arcade Building, upon said lands, and the trustee shall receive and hold all of said bonds, with full power and authority to sell and dispose of all or any of them at such prices and upon such terms and conditions as the trustee may deem advisable, and the trustee shall use and apply said bonds and the proceeds of any sale or sales thereof in paying and liquidating the cost of erection of such building upon the said lands, and none of said bonds and none of the proceeds of sales thereof shall be used for any other purpose or purposes."

Said article also provides for the payment by the trustee of all sums due to contractors and materialmen employed in the construc-

tion of the building upon said premises, under the written order and direction of one Robert T. Newberry, architect.

Among other provisions in said trust deed or mortgage is one authorizing the trustee to raise and borrow money on the security of the mortgage, lease, and premises, or upon any sublease, for the purpose of paying off any sum due for interest, rentals, insurance, taxes, or other charges payable by the lessee under said 99-year lease, or any charges or any lien for the time being charged upon the mortgaged property or any part thereof, in priority to the trust deed, with such interest and upon such terms as to the trustee may seem best.

Article 5 provides, among other things, as follows, to wit:

"In case default shall be made in the payment of any interest on any of the bonds issued hereunder, and shall continue for the period of six months after payment of such interest shall have been duly demanded in writing, or in case default shall be made in the payment of the principal of any of said bonds, or in case the mortgagor shall fail to keep the buildings insured against loss by fire, as herein agreed, or fails to pay the expense of effecting such insurance when due, or shall fail to keep, observe, and perform any condition of said lease by the lessee to be kept, observed and performed, then and in every such event the trustee may, and upon a requisition in writing signed by the holders of not less than one-third of the amount of said bonds then outstanding, and upon adequate indemnity," etc., "furnished, it shall be the duty of the trustee, * * * to enter upon all and singular the said property, * * * and to exclude the mortgagor and its agents (who shall forthwith surrender the same to the trustee) wholly therefrom, and to have, hold, manage, control, and use the same, * * * and exercise all rights and privileges pertaining thereto, and from time to time, and at the expense of the trust estate, effect such insurance against loss by fire, make all repairs and replacements and alterations, additions, and improvements thereto as may seem to him necessary or judicious, and to collect and receive all income, rents, issues, and profits of the same, and of every part thereof, and to apply the moneys arising as aforesaid, to the payment, first, of all rentals, insurance, taxes, and other charges to be paid by the said lessee in said lease; second, the cost of repairing, rebuilding, and replacing and altering said building, and operating and caring for said property; third, a commission of 3 per cent. of the rentals collected to the trustee for his services, to be computed monthly; fourth, to set aside and retain as a sinking fund to pay semi-annual interest on said bonds and coupons, and to pay the principal of said bonds out of the remainder of the moneys so received by the trustee, and apply the sums retained, as far as they will extend, in the payment of the semi-annual interest on said bonds and coupons, and then on the principal of the bonds which may be at that time due and unpaid," etc.

Article 4 of the trust deed or mortgage authorizes the trustee, in case the mortgagor

fails to keep the buildings insured against loss by fire as provided for in said mortgage, or in case it fails to keep and perform any of the conditions of said lease, to elect and to declare the whole amount of the principle of said bonds to become due and payable, and that upon the exercise of such election the whole amount of the principal of such bonds shall become immediately due and payable; and article 6 of said trust deed or mortgage authorizes the trustee, in the event of default in the payment of any of the principal of any of the bonds when the same shall become due and payable, or in the event of a failure on the part of the said real estate company to perform any of the conditions of said trust deed or mortgage after having exercised his option or privilege to declare the whole amount of the principal of said bonds due, to commence and prosecute an action of foreclosure. Said trust deed or mortgage also contains a provision authorizing the trustee, after entry upon conditions broken, to sell the mortgaged property in accordance with the terms and provisions of said trust deed.

Pursuant to the provisions of said 99-year lease, the real estate company proceeded to and did erect and construct upon said leasehold estate a substantial building four stories in height; it being its object and design to lease said building to tenants for stores and offices.

In the year 1914 the defendant Berlin Arcade Theater Company (hereinafter referred to as "theater company") was organized as a corporation, for the purpose of leasing and operating as a theater a portion of the building belonging to the real estate company, and situated upon said leasehold estate; and one Hugo Heller, one of the organizers and promoters of the theater company, and one Frank P. Burke, an attorney for the theater company, entered into negotiations with the real estate company for a 15-year lease of a part of the real estate company's building for theater purposes, and examined the records of the office of the register of deeds with respect to the title of the property of the real estate company, and upon such examination discovered and were informed of said trust deeds or mortgages and the terms and conditions thereof, and thereafter had an interview with Schroeder, the trustee for the mortgage bondholders. These representatives of the theater company personally saw Mr. Schroeder, the trustee, on two or three different occasions before the lease to the theater company was negotiated and executed, and discussed with him the general terms and conditions of the lease and also the matter of making certain alterations, etc., in the building, which, among other things, consisted in converting a certain arcade running from Third street through to North avenue into a theater lobby, and to convert the rear

portion of a store fronting on Third street into an auditorium for a theater. Among other work contemplated by said representatives of the theater company was the taking out of the stores that were on the inside of the arcade to be used for the purposes of a theater, and also the raising of the ceilings and lowering of the floors.

Upon an oral discussion with Mr. Schroeder, by both Mr. Burke and Mr. Heller, of the terms of the proposed lease with the real estate company, the trustee, Schroeder, expressed his satisfaction with such lease, and also with respect to the proposed changes to be made in the building so that the theater company might be properly accommodated and housed. The rents to be paid by the theater company were also discussed, and were approved by the trustee, Schroeder. The sum of about \$3,000 was paid by the theater company to the trustee, out of which money part of the improvements to be made for the benefit of the theater company were to be paid. Furthermore, certain deposits were to be and were made by the theater company with Schroeder, the trustee, in order that such improvements might be paid for out of such fund, and so as to avoid the possibility of the filing of liens on the building.

Before the lease was drawn, Schroeder also suggested that there be incorporated therein certain conditions with respect to insurance, in order to protect parties interested from damages for personal injuries received by persons in the theater and during building operations.

After the lease had been prepared, a request was made by the representatives of the theater company of Mr. Schroeder, as trustee, to sign the same, but he refused to comply with this request.

The contemplated changes in the building to accommodate the theater were made, at an expense of about \$15,000.

At the time of the execution of the lease with the theater company there had been no default by the mortgagor of the terms and conditions of the said mortgages, and the real estate company was in possession of the premises.

About the time of the execution of the lease with the theater company the real estate company assigned and transferred to Edward Schroeder the rents accruing from the said lease, and notice of such assignment was given in writing, by the real estate company to the theater company, on or about the 15th day of September, 1914; and on the 9th day of December, 1914, Schroeder notified in writing the theater company of the assignment of the rentals from the theater company to him, and requested that payments of rent be made to him, the said Schroeder.

On or about the 2d day of October, 1916, default having been made by the real estate company in the payment of interest on the

bonds and taxes on the real estate, and on account of failure to meet the terms of the 99-year lease, the said Schroeder, as trustee for bondholders, caused to be served upon the said real estate company a notice in writing, under and by the terms whereof, on account of the defaults above referred to, and pursuant to the provisions of the first trust deed or mortgage, he elected to declare and declared the whole amount of the principal sum of said first mortgage bonds, together with the interest thereon, as due, and demanded immediate payment thereof, and also notified said real estate company that in the event of a failure to comply with said request for payment forthwith an action would be begun to foreclose said first trust deed or mortgage.

Pursuant to the provisions of said trust deed or mortgage, and on account of the default of the mortgagor, the plaintiff, Schroeder, as such trustee under the first trust deed or mortgage, entered upon and took possession of the property of the said real estate company, and thereupon and thereafter collected all the rents accruing from said property, and did all things which he was authorized to do under and pursuant to said first trust deed or mortgage.

Foreclosure action in behalf of the trustee was thereupon commenced on the first trust deed or mortgage, and judgment demanded that any right, title, or interest that the defendant theater company had in and to said property by virtue of said 15-year lease be declared subsequent to the lien of the plaintiff, as trustee under said first mortgage or trust deed. The defendant Leidig as trustee under second trust deed or mortgage, filed a cross-complaint, in and by which he prayed for judgment in his behalf, and demanded substantially the same relief with respect to his said trust deed or mortgage as was prayed for by the plaintiff herein.

The defendants Esbenshade, as executrix, Hummel and Leafgreen, holders of second mortgage bonds under said second trust deed or mortgage, were also made parties defendants to said foreclosure action, as was also one Floyd E. Jenkins, as receiver of the defendant real estate company.

The theater company answered, and among other things alleged that the real estate company owned the building situated upon the leased premises herein referred to and the leasehold interest in the land, and owned no other property; that it was organized for the purpose of taking over said building and leasehold interest; that the building was a three-story building, designed for stores, offices, and a theater, and was not designed so that the whole building could be used by a single tenant; that the plaintiff knew that it would be necessary for the real estate company to enter into leases with divers persons on various terms, so that it could pay its taxes, insurance, interest, rent, and the upkeep

of the mortgaged premises; that the trust deed on which the plaintiff was foreclosing, and also the second trust deed, provided that until default should be made and continued by the mortgagor the mortgagor should be permitted to possess, manage, use, and enjoy the property and the improvements as if the said trust deed had not been made; that at the time the lease was entered into with the theater company the real estate company was not in default, and was still in possession of the mortgaged premises; that the theater company submitted the proposed lease to Schroeder, as trustee, and was assured that said lease was in all respects satisfactory to such trustee; and that by reason of the actions of the plaintiff, and his approval of said lease, he was estopped to deny the validity of said lease.

By the stipulation of the parties the issue raised by the plaintiff's complaint, the answer of the defendant Leidig, as trustee under the second mortgage bonds, and the answer of the defendant theater company, were tried separately.

Upon the issues so raised by the theater company, the facts above stated were substantially disclosed, and after such hearing the circuit court made and filed, among others, the following findings, to wit:

The court found that the real estate company executed the bonds pertaining to the first trust deed or mortgage, and also the execution of the first trust deed or mortgage, and delivery of said first mortgage bonds and of said first mortgage or trust deed to said plaintiff, Schroeder, as trustee; the acceptance by said Schroeder, as such trustee; the sale and delivery of said bonds by said plaintiff, Schroeder, as such trustee, for the use and benefit of the real estate company; that all of the first mortgage bonds are outstanding and held and owned by persons other than the trustee, and are wholly unpaid as to principal; that the said defendant real estate company defaulted in the payment of taxes on said property, and also in the payment of interest on said bonds; that pursuant to the provisions of said first trust deed or mortgage the plaintiff, on October 4, 1916, declared the whole amount of the principal and interest on said bonds as due, and demanded immediate payment thereof, and that such demand was not complied with; and that upon such declaration of election of option, and the service thereof, the whole amount of the principal of said first mortgage bonds, namely, the sum of \$125,000 and interest, became due; and that this action to foreclose was commenced on or about the 11th day of October, 1916; that on the 11th day of October, 1916, the plaintiff, as trustee, with the consent of the mortgagors, and under the provisions of said first trust deed or mortgage, entered into possession of the

mortgaged premises, to conserve the same as security for the bondholders, collected the rents thereof, and used the same towards a reduction of the taxes and interest becoming due on the bonds; and that he retained and now retains possession of said premises.

The court also found the execution of the lease by the real estate company with the theater company, as above stated; that at the time said lease was executed there had been no default by the mortgagor; that the real estate company was at that time in possession of the premises; and that said Edward Schroeder did not at that time, as such trustee, take possession of said premises; that prior to the time the theater company entered into said lease its officers and representatives consulted with the said Schroeder, as trustee, and advised him of their intention of leasing a part of the premises in question for a period of 15 years, and that it would be necessary to expend a large sum of money in order to change and remodel said building so that it would become suitable for theater purposes; that the said Schroeder, as trustee, expressed his satisfaction with the general outline of the proposed lease, but refused to give his consent in writing to the making of such lease, and that thereafter said lease was actually executed, and that the theater company proceeded to change and remodel the building for theater purposes, at an expense of about \$15,000; that said plaintiff, as trustee of both the first and second trust deeds or mortgages, did nothing which in any way interfered with the rights of the bondholders; and that it does not appear from the evidence that the plaintiff is estopped to assert the priority of the lien of said trust deeds or mortgages over the rights of said defendant theater company, as lessee; and that the rights of the theater company are subsequent and subordinate to said two trust deeds or mortgages; and that the interests of all of the defendants are subsequent to the lien of the first mortgage.

Similar findings were thereupon also made by the court with respect to the second mortgage or trust deed; also that the real estate company is wholly insolvent; that 81 of the 100 second mortgage bonds were duly issued and sold by the real estate company.

With respect to the issues so raised, and pursuant to the findings of fact, and as conclusions of law, the court found that the plaintiff was entitled to the relief demanded in the complaint; that the defendant theater company was not entitled to any relief; that the plaintiff and defendant Leidig, as trustee under said second trust deed or mortgage, were entitled to judgment of foreclosure and sale in the usual form; and thereupon judgment was entered in accordance with such findings, from which judgment the theater company has appealed.

The issue presented on the appeal of the theater company involves substantially the following:

Question No. 1. Is the lease from the real estate company to the theater company subject and subordinate to the first and second mortgages or trust deeds, and did the circuit court properly adjudge that the premises be sold free and clear of such lease?

It will be unnecessary in detail to go into the various answers of the defendants Esbenshade, Hummel, Leafgreen, Jenkins, as receiver, or the real estate company, for the reason that in substance the same issues are raised in somewhat different form by these respective answers. Among other things they allege that there was in fact no default on the bonds at the time of the commencement of the action; that the moneys received from the sale of the bonds and the rentals derived from the property and paid to the plaintiff, Schroeder, were sufficient to pay all necessary requirements and demands; that the plaintiff, Schroeder, collected from the sale of said bonds a large amount of money, aggregating a sum in excess of \$20,000, which amount he applied to his own personal use, and which amount he has failed to account for; that he, the said Schroeder, expended a large sum of money, aggregating the sum of about \$8,000, being his own individual funds, for the installation of a bowling alley in said premises, all without authority and contrary to his duties and obligations as trustee, and that in order to reimburse himself, in part, for such expenditures, he used the moneys derived from said property and said bonds.

And it is further alleged that at the time of the purchase by Hummel, Esbenshade, and Leafgreen of the second mortgage bonds held by them, it was represented to them by said Schroeder that all of the moneys derived by said plaintiff, Schroeder, from the sale of said first and second mortgage bonds would be used in the erection and construction of the building to be erected upon the premises hereinbefore described, and for no other purpose; and that a large amount of such money so derived from the sale of such bonds was converted by said Schroeder to his own individual use, to the great damage of the said second mortgage bondholders and of said real estate company; also that said Schroeder, as such trustee, in taking over the collection of rentals and in leasing the said building, was negligent in the execution of his trust, and by reason of such negligence such defendants sustained large damages.

The answers of these defendants also demand an accounting that the plaintiff, as trustee for the first mortgage bondholders, be required to exhaust all property and security to which he may be entitled by virtue of the alleged misappropriation of funds by the said Edward Schroeder before resorting

to the mortgaged property, and for an accounting of the plaintiff of all moneys received by him as such trustee for rents collected and from other sources, and that the amounts found due from him be applied upon the amounts due upon the bonds secured by the first and second trust deeds or mortgages, in such manner as may be just and equitable, and for judgment against the said plaintiff for the amounts unaccounted for by him, and for damages for his negligence as aforesaid, etc.

The foregoing does not set forth all of the claims of the respective defendants above referred to in regard to the alleged mismanagement and misconduct, etc., of the said Schroeder, but the allegations are sufficient to show the general nature of such allegations and the relief demanded. Other issues raised will be referred to and treated in the opinion.

After the trial had proceeded for about two weeks, an application was made by the defendants to implead the said Edward Schroeder, individually, and testimony was ostensibly offered for the purpose of substantiating such allegations of misconduct, mismanagement, and misappropriation, and the court refused to implead said Edward Schroeder individually and to permit testimony to be received or introduced in proof of such allegations.

The principal question, therefore, arising and submitted to the court with respect to the answers of the defendants, other than the theater company, is substantially involved in the following:

Question No. 2. Did the court properly refuse to implead Edward Schroeder individually, to determine whether or not he is personally liable to any of the parties to the action?

Alexander & Burke, of Milwaukee (Bottum, Bottum, Hudnall & Lecher, of Milwaukee, of counsel), for appellant Arcade Theater Co. Joseph G. Hirschberg, Horace B. Walmsley, George A. Affeldt, Glicksman, Gold & Corrigan, and W. J. McElroy, all of Milwaukee, for appellants in second appeal.

J. O. Carbys and L. A. Olwell, both of Milwaukee, for respondent Schroeder.

George A. Affeldt, of Milwaukee, for respondent Leidig.

DOERFLER, J. (after stating the facts as above). [1] We will first take up the issue raised by the answer of the theater company and as contained in question No. 1 set forth in the preceding statement of facts. A deed of trust in this state is a mere security for money advanced under the bond issue, and in legal effect is nothing more than a mortgage. *Hoyt v. Fass*, 64 Wis. 279, 25 N. W. 45.

In fact, in the instant case, the trust deeds are characterized as mortgages. It is held in this state that the title remains in the mortgagor, and the mortgagee holds the mortgage, as such, as mere security for the debt. So stringent is this rule that it has often been held by this court that a deed in fee simple absolute, given merely to secure a debt with a parol defeasance, is nothing more nor less than a mortgage, leaving the title in the grantor, and giving to the grantee a mere security for his debt, to be enforced like an ordinary mortgage. *Schreiber v. Le Clair*, 66 Wis. 586, 29 N. W. 570, 889; *Wis. Central R. R. Co. v. Wis. River Land Co.*, 71 Wis. 94, 36 N. W. 837; *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141. Also that the right of the mortgagee who has got peaceable possession of the premises after condition broken to retain them until his debt is paid, is founded upon his equitable right to be paid without being put to the cost of a suit, and not upon any title in him. *Brinkman v. Jones*, 44 Wis. 498.

"By the common law at first mortgages became absolute deeds, if the terms of the defeasance were not strictly performed on the day; but courts of equity succeeded in establishing an equity of redemption of the mortgagor in the land, which remained an equity in him until the mortgage was duly foreclosed by process of law. Courts were astute in protecting this equity of redemption and leaned strongly against all agreements between the mortgagor and mortgagee which abridged it. 'Once a mortgage, always a mortgage,' became a maxim. Therefore, when provisions began to be inserted in deeds which enabled the mortgagee to destroy at once this equity of redemption, the courts looked upon them with suspicion, if not with aversion, as devices intended to oppress and injure mortgagors, who are, from the nature of the case, more or less in the power of the mortgagees. But notwithstanding all opposition, the use of trust deeds has steadily increased, until they are common in England and in nearly all the states. They are regulated by statutes, and are under the jurisdiction of courts of equity, which can interfere by injunctions, prohibitions, orders, and decrees, to prevent oppression and remedy abuses. A large proportion of the mortgage deeds of real estate now contain powers of sale in case of default, and the laws regulate and protect them." *Perry on Trusts*, vol. 2, § 602c.

"Especially until condition broken, a trust deed does not divest the estate of the mortgagor. He can convey the estate, subject to the mortgage; he may make a second mortgage; the estate may be attached for his debts; the mortgagor is considered as having all the rights and powers of an owner, except so far as it is necessary to hold otherwise in order to give effect to the mortgage. The interest of the mortgagor may be levied upon and seized delivered by the officer; in which case the creditor will hold in fee, subject to the mortgage. The same principles apply to the rights and title of the grantor in deeds of trust." *Perry on Trusts*, vol. 2, § 602j.

The foregoing statements are made under the authorities cited to show the legal effect of the execution of a trust deed in this state with respect to the interests of the mortgagor and the mortgagee.

Trust deeds, particularly in recent years, have become a very popular security in this state, and but few large mortgages are now executed excepting they are in the form of a trust deed. In fact, this can be considered the age of trust deeds in this state, as elsewhere, and hardly a day passes during the present period of economic readjustment but what we read or hear of the flotation of a large bond issue in railroad, industrial, real estate, or other enterprises, and a very large percentage of the securities held by the people at large, who make such investments for economic purposes, are in the form of bonds, secured by trust deeds, executed to trustees.

[2] It has also become a matter of common knowledge that at the present time, where, as one of the results of the great war, housing conditions have become very oppressive and facilities to furnish homes for the masses have become scarce, and where office space for professional men and others is at a great demand, and where rentals have been raised by landlords in many instances far in excess of the requirements of the situation, numerous corporations and individuals have become interested and engaged in the erection of tenement, apartment, and office buildings, intended to house and accommodate a vast number of our population in need of such accommodations, and corporations have also sprung up, actuated by a spirit of civic pride and righteousness, to build homes to be leased to the masses, and in almost every instance the moneys are raised by the flotation of large bond issues, and these facts have been recognized in a large measure by statutes in our state, which authorize the issuance, regulation, and sale of these bonds under the supervision and authority of public bodies such as the Railroad and Insurance Commissions of the state. These bonds are purchased by trust companies, bond and stock brokers, and other similar institutions and individuals, and are resold in a large measure to the rank and file of the people, who invest in the same in accordance with their means.

It is true that the issuance of bonds and the execution of trust deeds is of comparatively recent origin, and that the growth of this practice has kept pace in a large measure with the enormous expansion of our commercial and industrial interests. Bond issues are to be encouraged rather than discouraged, for they afford an opportunity for frugal investors and the people at large to invest their savings in remunerative and successful enterprises, and bring in closer contact the investors, who in a large degree are employees, with the institutions by whom they

are employed, and so have a tendency to bring about a mutuality of interest and a better understanding between the employers and employes, generally.

From what has preceded it will readily be seen that the question as to whether a mortgage in the form of a trust deed, when once executed, shall continue to be a fixed lien and hold its place as a first or second mortgage, in accordance with the date of its execution and recording, becomes a matter of great importance, not only to the investor, but also to the borrower. To a large extent, the salability of the bond issue depends upon the fixed and unshakable security of the trust deed, which is of prime importance to the investor. To the borrower this same consideration becomes of great importance, for upon the existence thereof depends his ability to float the bonds and to raise the necessary money for the purpose of which the bond issue has been designed.

[3] Therefore the general rule has been evolved and is a fixed one in contemplation of law, that a fixed legal right under a mortgage cannot be impaired by any equity subsequently arising, although there is an apparent exception to this rule in the case of operating expenses, having practical application with respect to railroads, and also one pertaining to employes, who are frequently given preferred claims by statutes. *Elliott on Railroads*, vol. 2, § 500.

"And it is held that the priority of a first mortgage is not affected by the fact that the road was completed, or part of it wholly built, by money obtained by means of a junior mortgage, nor are unsecured claims of contractors or materialmen who have furnished money or material for building or repairing it entitled to priority over a prior mortgage." *Elliott on Railroads*, vol. 2, § 500.

"And a mortgage trustee has no power to agree that an unsecured debt or a subsequent mortgage debt shall be paid in preference to the first mortgage bonds." *Elliott on Railroads*, vol. 2, § 656; *Duncan v. Mobile, etc., R. Co.*, 2 Woods (U. S. C. C.) 542, Fed. Cas. No. 4137; *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782; *Col. & So. R. Co. v. Blair*, 214 N. Y. 497, 108 N. E. 840, Ann. Cas. 1916D, 1177.

"A trustee has no authority to waive defaults or otherwise deprive bondholders of their rights." *Hollister v. Stewart*, *supra*.

Thus it will be seen, from the citations and authorities, that the courts have carefully guarded and protected the interests of bondholders secured by a mortgage or trust deed, and have generally and quite universally accorded them the priority which was originally contemplated by the issuance of such bonds and the execution of such trust deeds or mortgages.

The floating of a bond issue is generally accompanied with the issuance of a prospectus, by which the investors are fully apprised of the nature of the security offered, the location and value of the property intend-

ed to be mortgaged, the object and purpose of the erection and construction of the building or buildings, the rental value of the building, the industry or business project to be accommodated by the erection of the buildings, and many other incidental facts involved in the matter of the security of the proposed bond issue.

In a vast number of these bond issues the property which it is intended shall form the basis of the security consists of buildings designed to be leased in whole or in part for manufacturing purposes, for tenements, for office and for commercial purposes.

In the instant case the building known as the Berlin Arcade building was originally designed to be used for office and store purposes, and, in fact, the building was erected for that purpose, and the bonds were issued and negotiated in order to furnish a fund out of which to pay for the building to be used for that purpose, and for no other purpose.

It is also true that the investors in these bonds had in view this purpose for which this building was to be used, the location of the building, the construction of the same, and the rentals to be derived from the building, all of which elements, to a large degree, formed the basis upon which the value of the property was fixed and determined and the security of the bond issue estimated. If there was one thing over and above all others that investors in these bonds had in mind, whether they invested in the first mortgage bonds or in the second mortgage bonds, it was the fact that the investment and the lien constituted by the respective trust deeds or mortgages would be and would constitute a fixed lien or security, which could be defeated only by such considerations as arise by virtue of the terms of the trust deed or the law, as, for instance, unpaid taxes or failure to pay or meet the obligations under the 99-year lease with respect to rentals thereunder, or other obligations assumed thereby.

[4] The trustee, under the provisions of the trust deed, in some respects represents the bondholders, in other respects the mortgagor, and in still other respects both bondholders and mortgagor.

"The powers of trustees under deeds of trust, and of mortgagees under mortgages with power of sale depend entirely upon the terms of the deeds. Such powers are created by and exist in the deeds, and of course they exist in the terms in which they are created, and in no others. They are to be exercised by the trustees in pais. They are wholly matters of convention and contract between the parties, and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them. The statutes in some of the states have regulated their execution, but such statutes do not create the powers themselves." *Perry on Trusts*, vol. 2, § 802g.

"The trustee or mortgagee with the power of

sale holds the lands in trust for the purposes for which the trust deeds are made, which purposes are generally specified in the deeds thereof." Perry on Trusts, vol. 2, § 6021.

[5] A further legal doctrine must be borne in mind, and that is that the provisions of a mortgage are not personal to the party named in it as a mortgagee, but are for the benefit and security of the real owner of the debt secured thereby. 27 Cyc. 1045, and note 56. So that from the foregoing it becomes quite clear that in order to ascertain and determine the rights of a trustee under a trust deed or mortgage it is necessary to look to and examine closely the provisions of the trust deed, for under such trust deed there is created, not only the very office of the trustee, but also his various duties, obligations, and powers.

[6] The bonds and the interest thereon are made payable to the trustee who for that purpose is constituted the agent to receive the money and to distribute it among the bondholders, upon presentation of the bonds or the interest coupons.

As has been said in *Connell v. Kaukauna*, 164 Wis. 471, 496, 159 N. W. 927, 936 (Ann. Cas. 1918A, 247):

"The authority of the trustee to act for the bondholders is prescribed and limited by the terms of the trust deed, and a payment to the trustee merely as trustee cannot be held to be payment to the bondholders, unless made when and as prescribed by the terms of the deed." *Miller v. Mitchell*, 58 W. Va. 431, 52 S. E. 478; *Kranz v. Uedelhofen*, 193 Ill. 477, 62 N. E. 239; *Fortune v. Stockton*, 182 Ill. 454, 55 N. E. 367; *Schroeder v. Wolf*, 227 Ill. 133, 81 N. E. 13.

[7] The bonds may be registered as to the payment of principal upon the books of the trustee, and in performing the office of registrar the trustee represents both the mortgagor and the bondholders.

[8] In the event that the building upon the premises is destroyed by fire, the insurance moneys shall be paid to the trustee, and the trustee shall thereupon hold said sum so derived from insurance and pay the same to various contractors, materialmen, and laborers, in accordance with the certificates of the architect of the building, and in doing this the trustee represents both the interests of the mortgagor and of the mortgagee.

[9] In the event of the failure of the mortgagor to keep the buildings properly insured, or in the event of his failure to pay the taxes, or in any other respect to comply with the provisions of the trust deed, the trustee, under certain circumstances, shall have the right to declare the whole amount of the mortgage debt, both principal and interest, due, and to foreclose the trust deed or mortgage, and with respect to this provision the trustee represents the bondholders. He is also authorized, upon conditions broken, to

enter into and upon the premises and to possess the same, and thereafter collect the rents, issues, and profits derived from the building, and in that regard he is the representative both of the mortgagor and of the bondholders.

In the event of the failure of the mortgagor to pay the rent due upon the 99-year lease, or to pay the taxes upon the property, the trustee is authorized, under the terms of the trust deed, to pay such rent and to pay the taxes, in order to save and protect both the interests of the mortgagor and the bondholders.

[10] The trustee may also raise and borrow money on the security of the mortgage lease and premises, or upon any sublease, for the purpose of paying off any sum due for interest, rental, insurance, taxes, or other charges payable by the lessee under the 99-year lease, and in doing this he acts both as the representative of the bondholders and of the mortgagor, in order to protect the mortgaged property from forfeiture under the terms of the lease. And upon conditions broken, if the trustee takes possession of the mortgaged property, under the terms of the trust deed, he is authorized, first, to sell the real estate; second, to apply so much of the proceeds of the sale as is necessary to the payment of the debts secured by the deeds; and, third, to account for and pay over the balance, after paying the expenses of the trust and the sale, to the grantor or mortgagor, his legal representatives or assigns.

The foregoing are but a few of the rights, powers, duties and privileges of the trustee, as defined by the trust deed, and they tend to show the appreciation on the part of the contracting parties of what it was intended to make clear by the foregoing, that the creation of such rights, powers, duties, and privileges depend upon the trust instrument.

[11] The delicate position in which a trustee therefore is placed by the trust deed, in and by which he is required and obligated to act in a dual capacity, also becomes clear, and in the execution of his obligations and powers, under the law, it is incumbent upon him to use the utmost good faith towards all parties in interest. He must act impartially for every person who has any rights in the estate. Perry on Trusts, vol. 2, § 6020.

[12, 13] In vain do we search through the provisions of these trust deeds to find any authority vested in the trustee to enter into any lease with a tenant or tenants of the building, or to ratify or confirm any lease, or to consent to any lease, either orally or in writing, before conditions broken.

It is true that upon conditions broken on the part of the mortgagor an entirely different situation arises. Under the terms of the trust deed, the mortgagor is then authorized to enter into and upon the mortgaged premises, take possession of the same, manage and

control the same, recognize, make, or alter leases or to enter into any agreements within the purview of the trust deed the situation may demand.

While it is a fact that under the provisions of the first paragraph of the trust deed proper the mortgagor conveys and assigns to the trustee, etc., all its right, title, and interest in, to, and under said lease (meaning said 99-year lease), and to any and all future income, rents, and revenue from the lease and leased property, and any part thereof, such assignment and transfer is intended to be made effective only in the event of conditions broken for a subsequent provision of the lease expressly provides that until default shall be made and continued by the mortgagor in the payment of the principal and interest of any of the bonds secured by the trust deed, or until default shall be made and continued in respect to some act, thing, obligation, or agreement required to be done, performed, or kept by the mortgagor as in said lease provided, the mortgagor shall be permitted to possess, manage, use, and enjoy the said mortgaged property and the improvements, appurtenances, rights, and privileges, and to take and use the incomes, revenues, rents, and profits thereof, as if the mortgage had not been made. Furthermore, it must be conceded that the trust deed does not in express terms, before conditions broken, authorize the trustee to lease any of the property covered by the 99-year lease, or the buildings thereon, or to accept or demand an assignment of the 99-year lease, or of any of the subleases, or of the rents, issues, and profits derived from any of said leases, excepting only in so far as he is authorized to act in order to prevent a forfeiture of the 99-year lease pursuant to conditions broken by the mortgagor of the terms of said lease.

We now come to the lease executed by the real estate company to the theater company. This lease contemplated structural changes in the building of the real estate company. The walls of the building were to be removed, ceilings raised, floors lowered, entrances changed, and other material and structural changes were contemplated. It was therefore an act of wise precaution on the part of the representatives of the theater company to confer with the trustee in order to fully present to him the plans in detail with respect to such contemplated changes. Such conferences were held, and, it appearing to the satisfaction of the trustee that such changes would not be detrimental to the interests of the bondholders, he expressed his satisfaction with respect thereto. The terms of the proposed lease were also submitted to the trustee, and he examined the same and found no objections thereto, and expressed his satisfaction thereto. The bondholders were vitally interested in having no changes made in the building of a structural nature that would

endanger the stability of the building, for had the building been endangered by reason of such changes the same would have constituted waste, and would have vitally and materially affected the interests of bondholders. Every effort was made on the part of the representatives of the theater company to obtain the written consent of the trustee to this new lease with the theater company. Such consent was refused, indicative strongly of the position which is made apparent on the part of the trustee, that he did not intend to bind himself as trustee, or the interests of the bondholders, to said lease. In fact, it is difficult to conceive of any situation or circumstance which would make the trustee's position, as he made it manifest, clearer than was done by his refusal to either join in the lease or to give his written approval or consent to the document. Had he done so, he would nevertheless have failed to bind the interests of the bondholders, for the reason that his authority vests almost exclusively in the provisions of the trust deed, and, no such authority having been granted or vested in him, the interests of the bondholders could not have been bound.

A careful examination of the lease with the theater company will disclose the fact that it contains no provision whatsoever intended to bind the bondholders, or even the trustee. It must also be borne in mind that at the time of the execution of the lease with the theater company there had been no default by the mortgagor of the conditions of the mortgage, and that the real estate company was in possession of the premises.

The evidence does not disclose, nor has the claim been made, that any of the bondholders at any time had any knowledge whatsoever of the proposed execution of said theater company lease; nor is there any evidence or claim that such bondholders were notified thereof subsequently, so as to lay the possible foundation on the part of such bondholders to a ratification or confirmation of such lease. True, the trustee, upon the execution of the lease with the theater company, received a large amount of money, aggregating about \$15,000, which amount he disbursed to contractors and others engaged in the making of the necessary changes in the building to accommodate the theater. In making these disbursements the trustee acted primarily in the interests of the mortgagor, as is made evident by the fact that the object and purpose of placing this money in the trustee's hands for disbursements was to prevent the filing of liens and the incumbering of the mortgagor's interests. The mortgagee's interest could not have been affected by the filing of contractors', material-men's or laborers' liens. A bond was also executed to protect persons on the premises from personal injury during the construction of the theater, and to also protect occupants

of the theater. The execution of this bond was suggested by the trustee, and was solely for the benefit of the mortgagor and of the theater company.

So that it must have appeared to the bondholders at the time of the execution of the theater company lease that the property was in the possession of the real estate company. The bondholders had no notice of the lease or of any changes with respect to the collection of the rents and of the proposed alterations in the building. There is nothing in the situation which justified any alarm on the part of the bondholders. Every one is familiar with the floating of bond issues of the nature of the one in question. These bonds are sold to numerous persons, who look for their security to the mortgaged property. Bondholders as a rule do not interest themselves in the collection of rents, and first become apprehensive when a default occurs in the payment of principal or interest.

So that it is readily deducible from the foregoing: (1) That no authority was vested in the trustee to subject the interests of the bondholders to the theater company lease; (2) that the bondholders had no knowledge of the changes in the building designed to accommodate the theater company; (3) that the bondholders had no knowledge of the assignment of the rentals of the Berlin Arcade building; (4) that they did not ratify or confirm said lease, so as to subject their security to said lease.

So that the findings of the circuit court, wherein it substantially found that the matters and things the trustee did with respect to the lease of the theater company were not done for the purpose of jeopardizing the lien of the bondholders, and that the lease of the theater company did not become a prior lien to the lien of the bondholders, are well sustained by the evidence and by all the surrounding facts and circumstances in the case.

It is claimed by counsel for the theater company, under the rule as laid down in 16 R. C. L. p. 599, § 77, and cited in Jones on Mortgages (5th Ed.) § 782, "though the general rule is that a subsequent lessee of mortgaged property, taking under a lease from the mortgagor, takes subject to the mortgage, yet where the mortgage, in express terms, or by clear implication, authorized the mortgagor to make leases for the benefit of the mortgagee, a lease made in pursuance of such authority is binding upon the mortgagee and those claiming under him," that the lease to the theater company was such a lease as was contemplated by the parties to the trust deed to be made by the mortgagor for the benefit of the mortgagee, and is therefore binding upon the mortgagee, and subjects his security to the prior right of the lease.

The doctrine as above stated, and con-

tained in R. C. L. and in Jones on Mortgages, is founded principally upon the decision in the case of Sammons v. Kearney Power & I. Co., 77 Neb. 580, 110 N. W. 808, and 8 L. R. A. (N. S.) p. 404.

A careful examination of the facts in the Sammons Case will reveal a radical distinction or difference between that case and the instant case. In the Sammons Case the plaintiff appealed from a decree of the lower court in an action brought to foreclose a mortgage, by which decree the plaintiff's mortgage lien was made subject to a certain lease or contract, executed by the mortgagor to the defendant Northwestern Electric Heat & Power Company. It appears that the general nature of the business of the defendant Kearney Power & Irrigation Company is the owning, constructing, and operating of canals, reservoirs, dams, and other works for irrigation and water power purposes, including the power to lease its own property and to acquire by purchase such canals, reservoirs, and other works for irrigation and water power purposes, including the power to execute mortgages or deeds of trust to secure such bonds as may or shall be issued by the company in furtherance of the objects of its incorporation. On the 15th day of July, 1898, the defendant Kearney Company executed and delivered to a trustee a mortgage on certain of its property and rights, to secure a bond issue of \$150,000 in bonds of \$500 each. On the 1st day of November, 1899, the mortgagor entered into a contract in writing with the N. W. Electric Heat & Power Company, whereby for a consideration therein named the latter was given the right to take water from the canal in question for a period of 15 years, with the privilege of a renewal of the contract on the same terms for an additional 15 years, for the purpose of furnishing power for its electrical machinery. Default was made in the payment of the interest on the bonds, and on the 9th day of September, 1906, Sammons, who was the owner and holder of 239 of the 274 bonds disposed of, brought an action to foreclose the mortgage. The N. W. Electric Heat & Power Company was permitted to intervene and settle its rights under the contract with the defendant, Kearney P. & I. Company, the mortgagor. The court found in favor of the plaintiff and ordered a decree that the property should be sold subject to the rights of the intervener, N. W. Electric Heat & Power Company, under its contract with the mortgagor, and that such contract should be binding upon the purchaser at such sale. From this decree of the lower court, ordering a sale of the mortgaged property subject to the contract of the N. W. Electric Heat & Power Company, the plaintiff Sammons appealed.

On the appeal the principal question to be determined was: Did the court err in pro-

viding in the decree that the sale thereunder should be subject to the rights of the intervening company under its contract with the mortgagor?

The court in its opinion first recites the general rule as heretofore stated, and then proceeds as follows:

"The foregoing rule is easily recognizable, as it is grounded on the general rule, applicable to all mortgages, that an interest subsequently acquired by a third party in the mortgaged property is subject to the mortgage; but the question is whether the facts in this case bring it within that rule."

In substance, the mortgage in the Sammons Case, among other things, covered first, all the property of the mortgagor of every character; second, it was intended to cover not only such things in action, contracts, leases, claims, and demands as existed when the mortgage was given, but all such as the mortgagor might thereafter acquire; third, it also provided that all the things in action, contracts, leases, claims, and demands as the mortgagor might subsequently acquire, should be duly assigned to the mortgagee as further security for the mortgage debt.

In construing the trust deed and the contract above specified, the court, in its opinion in the Sammons Case, further said:

"But, when the construction of a contract becomes necessary, it is permissible to look beyond the language of the contract, and take into account the nature of the subject-matter, the condition and situation of the parties, and the facts and circumstances surrounding the transaction. The mortgagor was a corporation, and one of the purposes of its organization was to lease water rights. It was the owner of a plant designed to serve that purpose, but which, as the record shows, yielded no revenue save such as might be derived from the sale or leasing of water rights. The bonds by their terms were made to run for a period of 20 years, and the interest thereon is payable semi-annually. Now, taking into account these facts and circumstances, in connection with those provisions of the mortgage hereinbefore set out, it is too clear to admit of argument that the parties to the mortgage at the time it was made contemplated that the mortgagor's plant covered by the mortgage should be maintained as a going concern, because in no other way could it meet the interest on the bonds from time to time, to say nothing of the discharge of the principal debt when it became due."

The opinion further proceeds with the idea that at the time when these water rights were leased it was contemplated by the parties that the lessee would necessarily be obligated to expend a large amount of money in improvements for its business, and that the trust deed or mortgage contained a provision that upon default of the mortgagor the mortgagee could declare the whole amount of the bonds and interest due and

payable, and immediately commence foreclosure proceedings and thus deprive the lessee of his investment, unless it be held that the mortgage, when originally made, contemplated the execution of these contracts and leases for the benefit of the mortgagee.

In the case at bar the trust deed was executed to run for a period of five years. It was contemplated at the time of the execution of such trust deed that at the end of this period there would be a refunding of the mortgage debt; so that it could not have been contemplated that during such period of five years the principal of the mortgage debt would be paid out of the rentals or profits of the building.

The five-year period of the trust deed in the instant case constituted an unusually short term for a bond issue of that kind, and was no longer than the usual period for which mortgages in considerably smaller amounts are executed. The very fact that the bond issue covered so short a period of time, in itself, was indicative of the fact that the parties at the time of the execution thereof did not contemplate subjecting this bond issue to the provisions of a long-term lease such as the theater company lease.

Furthermore, there is no provision contained in the trust deed or mortgage in the instant case whereby all the profits and rents derived from the leased property are to be paid and assigned to the mortgagee for his benefit. Under the trust deed in the instant case, the mortgagor, until conditions broken, was to continue in the uninterrupted possession of the leased premises and enjoy the rents, issues, and profits thereof. On the other hand, in the Sammons Case all the property of the lessee or contractee, including leases, contracts, rentals, profits, etc., of every nature and description, was assigned and transferred to the mortgagee, and it does not appear, as far as the reading of the opinion in the case is concerned, that the mortgagor in the Sammons Case was entitled to possession and enjoyment of the mortgaged property, and of the rents, issues, and profits thereof, until conditions broken. Furthermore, in the Sammons Case the leases and the trust deed, respectively, covered terms which would expire at or about the same time, strongly indicative of an intention on the part of the parties to make the mortgage subject to the provisions of such lease. It is also clearly inferable from the provisions of the Sammons trust deed and lease or contract that it was contemplated by the parties that the principal amount of the trust deed would, during the period thereof, be fully paid by the rentals, issues, and profits derived from the lessees and others of the mortgaged property.

It also appears clearly that in the Sammons Case, where valuable water rights were leased, it was contemplated, in order to make

use of the provisions of such lease, that the expenditure of a large sum of money would be necessary on the part of the lessee in order to obtain the full advantage of the leased rights. And above all things it appears from the Sammons Case, and is so stated in express language, that the facts and circumstances in connection with the provisions named in the trust deed or mortgage are such that by necessary implication the parties to the mortgage, at the time it was made, contemplated that the mortgagor's plant covered by the mortgage should be maintained as a going concern for the benefit of the mortgagee.

It was not claimed in the Sammons Case that the mortgage gave express authority to the mortgagor to make the contract or lease under which the intervening company claimed superior rights to that of the mortgagor, but it was claimed that such rights followed from the terms of the trust deed or mortgage, by necessary implication. And the court very rightly said in its decision in the Sammons Case that the solution of the question is to be found in the familiar rules of construction applicable to the facts in that case rather than in precedents, resting, as they must, on instruments differing materially from that under consideration.

It is contended on the part of the counsel for the theater company that injustice may be done to their client, resulting from the investment of a large sum of money in the reconstruction of the building in order to accommodate the theater, which money, to a large extent, under the decree as entered by the lower court, would constitute a loss. That fact is to be regretted, and it is also to be regretted that the proper officers of the theater company and of the real estate company did not see fit to enter into an agreement wherein and whereby it would be stipulated that the mortgaged property was to be sold and bids invited, so that title might be conveyed either free from the lease or subject to the lease, in accordance with the bids received upon such sale. It is not too late now to enter into such a stipulation, and it would appear to us that the interests of all parties would be subserved thereby. However much we may sympathize with the theater company in its present deplorable condition, we nevertheless must also take into consideration the status of the bondholders and the rights which they contemplated at the time of the purchase of the bonds. Their interests were first in point of time. It was always within the power and the province of the theater company and its officers to make a careful study and examination of the trust deeds in question, and thereby reasonably satisfy themselves as to their rights thereunder. Such examination, from the evidence, has apparently been made by counsel for the theater company. Realizing the situation, the the-

ater company saw fit to proceed with the expenditure of a large sum of money, notwithstanding the open and direct refusal of the trustee to join in the theater company lease or to approve of the same in writing, which is not at all decisive upon the legal aspect of this case, but very persuasive and almost conclusively decisive of the fact in this case that the theater company and its officers concluded to take their chances of the mortgagor avoiding a default, and thus securing to themselves the benefits of the full term of the theater company lease.

We are therefore of the opinion that the doctrine of the Sammons Case, and as cited by Jones on Mortgages and in R. O. L., has no application to the case at bar.

In view of what has been said, it is unnecessary to take up and treat further the claim made by the attorneys for the theater company, under which it is contended that the plaintiff is estopped from insisting upon the priority of the trust deed or mortgage over the lease. The real party in interest is not the trustee but the bondholders. The latter had no knowledge of the theater company lease or of the changes made to accommodate the theater company, and, the trustee not having authority in the premises, the bondholders cannot be held as bound and cannot be deemed estopped.

By all the authorities we have been able to find pertinent to the subject, it is held that in order to authorize the trustee to subject the trust deed to a lease subsequently made the right must be contained in the provisions of the trust deed, either by express language or by necessary implication, and, such language not being contained in the trust deed in question, the result follows that the trust deed in question is not subject to the lease. Other authorities confirming this position are: *Sands v. Kaukauna Water Power Co.*, 115 Wis. 229, 91 N. W. 679; *Haven v. Adams*, 86 Mass. (4 Allen) 80; *Ellis v. Boston H. & E. R. Co.*, 107 Mass. 1.

[14, 15] It is further contended by the theater company that the mortgagor assigning the rents to the mortgagee, and both the mortgagor and mortgagee notifying the tenant of such assignment, and the tenant paying the total rents accruing under the lease to the mortgagee, as disclosed by the uncontradicted evidence, was an attornment and established the relation of landlord and tenant between the mortgagee and the tenant.

The law of attornment does not apply as between the tenant of a mortgagor and the mortgagee in states where the legal title of the mortgaged premises does not pass to the mortgagee. The status of the mortgagor and mortgagee with respect to mortgages and trust deeds has heretofore been fully set forth, under authorities cited.

The doctrine is stated in Jones on Mortgages (7th Ed.) § 778:

"Attornment Ineffective Where Mortgage is Mere Lien. But in a state where a mortgage is regarded as conveying no title to the mortgagee, and the right of possession under foreclosure and sale is assured to the mortgagor by statute, it has been held there is nothing to rest an attornment upon and that the doctrine has no application. The verbal agreement of a tenant to pay rent to the mortgagee does not continue the existing tenancy, simply putting the mortgagee in place of the mortgagor as landlord; but it is a new undertaking and must be valid as a new agreement if valid at all. In such states a mortgage by the lessor does not carry the reversion in the leased premises so as to entitle the mortgagee to recover lands; though the mortgagee may, of course, secure the right to the land by an assignment contained in the mortgage. In such states, the tenant cannot repudiate his tenancy under the mortgagor and acknowledge a tenancy under the mortgagee, until after the mortgage has been foreclosed and the period of redemption has expired."

In a Michigan case (*Hogsett v. Ellis*, 17 Mich. 351), it is said:

"If it be said that, though the mortgage does not give the mortgagee the right to possession against the will of the mortgagor, yet, by the consent of the mortgagor and the tenant, he may be let into possession, and thus secure the right to rent; so, I reply, may any other person not holding a mortgage acquire, in the same way, the right to possession, and the right to rent, by any valid agreement to that effect. But, in both cases alike, I think it would depend upon the contract, as such, which might be made between them, and not upon the doctrine of attornment."

In connection with this doctrine of attornment, we must reiterate what has been repeatedly heretofore said, that neither under the express terms of the trust deed or mortgage, nor by necessary implication, did the trustee have the right or authority to do anything before conditions broken that would jeopardize the interests of the bondholders with respect to the lien acquired at the time of the execution of the trust deed.

As to the status of the theater company and the mortgagee after conditions broken, and after entry on the part of the mortgagee, a different situation exists.

It is said in *Gartside et al. v. Outley et al.*, 58 Ill. 210, 214, 215, 11 Am. Rep. 59:

"It is in the power of the mortgagee, on entry for conditions broken, where the property has been leased subsequent to the making of the mortgage, to treat the tenant as a trespasser and bring ejectment, even without notice, or the mortgagee may elect to recognize the lessee as his tenant. The authorities all agree, in holding, where the mortgagee has entered for conditions broken, or received rents of the tenant, that the relation of landlord and tenant will be created between the parties. * * * The question of the time for which it will be considered that the tenancy is created by the fact that the mortgagee received rents of the lessee, whether for the entire

period of the unexpired lease, or for only a shorter period, is a question of more difficulty of solution. The generally received doctrine seems to be that the receipt of rents by the mortgagee will only create a tenancy from year to year, in analogy to the rule where the tenant holds over after the expiration of the lease. The doctrine proceeds upon the ground that the lease is inoperative as to the mortgagee, and is terminated by the act of entry. The rule of the common law is well established, that the mortgagor cannot, without the consent of the mortgagee, execute a lease that will prevail against the rights of the mortgagee, and it has been uniformly held that the entry of a mortgagee puts an end to the lease. *Keech v. Hall*, 1 Doug. 2. Upon principle, therefore, something more is required than the mere receipt of rents from the lessee, to make valid the lease for the unexpired term, as against the mortgagee. In *Doe ex dem. Hughes v. Buckner*, 8 Carr & Payne, 566, *Patterson, J.*, held that if the mortgagee, instead of turning out the lessee, elects to take him as his tenant, the mortgagee does not thereby set up the tenancy for the entire unexpired term of the lease, but only from year to year. The case of *Thunder v. Belcher*, 3 East, 449, holds the same doctrine, that the receipt of rents will only create a tenancy from year to year, as between the lessee and the mortgagee. We find that these cases have been quoted by numerous text-writers, and the doctrine established does not seem to be questioned. *Hilliard on Mortgages*, p. 235, § 231; *Taylor on Landlord and Tenant*, § 120; *Platt on Leases*, p. 171."

[16] While the doctrine as set forth in the *Gartside Case*, supra, undoubtedly is the accepted doctrine of the authorities on the subject, under that very doctrine, it would appear to us that when in the year 1916 the trustee after conditions broken took possession of the mortgaged property and collected the rents, issues, and profits thereof, including the rents from the theater company, and immediately followed such acts by a foreclosure proceeding in the instant case, he thereby made manifest his intention of not treating the theater company as a trespasser, but of treating it as its new tenant, under a lease to expire upon the sale of the property under foreclosure proceedings.

Having covered all of the various points made in the brief of counsel for the theater company, and having arrived at a conclusion adversely to the contentions of such company, we will now take up the consideration and determination of question No. 2, above set forth.

It is contended by the trustee for the second mortgage bondholders, and by the individual bondholders, defendants herein, and by the real estate company and its receiver, that, among other things, the trustee retained over \$22,500 out of the proceeds derived from the sale of the bonds secured by the first trust deed or mortgage for his own individual purpose, and for other purposes

foreign to the provisions of such trust deed or mortgage, under and pursuant to which such proceeds were to be used solely in the erection and construction of the building; that he also converted to his own use, or wrongfully disbursed and expended, a large sum of money derived as interest on the first mortgage bonds and by way of rentals and income from the tenants in the arcade building (and that he otherwise violated his trust in other particulars, with respect to which it is not necessary at this time to go into detail), in the administration of his trust, all to the great damage of such defendants, on account of which such defendants have, in the course of the trial, demanded that said Schroeder be impleaded individually in order to enable such defendants to compel him to account for such maladministration personally, etc., and an offer of proof was made by such defendants in order to substantiate such allegations.

With respect to the issues raised by such defendants, among other things, the court found, in addition to the findings already hereinbefore set forth, as follows: That Schroeder, acting as trustee under both the first and second mortgages, purchased the mortgaged premises at tax sales for the years 1915 and 1916, for the city and county taxes, and out of the rents collected, after taking possession as trustee, repaid himself for redemption moneys; that plaintiff entered into the possession of the mortgaged premises as trustee with the mortgagor's consent, on October 11, 1916 (which was the day of the commencement of this action); that Schroeder, as trustee, had advanced for the benefit of said mortgage bondholders various interest payments, aggregating \$23,000, and is entitled to be subrogated in that sum; that \$4,000 is a reasonable solicitors' fee to be paid to the plaintiff's attorneys.

The court also in such findings allowed the plaintiff, as trustee, for the collection of the rents, an amount equal to 3 per cent., as stipulated in the mortgage and also allowed him an additional fee as trustee, in renting, making repairs, managing, and otherwise caring for the mortgaged premises and property and for performing other duties devolving upon him as trustee, and found such sums as reasonable.

As conclusions of law, the court found that the counterclaims of the defendants real estate company and Benjamin Leafgreen, the counterclaim of the defendant Esbenshade, as executrix, the counterclaim of the defendant Hummel, and the counterclaim of the defendant Leidig, as trustee, should be dismissed; and judgment pursuant to such findings was thereupon duly entered and docketed.

[17] Schroeder, as trustee, was the plaintiff in the action. As an individual, he was not a party, and in law could not be consid-

ered a party unless he was impleaded in his individual capacity. The mere fact that he was a party in a representative capacity does not authorize proceedings against him in an individual capacity, unless he is first joined as an individual. In other words, in contemplation of the law, Schroeder as an individual and Schroeder in a representative capacity are deemed two distinct entities.

"A bill cannot unite distinct demands against the same defendant where his liability upon one is individual and upon the other is in a representative capacity; but the rule is confined to the presentation of distinct demands and does not extend to cases where defendant is otherwise a proper party in both capacities." 16 Cyc. 255.

So that we must conclude that Schroeder, as an individual, was not before the court.

[18] Of course, the rule is well recognized that a failure to use reasonable diligence or an abuse of his discretionary powers renders a trustee under a trust deed personally liable to the party injured for the damages done. *Jones on Mortgages*, § 1771.

[19] As already stated, the application to implead Schroeder individually was not made to the lower court until after the trial of the issues had proceeded for a period of about two weeks. It must not be understood that it is our opinion that Schroeder, as an individual, would not have been a proper party; on the contrary, it is our opinion that had the court seen fit, even at that stage of the trial, to suspend the trial for the purpose of impleading Schroeder and of thus enabling an accounting and a final adjudication of the issues presented by the defendants, it would have exercised a proper and a wise discretion, in view of the provisions of sections 2610 and 2656a of the Statutes, which are intended to give the trial court very broad powers, not only in the calling in of parties, but in the molding and adapting of the pleadings so as to finally dispose of all branches of the controversy. *Swanby v. Northern State Bank*, 150 Wis. 572, 577, 137 N. W. 763; *Doherty v. Doherty*, 131 Wis. 375, 111 N. W. 478; *Carney v. Gleissner*, 62 Wis. 493, 22 N. W. 735.

Section 2610 of the Statutes, among other things, provides that—

"A defendant who shows by affidavit that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action, and the court may in its discretion make such order."

Section 2656a, among other things, provides:

"A defendant * * * may have affirmative relief against a codefendant, or a codefendant and the plaintiff or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject-matter of the action."

Attention is called to the fact that in and by that portion of section 2810 quoted the interpleader is made discretionary with the court.

[20] The portions of the sections above referred to have been repeatedly construed by this court, and the right to interplead has been held discretionary. *Ertel v. Milwaukee E. R. & L. Co.*, 164 Wis. 380, 384, 385, 160 N. W. 263; *Kresge v. Maryland Casualty Co.*, 154 Wis. 627, 631, 143 N. W. 668; *Schmuhl v. Milwaukee E. R. & L. Co.*, 156 Wis. 585, 586, 146 N. W. 787; *Hemenway v. Beecher*, 139 Wis. 399, 402, 121 N. W. 150; *Swanby v. Northern State Bank*, 150 Wis. 572, 137 N. W. 763.

[21] Furthermore, it has been repeatedly decided by this court that an order denying a motion to bring in a person who may be a proper, but is not a necessary, party, is not appealable. *Reinhart v. Fire Ass'n*, 93 Wis. 452, 67 N. W. 701; *Cook v. Menasha*, 95 Wis. 215, 70 N. W. 289; *Wechselberg v. Michelson*, 105 Wis. 452, 81 N. W. 657; *State v. Wis. T. Co.*, 134 Wis. 335, 341, 113 N. W. 944; *Schmuhl v. Mil. E. R. & L. Co.*, 156 Wis. 585, 146 N. W. 787.

So that, with respect to said question No. 2, we answer, first, that, inasmuch as it was discretionary with the court to have either impleaded or denied the impleading of Edward Schroeder, individually, in refusing to permit Schroeder to be impleaded the court acted within its rights and exercised its discretion; and, secondly, that, the court having exercised its discretionary rights, an appeal from the ruling of the court does not lie.

It is contended by counsel for the real estate company and for Leafgreen that foreclosure action was prematurely brought for four reasons, namely: (a) Because no meeting of the bondholders declaring a default and directing the trustee to enter and foreclose the mortgage was ever held; (b) because no six months' notice in writing of the alleged default under the 99-year lease was given; (c) because no six months' notice was given of the intention to declare the whole amount due for nonpayment of interest or any other alleged violation of the terms in either one of the trust deeds; (d) because there was in fact no interest due and unpaid at the time the foreclosure was begun.

We will first take up the contention under paragraphs (a), (b), and (c).

Article 6 of the trust deed provides:

"In case such default shall be made in the payment of any interest on any of the bonds

issued hereunder and shall continue for the period of six months after payment of such interest shall have been duly demanded in writing, or in case default shall be made in the payment of the principal of any of such bonds when the same shall become due or be declared due and payable as in this mortgage provided, or in case default shall be made in the performance of any other agreement or stipulation herein or in said lease contained, on the part of the mortgagor or lessee, or either of them, to be kept and performed, then and in either or any or every such case it shall be lawful for the trustee, and upon a requisition in writing signed by the holders of not less than one-third in amount of the bonds then outstanding, and adequate indemnity against all costs, expenses, and liabilities to be by him incurred, it shall be the duty of the trustee, to proceed to enforce the rights and liens of the bondholders under this mortgage, either by the foreclosure," etc.

It will thus be seen from the portion of article 6 above quoted, that for a default in the payment of interest upon the bonds it is necessary that the same shall continue for a period of six months after a payment shall have been duly demanded in writing, before the trustee can commence any action to foreclose the mortgage on that account. However, it is clear from the subsequent provisions of said article 6 that where default shall be made in the payment of principal, or in case default shall be made in the performance of any other agreement or stipulation, which would include a default pursuant to failure to pay taxes on the property, the trustee is authorized to proceed with the foreclosure of the mortgage; and the subsequent provisions of said article 6 above referred to make this clear, because it provides in express terms that "upon a requisition in writing, signed by the bondholders, * * * and upon adequate indemnity having been given," etc., it shall be the duty of the trustee to proceed with foreclosure, or some other remedy provided for in the trust deed.

[22] It is clear, therefore, that said article 6 first on the given default extends and grants the right to the trustee to foreclose of his own motion, if he so desires, and becomes compulsory upon the requisition of the bondholders and the furnishing of security as is so provided in said trust deed.

Article 4 of the trust deed provides:

"* * * Or in case the mortgagor shall fail to observe, keep, or perform any obligation of said lease, then and thereupon the principal of all bonds secured by this mortgage shall, at the election of the trustee, immediately become due and payable. Provided that a majority interest of the bondholders of all of such bonds issued hereunder and then outstanding may in writing or by a vote of such majority at a meeting duly held as herein provided, at any time after such default or failure, declare or instruct the trustee in such case to declare that upon the expiration of such period after such

default and demand, or immediately after such failure to insure, the said principal shall become immediately due and payable as aforesaid, and the same shall thereupon become immediately due and payable; or such majority may in like manner waive or instruct the trustee to refrain from making such election and declaration on such terms and conditions as such majority may deem proper, and may annul or reverse the previous election made or action taken by the trustee in that behalf, whereupon said principal sum shall immediately cease to be due and payable."

Under and pursuant to said article 4 of the trust deed, therefore, the trustee had authority, upon failure of the mortgagor to observe or keep or perform the conditions of said lease, among which was the obligation to pay taxes, to elect to and to declare the whole amount of the principal of said bonds due. However, the bondholders at all times retained the right to waive such default and to insist that the trustee refrain from making such election and declaration of default.

The notice of election of the trustee to declare the whole amount of the first mortgage bonds due assigned as reasons: (a) Failure to keep the covenants and conditions of the 99-year lease requiring the payment of taxes, and the default on the part of the mortgagor in the payment of the taxes for the years 1914 and 1915. So that it is apparent that said trust deed gave the right to the trustee to declare the first mortgage bond indebtedness due for breaches of the terms of the 99-year lease, without a meeting of the bondholders as a condition precedent.

[23] It is true that there is a provision in the 99-year lease that any successor in interest of the lessee must be given notice by the lessor in writing of the fact that he has not performed the covenants of the lease, and that such successor in interest has six months after such notice in writing in which to perform. No such notice was ever given, and the notice given by the trustee on October 2, 1916, being the notice of default for payment of taxes, etc., is the only notice that was given with respect to any failure on the part of the mortgagor. This notice last referred to is a notice expressly designed to be for the benefit of the lessee under the 99-year lease, being the mortgagor under the trust deed, and is contemplated to be given and can be given only by the lessor. Such provision in the 99-year lease inures to the benefit of the lessee or mortgagor under the trust deed, and prevents any action on the part of the lessor in the form of proceedings to forfeit the 99-year lease on account of such conditions broken on the part of the lessee during the six months period.

Inasmuch, however, as a failure to pay the taxes under the 99-year lease was expressly made a default, upon the happening of which, under the provisions of the trust deed, the trustee was authorized to proceed by election

to declare the whole amount of the principal of the bonds due by foreclosure, the trustee was fully authorized to proceed with his declaration and foreclosure, notwithstanding the aforesaid provision in the 99-year lease.

[24] It is also claimed that there was in fact no interest due and unpaid at the time the foreclosure was begun, and it is claimed that every interest coupon that had matured before foreclosure had been discharged and paid by Schroeder. The evidence, however, shows that Schroeder had advanced the interest to the bondholders and held the coupons as security for the advancements, and that he is entitled to be subrogated to the rights of the coupon holders, and the court so found.

The evidence also shows that Schroeder held these coupons and that they were not marked "Canceled," and Schroeder's books as trustee do not show the payment of the interest on the coupons. The evidence also shows that Schroeder kept two accounts with the Berlin Arcade Company, one an account of moneys advanced on its account by him personally, and another account which shows his receipts and expenditures as trustee, entered on the books as "Edward Schroeder, special," and that from time to time, when there were moneys received as income from the mortgaged premises, it would be transferred from the Edward Schroeder special account, in part payment of the indebtedness shown in the personal account of Schroeder.

It also appears that Schroeder had in this way advanced for the benefit of the real estate company an amount to be paid to the bondholders for interest on the bonds in the sum of \$23,000, as the result whereof foreclosure on the trust deed was delayed for a period of two years.

It would inequitable and unjust, under the circumstances, therefore, not to subrogate Schroeder for the payments so made to the interests of the bondholders under these coupons, and we hold that the circuit court in so doing should be sustained.

It is further contended by counsel for Leafgreen and the real estate company that the current income up to the time of the foreclosure was in a sum greater than the amount necessary to discharge all previously maturing interest payments. Schroeder's books, having been introduced in evidence, clearly controvert this claim, and show that the mortgagor, the real estate company, was always indebted to the plaintiff, and that the advancements of Schroeder for the benefit of the mortgagee up to the time of the trial amounted to the sum of \$24,875.

On April 15, 1914, the defendant Leafgreen, then owning substantially all the capital stock of the mortgagor, and the plaintiff, Schroeder, made an agreement in writing, which, among other things, recited and provided the following:

This agreement recited, first, the execu-

tion of the first trust mortgage and the fact that \$125,000 of the first mortgage bonds were all outstanding; second, the indebtedness of the mortgagor to Schroeder for insurance premiums for \$1,248.04; third, the holding by Schroeder of past-due interest coupons from first mortgage bonds, aggregating \$5,400.94, plus interest; fourth, the default by mortgagor in the payment of the 1912 and 1913 taxes; and, fifth, the accruing of additional interest on the mortgage and quarterly rent payable by mortgagor under the 99-year lease on May 1, 1914.

It was therefore agreed that in order to raise the above moneys then due and in the future accruing, and to secure Schroeder moneys owing him, the mortgagor pay to Schroeder \$4,500 in cash, to be applied: (a) In payment of semiannual interest on first mortgage bond coupons maturing May 1, 1914; (b) in payment on account of taxes and assessments for the year 1912; (c) in payment of quarterly rent owing Maria Niemann (the lessor under the 99-year lease), on May 1, 1914. "If above sum is insufficient, Schroeder to advance sufficient money to make up deficiency."

Then the agreement provides for an assignment to Schroeder of all rent moneys accruing from mortgaged premises, etc. The moneys collected by Schroeder were to be applied by him as follows: (1) Wages for janitor and elevator man and charwoman, not exceeding \$115 monthly; (2) semiannual interest and quarterly rent becoming due May 1, 1914; (3) taxes and assessments, general and special, due or to become due; (4) all subsequent installments of interest on first mortgages; (5) rent under 99-year lease and taxes and assessments. "When items 1 to 4 are paid, any surplus to be applied to the payment of sum due Schroeder, as recited in the first whereas preamble above, for expenditures for taxes and amounts due on past-due clipped coupons."

When the foregoing sums are paid, the agreement was to terminate. Schroeder was not bound by any fixed order of payments, but could apply moneys as by him deemed advisable, excepting only that nothing should be paid on account of moneys due Schroeder personally until interest, rent, taxes, assessments, and wages had been paid.

The mortgagor also agreed to defray all costs and expenses to operate the building, except for moneys to be paid out of rentals as above recited, and that it would make up any deficiency on account of any or all the above obligations, if the rentals and income were insufficient.

The foregoing agreement is set forth in the answer of the real estate company and of the defendant Leafgreen.

[25] This agreement amounts to a clear confession on the part of the real estate company and Leafgreen, its principal stock-

holder, that at the date of said agreement, namely, April 15, 1914, there was a large indebtedness of the mortgagor to Schroeder; that there was no property in the hands of the said plaintiff out of which such indebtedness at that time could be paid; and absolutely precludes the idea that there were unexpired portions of the proceeds of the first mortgage bonds available at that time out of and from which these various obligations could be paid.

It also appears that the \$22,500 alleged to be the unexpended portions of the proceeds of the first mortgage bonds had been paid out in liquidation of obligations created by the mortgagor before Leafgreen became a stockholder and officer of the real estate company, and that the mortgagor and Leafgreen knew of these facts at the time of the execution of said agreement of date of April 15, 1914.

Schroeder testified that from April 15, 1914, to October 11, 1916, Leafgreen had an office in the Berlin Arcade building, and that Schroeder consulted him with respect to all of the expenditures, and that Leafgreen never made any objections with reference to the same. And it further appears, as the result of cross-examination of Schroeder on the trial by one of the defendants' counsel, that he testified that the whole proceeds of the sale of the first mortgage bonds were paid out upon the written directions of the mortgagor.

If that be true, and there is testimony to substantiate it, notwithstanding the provisions in the first trust deed or mortgage, wherein and whereby the proceeds of the first mortgage bonds were to be all expended in the erection and construction of the building, such provision was modified by the mortgagor and Schroeder, and they, being the only parties interested, had a perfect right to make such modification.

It also appears from the testimony in the case that after the execution of the trust deeds in question the mortgagor and Leafgreen made a contract for the construction of the building, whereby Leafgreen obligated himself to furnish all the material and do all the work to finish and complete it for \$151,000, of which Leafgreen received \$102,000, proceeds of the first mortgage bonds, \$30,000 in second mortgage bonds at face value, and \$19,000 in notes of the real estate company. Additional expenditures were made, making the total cost of the building the sum of \$193,000, and Leafgreen testified that \$172,657 went into the building, and that he still had coming to him for extras the sum of \$21,157.

From the foregoing it would also appear quite conclusively that the contract last above referred to not only made it possible to complete the building without applying all the proceeds of the first mortgage bonds for that purpose, but this agreement is also strongly indicative of an understanding by

and between the mortgagor and the plaintiff, and tends to prove, that the balance of the first mortgage bonds not expended in the erection of the building was disposed of for the purpose of paying the various items which the testimony shows were paid, and which constituted the sum of about \$22,500.

Let us now consider what the status of the trustee under the second trust deed and second mortgage bondholders is in this case.

With respect to the alleged illegal expenditures and appropriations of the proceeds of the first mortgage bonds, and of other alleged misappropriations, the first mortgage bondholders are directly interested.

"In the foreclosure proceedings, the trustee represents the first mortgage bondholders, and it has been held that such trustee may sue to foreclose the mortgage without joining the bondholders. And where a bill in equity is filed by the trustees for the foreclosure of a mortgage, the individual bondholders are not necessary, nor, as a rule, even proper parties to the suit." Elliott on Railroads, vol. 2, § 508; Central Trust Co. v. Burton, 74 Wis. 336, 43 N. W. 141; section 2607 of the Statutes.

Article 6 of the trust deed also provides:

"No holder of any bond or coupon hereby secured shall have the right to institute suit, action, or proceeding, in equity or at law, for the foreclosure of this mortgage or for the execution of any trusts thereof, or for the appointment of a receiver, or for any other remedy hereunder."

And further provides that such right shall vest exclusively in the trustee.

The first mortgage bondholders, not having participated in a modification of the trust agreement with respect to the application of the proceeds of the first mortgage bonds, would undoubtedly have had the right, upon a proper pleading in that regard, to have enforced an accounting on the part of the trustee for the alleged improper expenditure of the amount of the first mortgage bonds. Evidently, however, the first mortgage bondholders considered the security ample to protect them, and therefore no application was made by them, or by any of them, intended to effectuate such purpose. On the contrary, they have seen fit to rely solely upon the security of the first trust mortgage and the property covered thereby, and this was and is their undoubted privilege.

[26] The second mortgage bondholders were contented to and did accept a second mortgage upon the leasehold interest of the mortgagor and the buildings thereon, subject in all respects to the lien of the first mortgage. The obligation provided for in the first trust deed or mortgage, wherein and whereby it is agreed that the proceeds of the first mortgage bonds shall be used exclusively for the erection and construction of the contemplated building, constitutes an agreement between the mortgagor and the first

mortgage bondholders, and is a personal agreement with the first mortgage bondholders, which in no manner inures to the benefit of the second mortgage bondholders, and does not constitute an agreement running with the land, so as to enable the second mortgage bondholders to take advantage of the same. This agreement between the mortgagor and the first mortgage bondholders was not one made for the benefit of a third party, namely, the second mortgage bondholders, and in order to entitle the second mortgage bondholders to the benefit of such agreement there must be on the part of the original parties to the contract a clear intent to effectuate that purpose. 2 Elliott on Contracts, § 1413.

Such intent not being made manifest from the wording of the first trust deed, such provision in the first trust deed becomes a personal covenant, if anything, and does not inure to the benefit of the second mortgage bondholders. Hartung v. Witte, 59 Wis. 295, 18 N. W. 175; 7 R. C. L. § 29. Therefore it becomes evident that the second mortgage bondholders must rely, first, upon the equity in the leasehold estate after the satisfaction of the claims of the first mortgage bondholders, and, secondly, they have the right, in the event of an amount being realized upon such sale which is inadequate and insufficient to pay the amounts due them in whole or in part, to obtain a deficiency judgment against the mortgagor, which amount they must collect either from the receiver of the mortgagor in the receivership proceedings, as a general creditor, or, in the event that such receivership proceedings be discontinued or not made effectual, to sequester upon proper proceedings all the property of the said mortgagor not sold or disposed of under the foreclosure proceedings.

It follows, therefore, from what has heretofore been said, that the trustee under the second trust deed or mortgage and the second mortgage bondholders, except as herein stated, have no interest whatsoever in this foreclosure proceedings, and that their counterclaims for affirmative relief were properly denied and dismissed.

The real estate company also has appeared in this action, filed an answer and cross-complaint, and in law is authorized to participate in the litigation. Any proceeds, however, derived from this litigation over and above what is necessary to satisfy the claims of lienholders, belong to and are the property of the receiver. The direction of the litigation in behalf of the mortgagor and the control thereof therefore rest in the receiver, and the policy and remedies pursued by him must necessarily govern.

The receiver interposed an answer in and by which he puts the plaintiff to his proofs; alleges that all the holders of the outstanding bonds are necessary parties to this action; asks that the equities of the several

parties to the mortgaged premises be ascertained, so that the receiver may determine the amount necessary to redeem from the liens as so established. He further asks that only one judgment of foreclosure be entered, and expressly reserves the right to litigate in a separate action the issues in an action then pending in the circuit court of Milwaukee county, brought by the receiver against Edward Schroeder and others, and designed to recover damages on account of misconduct on the part of the trustee and misappropriation of funds.

It having been found by the court below that the amount of the principal of the bonds on both the first and second mortgages is due, together with the interest and other items, such as taxes, etc., and there being ample evidence to sustain such finding of the lower court, and one judgment having been entered as prayed for by the plaintiff and the defendant Leidig and the receiver, the judgment of the lower court must be affirmed.

[27] Counsel for Leidig, trustee, etc., also contends that he has the right to compel the plaintiff in this action, by the judgment of the court, to marshal and apply all of the assets available to the trustee for the first mortgage bondholders, and to compel the trustee to first satisfy as much of the claim of the first mortgage bondholders out of such assets other than the leasehold interest and the buildings thereon as such assets will pay, before resorting to the mortgaged property; and he also claims the right of subrogation of the trustee for second mortgage bondholders to the rights of the trustee for the first mortgage bondholders, with respect to such assets, exclusive of the mortgaged property.

The doctrine of marshaling of assets is an old equitable doctrine, well recognized in this and other states, and should be applied wherever available, and where the same does not work hardship or inequity to the interests of the first mortgage bondholders.

As is said in Pomeroy's Equity Jurisprudence (3d Ed.) vol. 6, § 805:

"The equitable remedy of marshaling securities with that of marshaling assets depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund."

It appears from the testimony in this case that the plaintiff has but one property out of which to satisfy the claim of the mortgage bondholders, and that is the mortgaged property. The balance of the assets coming into the hands of the trustee have all been expended, either rightfully or wrongfully, so that in reality there is not more than one fund or one property out of which the plaintiff can satisfy his claim. What the mort-

gagor retains is a mere claim of cause of action.

[28] Under these circumstances, the doctrine of the marshaling of assets is not applicable, for the reason that the claim arising for misappropriation of the proceeds of the first mortgage bonds and for misconduct of the trustee is one which may involve the trustee in litigation. A paramount creditor, such as the trustee in this case, cannot be compelled to exhaust in the first instance a mere personal remedy. 28 Cyc. 930, 931; *Palmer v. Snell*, 111 Ill. 161; *Wolf v. Smith*, 36 Iowa, 454; *Boone v. Clark*, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; *Walker v. Covar*, 2 S. C. 16.

Objection is also made by the counsel for second mortgage bondholders and the receiver that the court erred in allowing Schroeder to reimburse himself for moneys advanced by him in the construction of a bowling alley. There is ample evidence in the case to prove that these expenditures were made upon the direction and under the supervision of Leafgreen, who was at that time the president of the real estate company and the owner of practically all the stock of such company, and that it was understood and agreed between the mortgagor and Schroeder that Schroeder should be reimbursed for all moneys expended by him personally on that account.

A solicitor's fee of \$4,000 was allowed to plaintiff's attorneys by the court. There is ample evidence to sustain the finding of the lower court that such allowance was reasonable. We appreciate the efforts and labor connected with this foreclosure and the trial of the action, and the knowledge and experience requisite for that purpose.

The allowance made for the receiver is also reasonable, and the evidence fully warrants it.

There is no charge made in this case that there was collusion between Schroeder, the trustee, and the first mortgage bondholders, and the purchase in good faith of the first mortgage bonds by their holders, and the payment at par therefor, is unchallenged.

The judgment of the lower court is therefore affirmed.

ESCHWEILER, J. (dissenting). In this case I think the lower court should, during the trial, have granted the motion made to require the plaintiff trustee to disclose the names of the bondholders whom the plaintiff, as trustee, merely was representing. I think also that this court should have granted such relief upon the motion made after hearing of this case.

The purpose of all the transactions with reference to this real estate was to secure a building upon the same which should be rented and become revenue producing. In order that it might be such it was essential that some one in lawful possession of the premises at the time should be able to enter

into definite and certain leases with tenants and for reasonable terms. The consent of the trustee, not having taken possession, was entirely unnecessary, and the question whether or not he had so consented would only be material, if at all, upon the question of whether he was not thereby estopped from thereafter questioning any such lease. It stands uncontradicted in the record that the arrangement made with the Arcade Theater Company was a reasonable lease.

I think it became a binding obligation on all concerned and should not be regarded as in the nature of an incumbrance on the property, and that neither the mortgagor nor the trustee plaintiff should be heard to question the obligations of this lease, and it was as binding against the property as it was against the tenant.

IN re BREWSTER'S ESTATE.

SEILE v. HENLE et al.

(No. 22352.)

(Supreme Court of Minnesota. Oct. 7, 1921.)

(Syllabus by the Court.)

1. Wills $\S$ 55(1), 166(1)—Evidence held to support finding of mental capacity and absence of undue influence.

In a will contest the evidence is examined, and held to sustain the findings of the trial court to the effect that the will in dispute was not induced or brought about by undue influence exerted by those to whom the bulk of testator's property was given; and that the testator was of sound and disposing mind when the will was formally drawn and executed by him.

2. Wills $\S$ 164(1), 384—In a contest for undue influence, excluding evidence of happenings after execution or of a matter not probably influencing testator held not error.

There was no prejudicial error in the exclusion of certain evidence tendered by contestants on the trial.

Appeal from District Court, Hennepin County; E. F. Walte, Judge.

Proceedings to probate will of William Brewster, deceased. The probate court sustained the will, and Sarah Seile appealed to the District Court, where the will was sustained. From an order denying a new trial, contestant appeals. Order affirmed.

Geo. R. Smith and H. Stanley Hanson, both of Minneapolis, for appellant.

Cary & Kaminer, for respondent J. H. Staring.

Elmer W. Gray, of Minneapolis, for respondent Cora Henle.

John O. Loeffler, of Minneapolis, for respondent Irving Starr.

BROWN, C. J. William Brewster, late of Hennepin county, died therein on the 23d day of July, 1919, leaving what purported to be his last will and testament, by which he disposed of his entire property and effects. He left surviving as heirs and next of kin five nieces and two nephews, daughters and sons of his deceased sister, and they in different shares were made sole legatees under the will. The will was duly presented to the probate court for allowance. On the day appointed for hearing thereon, certain of the nieces who had not shared as well as others under the will, interposed objections to the allowance thereof on the grounds, as alleged and stated by them, (1) that the will had been revoked by the testator prior to his death; (2) that the will was procured by the undue influence of one of the nieces, and was not testator's free act and deed; and (3) that at the time the will was made testator was suffering from bodily infirmities and was mentally incompetent to know and understand the nature of his act; therefore, that the will was not in law valid or of legal effect. The issues thus raised were brought to trial before the probate court, and after consideration of the evidence resolved against contestants, and the will sustained. An appeal was taken to the district court where after a trial before the court without a jury, a like result followed. Contestants then appealed from an order of that court denying a new trial.

[1] The points made under the assignments of error do not require extended discussion. There was no showing of mental incapacity on the part of the testator, and the evidence presented to the trial court justified, and in our view thereof fully sustains, the finding that the will was not the result of or brought about by the undue influence of any of the legatees who received the bulk of the property. We need not review the evidence; it would serve no useful purpose. It is sufficient that we have read it with the result stated. The principal question raised on the appeal is whether there was reversible error in the rulings of the trial court in the admission and exclusion of evidence. We answer it in the negative.

[2] Testator was some 59 years of age at the time the will was executed, and he continued in life until he was 65. He owned both real and personal property of the value of \$40,000 or more. The evidence shows that for some 20 years prior to his death a woman by the name of Johnson served him in the capacity of housekeeper during all that time. He had no wife or children. His sister, the mother of the nieces and nephews named as legatees, died a number of years prior to the

(184 N.W.)

date of the will in question, and after her passing there seems to have grown up among her children much ill will and hatred, one toward the other, a condition that remained up to the time of the trial of this case. One of the favored legatees, Cora Henle, apparently was intense in her feelings towards her sisters, and the claim is that by methods of various kinds she sought to poison and prejudice the mind of testator against them, and that she in fact succeeded. It was sought to show by certain correspondence between the sisters, or some of them, and by letters written by Cora this intense and violent family disturbance and disruption of the natural love and affection usually found in the family circle. The evidence was excluded, and we think properly so. The letters were written, and the correspondence offered for the purpose took place, subsequent to the date of the will, and simply emphasized the existence of the strained family relations, a fact that was fully before the court. There was no error in this respect.

There was an attempt also to introduce in evidence a conversation had between the niece Cora and testator's housekeeper, which took place, it is claimed, in the presence and hearing of testator, and which tended to indicate a purpose on the part of Cora to place one of her sisters in an unfavorable light before testator. It was excluded. The court might have admitted the evidence without error, but the subject-matter and character of the conversation is not of such significance or importance as a factor in the direction claimed as to justify a new trial of the action. It seems that one of the nieces had sent to testator a jar of cherry preserves, and upon discovery thereof in the house, and hearing from whence it came, Cora admonished the housekeeper not to let testator eat thereof, for she believed the same had been poisoned by her sister. Whether testator heard the conversation is left in doubt by the evidence. He was in the room, but was reading a newspaper, took no part therein, and apparently paid no attention to what was under discussion by the housekeeper and Cora. The fact sought to be brought out corroborated what already appeared, and disclosed the extreme hatred Cora had for the particular sister. There being a serious doubt whether testator heard or was influenced thereby in making his will, the ruling should not require a new trial. Testator seems to have been a man of too strong a personal character to be influenced by the incident, conceding that he may have heard the conversation. He was in sound mental and physical condition when the will was made, and verbally directed the terms and provisions to be inserted therein. The will was drawn by a reputable attorney at his office in Minneapolis, and no other person

accompanied testator; in fact, it does not appear that any of the nieces or nephews knew when the will was so formally made and executed, or that they at any time made any suggestions to testator as to what he should do with his property; and the unfriendly relations between nieces appears as about the only basis for the charge that he was influenced by those favorably treated by the will in discriminating against the others.

There may be another item or two of rejected evidence, not necessary to specially mention, which could have been admitted without error. But our examination thereof in connection with the whole record leads to the conclusion that the matters tendered were not of special importance or significance, and that the exclusion thereof was not prejudicial. The result would not have been different had the evidence been admitted. 2 Dunnell's Dig. 7181-7182.

What has been said covers the case. The evidence sustains the findings of the trial court, the record presents no reversible error, and the order appealed from must be affirmed.

It is so ordered.

FROMMELT v. TRAVELERS' INS. CO.
(No. 22174.)

(Supreme Court of Minnesota. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Insurance $\S$ 665(5)—Evidence held to sustain finding that insured's death resulted from accidental means.

The evidence in this case is sufficient to sustain a finding that the death of the insured resulted from accidental means.

2. Insurance $\S$ 665(5) — Evidence held not conclusive that death was due to pre-existing disease.

The evidence is not conclusive that the death was due in part to pre-existing disease.

3. Insurance $\S$ 539(3, 6)—"Immediate notice" defined; insurer's procuring and refusing to surrender policy excused plaintiff's giving notice of death.

The policy covering the case required that, in event of accidental death, immediate notice must be given to the company. This means within a reasonable time. Almost immediately after death the soliciting agent who negotiated the policy procured it and surrendered it to the company, as plaintiff claims without her authority. It was never returned to her though later demanded. *Held*, this and other circumstances in the case excused plaintiff from giving notice of death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Immediate Notice.]

Appeal from District Court, Hennepin County; W. E. Hale, Judge.

Action by Martha A. Frommelt against the Travelers' Insurance Company. Verdict for plaintiff, and defendant appeals. Order affirmed.

Dille, Hoke, Krause & Faegre and L. N. Foster, all of Minneapolis, for appellant.

J. H. Sapiro and Henry M. Farnam, both of Minneapolis, for respondent.

HALLAM, J. This action was brought to recover on a policy of accident insurance issued to plaintiff's husband, Alfred Julius Frommelt. Plaintiff had a verdict. Defendant appeals.

[1] 1. The policy insured against loss resulting from "external, violent and accidental means." Defendant contends that the evidence fails to show that death resulted from such means. The short facts are as follows: About 1 a. m. January 16, 1918, deceased was, without premonition, taken sick at his home. He was suffering from a stricture of the urethra which prevented urination. Dr. Jones was called and arrived at 7 a. m. The evidence is in conflict, but there is competent evidence that in passing a metal catheter through the urethra, Dr. Jones caused a severe laceration. No relief was afforded. At 11 a. m. a trocar was passed into the bladder through an incision below the umbilicus and through this means the bladder was drained. At 3 p. m. another operation, styled the perineal operation, was performed. This consisted of an incision at the point of obstruction and the insertion of a drainage tube through the urethra into the bladder. Frommelt grew rapidly worse and died January 23d.

The testimony for plaintiff consisted of her own testimony, giving the history of the case and the symptoms shown and the testimony of two doctors, Dewar and Quinby, who performed an autopsy five months later. The result of the autopsy was more fruitful than the layman would perhaps expect after the lapse of time. The two doctors gave the opinion that an infection set in in the urethra, worked up to the kidneys and caused death. If this infection was caused by the laceration from use of the catheter at 7 a. m., it may fairly be said to be the result of accident. If arising from one of the operations later in the day, it cannot be said to be accidental. Dr. Quinby gave the opinion that it was the result of the laceration. As basis in part for his opinion he indicated that it was probable from the symptoms and facts developed that infection set in very early, that there were indications that it had set in before the operation in the afternoon, and the much greater probability of infection from a laceration caused by a catheter at a place within, where there had been no cleansing or sterilization,

than by an operation with a knife in the hands of an experienced surgeon, and at a place where cleansing and sterilization were easy. We think the evidence sustains a finding of accidental death. See *Lewis, Ex'r, etc., v. Ocean Acc. & Guar. Corp.*, 224 N. Y. 18, 120 N. E. 53, 7 A. L. R. 1129.

[2] 2. The policy covers only cases of loss through external, violent and accidental means "independently of all other causes" and by its terms excludes cases of death or other loss caused wholly or partly by bodily infirmity. Defendant contends that Dr. Dewar on the stand admitted that Frommelt's death was due partly to pre-existing disease, not to the stricture, but to a subacute nephritis. The court submitted this question to the jury in an instruction full and clear. The jury by their verdict decided this question adversely to defendant. We are of the opinion that their finding should not be disturbed. If Dr. Dewar's testimony contains the admission contended for, the admission of this one witness would not conclude plaintiff. But, while some of Dr. Dewar's answers at the close of a long cross-examination contain this admission, when we take all his testimony together, while there is some confusion, we cannot be certain that Dr. Dewar intended an opinion that Frommelt had pre-existing nephritis. We are of the opinion that this question was properly submitted to the jury.

[3] 3. The policy requires that, "in event of accidental death, immediate notice thereof must be given to the Company." No formal notice was ever given to the company. The day after Frommelt died, Mr. Fust, the solicitor who solicited the policy, procured it from plaintiff and returned it to the company and received from the company, the unearned portion of the premium which he paid to plaintiff. His testimony is that he procured it and returned it in order to save that amount to plaintiff. Plaintiff's claim is that he obtained the policy without her knowledge, and, while admitting that he later handed her the money, said that it was while she was in the agony of grief over her husband's death and that she did not understand what it was for. On March 28th plaintiff's attorney demanded of Fust that he return the policy to plaintiff and Fust reported that fact to the company, but the policy was never returned.

The requirement of immediate notice is a requirement of notice within a reasonable time, and what is a reasonable time depends on the circumstances of the particular case. *C. S. Brackett & Co. v. General Accident F. & L. Assur. Corp.*, 140 Minn. 271, 167 N. W. 798. The fact that the policy was not in the possession of plaintiff, but of the company, is important (*Curran v. National Life Ins. Co.*, 251 Pa. St. 420, 96 Atl. 1041; *Soloman v. Continental Fire Ins. Co.*, 160 N. Y. 595, 55

N. E. 279, 46 L. R. A. 682, 78 Am. St. Rep. 707), for plaintiff could have no knowledge of its terms, and, without disparagement of her case, it may well be said that she probably did not realize at once that her husband's death was due to accident. Under such circumstances, we think the delay of plaintiff was excused.

After the demand for a return of the policy and the failure, tantamount to a refusal, to return it, we think the purpose of notice had been subverted and the failure to return the policy, implying the claim that it was no longer in force, absolved plaintiff of her obligation to further comply with its terms. *Marcus v. National Council*, 127 Minn. 196, 149 N. W. 197; *Dechter v. National Council*, 130 Minn. 329, 153 N. W. 742.

Order affirmed.

STATE ex rel. JAFFA v. CREPEAU, Chief of Police et al. (No. 22626.)

(Supreme Court of Minnesota. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Pardon ⇐14—Board may grant conditional parole.

The Board of Parole of this state may grant a prisoner a conditional discharge and if the condition fails the discharge is inoperative. A discharge on condition that the prisoner is taken into custody by the authorities of another state becomes void on the authorities of such state declining to take him into custody.

2. Pardon ⇐2—Statute, authorizing parole board to order prisoner's return without hearing, held constitutional.

Under our statute the Board of Parole may order the return of a paroled prisoner without a hearing. The statute is constitutional.

Appeal from District Court, Ramsey County; Wm. L. Kelly, Judge.

Habeas corpus by the State, on relation of William Jaffa, against Henry Crepeau, Chief of Police of the City of St. Paul, and others, for a release of relator arrested after rescinding of a parole. Release was held absolute, and relator discharged, and the Minnesota State Board of Parole appeals. Order of release reversed and writ discharged.

C. L. Hilton, Atty. Gen., and E. S. Oakley, Asst. Atty. Gen., for appellant.

A. J. Hertz, of St. Paul, for respondents.

HALLAM, J. 1. Relator was adjudged guilty of grand larceny in the second degree and was sentenced to the State Reformatory at St. Cloud to be imprisoned until discharged by due course of law or by competent authority. The limit of punishment under the

law is imprisonment for five years. Relator commenced his term of service January 27, 1919. Early in 1921, the Board of Parole received advices that relator was charged with crime committed in Illinois, and that the Illinois authorities wanted to secure his arrest upon his discharge in Minnesota. On April 26, the Board of Parole, considering his case, took the following action: "Discharge authorized on condition that the Illinois authorities get him." Soon thereafter it developed that the Illinois charge had been dropped and that the Illinois authorities did not want him. Thereupon the Board of Parole again considered the case and on May 9, took this action: "Discharge to Illinois authorities rescinded and parole authorized." Relator was thereupon released on parole.

On July 26, 1921, the Board of Parole, again considering his case, took this action: "Parole rescinded and warrant for arrest issued." Under this warrant relator is now held.

[1] We construe the action of April 26th as a conditional discharge. This is just what it purports to be, a discharge on condition that relator should be taken into custody by the Illinois authorities. Since the Illinois authorities did not take him into custody the condition failed and it was inoperative.

The learned district judge was of the opinion that the condition was void, and that, the condition failing, the discharge became absolute. We cannot agree that the condition was void. Pardons and paroles upon condition are quite generally recognized as valid when authorized by statute or even in the absence of statute, if such condition is made a part of the discharge. *State v. Wolf-er*, 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783, 39 Am. St. Rep. 582; *Kennedy's Case*, 135 Mass. 48; *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395. There is nothing in the statutes that forbids, and we see no reason of public policy for holding such a condition void. Had the board granted only a parole under the usual regulations, relator could not have left the state and a discharge and not a parole was the proper procedure in event relator was to be remanded to the authorities of another state.

[2] 2. Relator contends that the prison authorities have no power to cause his arrest and return to prison without according him a hearing on the question whether he had in fact violated the terms of his parole. The statute provides:

"Such convicts while on parole shall remain in the legal custody and under the control of the state board of parole, subject at any time to be returned to the state prison or state reformatory, and the written order of said board, certified by the warden or superintendent of the state reformatory, shall be a sufficient warrant to any officer to retake and re-

turn to actual custody any such convict." G. S. 1913, § 9273.

This statute gives to the board the power to order the return of a paroled prisoner in the exercise of their judgment and discretion. No trial or hearing is provided for. The board in causing the arrest and demanding the return of relator accordingly acted within the law unless this statute is for some reason unconstitutional. We know of no constitutional provision that it violates. The propriety of such legislation is impliedly recognized in *State v. Wolfer*, supra, and is sustained in other states and it is generally held that there is no infringement of any constitutional guaranty of the personal rights or liberty of the convict. *Fuller v. State*, 122 Ala. 32, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1; *Kennedy's Case*, 135 Mass. 48; *Owen v. Smith*, 89 Neb. 596, 131 N. W. 914; *Spencer v. Kees*, 47 Wash. 276, 91 Pac. 963; *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047; *State v. Stephenson*, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Ann. Cas. 841; *State v. Page*, 60 Kan. 664, 57 Pac. 514; *State v. Peters*, 43 Ohio St. 629, 4 N. E. 81; *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109.

The theory is that a parole granted under such a statute, is granted, not as a matter of right, but of grace, and that the convict by accepting this form of parole is bound by the conditions imposed by the statute under which it is granted.

There are decisions in other states holding similar legislation wholly or in part invalid as an infringement of particular constitutional provisions resting the pardoning power in the Governor of the state. *People v. Moore*, 62 Mich. 496, 29 N. W. 80; *State v. State Board of Corrections*, 16 Utah, 478, 52 Pac. 1090; *In re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658; *People v. Cummings*, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285.

Our Constitution creates a board of pardons "whose powers and duties shall be defined and regulated by law." Const. Minn. art. 5, par. 4. We think this provision permits the legislation here in question. See, also, *People v. Cook*, 147 Mich. 127, 110 N. W. 514.

Order reversed, and writ discharged.

STATE v. MCPADDEN. (No. 22154.)
(Supreme Court of Minnesota. Sept. 30, 1921.)

(Syllabus by the Court.)

1. Rape § 4, 40(5)—Illicit relations with other men is no defense to statutory rape, and evidence thereof is inadmissible.

In a prosecution for rape on a female under the age of consent, the fact of illicit re-

lations with other men than defendant constitutes no defense, and evidence thereof is inadmissible either in justification or excuse.

2. Rape § 13—Willingness of prosecutrix under age of consent is immaterial.

The law withholds from her the right of consent, and her willingness or unwillingness is wholly immaterial.

3. Rape § 40(5)—Where state shows pregnancy in statutory rape prosecution, defendant may show illicit relations with other men.

In the case where pregnancy follows the act charged against defendant, he may show in refutation of any inference arising therefrom in corroboration of complainant that other men had illicit relations with her at about the same time.

4. Criminal law § 670—Rape § 40(5)—Offer to show prosecutrix's illicit relations with others held too indefinite.

But an offer to show such relations both "before and after" the date charged against defendant is entirely too indefinite.

5. Criminal law § 1160—Approved verdict of guilty in statutory rape case not disturbed.

The evidence made the question of defendant's guilt one of fact, and the verdict is sustained by sufficient competent evidence.

6. Rape § 22—Allegation that complainant was an unmarried female sufficiently negatives marital relations with defendant.

The allegation in the indictment that complainant was an unmarried female under the age of 18 years sufficiently negatives any marital relations between the parties.

(Additional Syllabus by Editorial Staff.)

7. Criminal law § 369(8)—In statutory rape prosecution, evidence of other illicit acts with defendant held admissible.

In a prosecution for statutory rape, evidence of prosecutrix's illicit acts with defendant prior and subsequent to date relied upon for conviction is admissible where not too remote.

Appeal from District Court, Carver County; O. M. Tift, Judge.

William McPadden was convicted of statutory rape, and from an order denying a new trial, he appeals. Order affirmed.

P. W. Morrison, of Norwood, for appellant. Clifford L. Hilton, Atty. Gen., Jas. E. Markham, Asst. Atty. Gen., and W. F. Odell, Co. Atty., of Chaska, for the State.

BROWN, C. J. Defendant was convicted of statutory rape upon a female child under the age of 18 years and appealed from an order denying a new trial.

The questions raised by the assignments of error do not call for extended consideration. The record presents nothing not found in the ordinary case of this character, and a

brief reference to the points raised in support of the appeal will suffice.

[6] 1. The evidence of the commission of the crime by defendant as given by complainant, though directly and flatly denied by him, presented an issue of fact for the jury. We discover from the record no fact or circumstance to discredit complainant as a matter of judicial inference, or reason for declaring as a matter of law that the jury erroneously gave credence to her testimony. The record in this respect is the usual one found in such cases where there is a direct and irreconcilable conflict in the testimony of complainant and the accused. Their credibility was for the jury; and although counsel presented this feature of the case persuasively and with much earnestness in this court, in the belief of the innocence of his client, we are unable, after full consideration of the record, to concur in the contention that the verdict is unsupported by competent and reliable evidence. The case was one for the jury. They reported a verdict of guilty which the trial court approved, and there the matter must rest. *State v. Johnson*, 114 Minn. 493, 131 N. W. 629; *State v. Bragdon*, 136 Minn. 348, 162 N. W. 462; *State v. Deike*, 144 Minn. 453, 175 N. W. 1000; *State v. Rutledge*, 142 Minn. 117, 171 N. W. 275.

[8] 2. The contention that the indictment is fatally defective in that it contains no allegation that complainant was not the wife of defendant is not sustained. The indictment does charge that she was an unmarried female under the age of 18 years. That conclusively negatives any marital relations between the parties.

[7] 3. The further point that there was error in the admission in evidence of prior and subsequent acts of intercourse between complainant and defendant is disposed of by our prior decision on the subject. The date of the offence as charged in the indictment was June 22, 1918. A prior act on the 14th of June and a subsequent act on July 4th are the acts so claimed to have been erroneously admitted. The precise point was involved in *State v. Schueller*, 120 Minn. 26, 138 N. W. 937, *State v. Roby*, 128 Minn. 187, 150 N. W. 793, Ann. Cas. 1915D, 360, 171 N. W. 275, *State v. Schtemme*, 133 Minn. 184, 158 N. W. 48, and *State v. Rutledge*, 142 Minn. 117, and decided adversely to the contention here made. The South Dakota court in *State v. Yeager*, 41 S. D. 51, 168 N. W. 749, cited and relied upon by defendant, apparently followed the rule applied by some of the courts as to subsequent acts and rejected by this court in *State v. Roby*, supra. The rule must be taken as settled in this state that evidence of illicit acts with defendant prior and subsequent to the date of the charge relied upon by the state for conviction is

admissible where not too remote in point of time. *State v. Rutledge*, supra.

[1, 2] 4. The fact of illicit relations with other men in a prosecution for statutory rape on a female under the age of consent is no defense, and evidence thereof is inadmissible either in justification or excuse. Such evidence can have no effect as tending to show consent, for the law withholds from her the right to consent. The statute was designed for the protection of young womanhood, and he who violates its commands can find no comfort or relief by a showing of consent; her willingness or unwillingness to be debauched is wholly immaterial. The rule is well settled on this subject. *State v. Henderson*, 19 Idaho, 524, 114 Pac. 30; *People v. Gray*, 251 Ill. 431, 96 N. E. 268; *Smith v. State*, 90 Ark. 435, 119 S. W. 655; *State v. Sibley*, 131 Mo. 519, 83 S. W. 167; *People v. Abbott*, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; *State v. Rash*, 27 S. D. 185, 130 N. W. 91, Ann. Cas. 1913D, 656; note to *State v. Apley*, 25 N. D. 298, 141 N. W. 740, in 48 L. R. A. (N. S.) 269; 22 R. O. L. 1211. Nor by the weight of authority is the evidence as a general rule admissible as affecting the credibility of complainant. *People v. Abbott*, 97 Mich. 484, 56 N. W. 862, 37 Am. St. Rep. 360; *State v. Hammock*, 18 Idaho, 424, 110 Pac. 169. There is authority to the contrary. *State v. Apley*, 25 N. D. 298, 141 N. W. 740, 48 L. R. A. (N. S.) 269. To what extent the subject may be inquired into on the trial by the usual method of impeachment of the complainant we do not stop to consider. The question is not involved.

[3, 4] But where in such cases the state presents evidence in corroboration of the charge, showing that complainant became pregnant as the result of the act charged against defendant, defendant may, in refutation of the corroborating effect of the evidence so tendered (*State v. Johnson*, 114 Minn. 493, 131 N. W. 629), show that complainant had like relations with other men at about the date charged against him. Evidence of that kind, if believed by the jury, would wholly neutralize or destroy the effect of the state's showing on that feature of the case. However, in the case at bar defendant offered no evidence showing or tending to show such relations with other men at or about the date charged against him. On cross-examination complainant denied any such acts with other men, and there was no evidence to contradict her. The offer made by defendant to show such relations with other men both "before and after" the time charged against him was entirely too indefinite; the evidence, to be admissible, must be of acts having some relation in point of time to the pregnancy of complainant. In this respect defendant's offer fell short.

This covers the case and all that is necessary to say in disposing of the appeal. The evidence made the question of defendant's guilt one for the jury, the record presents no error, and the order appealed from must therefore be affirmed.

It is so ordered.

SCANLON v. WANLESS et al. (No. 22342.)
(Supreme Court of Minnesota. Oct. 7, 1921.)

(Syllabus by the Court.)

1. Judgment $\S$ 199(3)—Defendant not entitled to judgment notwithstanding verdict where plaintiff could properly supply lacking evidence at another trial.

Even though the evidence was insufficient to justify a verdict for plaintiff, defendant was not entitled to judgment notwithstanding the verdict if it appeared probable to the trial court that what was lacking can be supplied at another trial.

2. Judgment $\S$ 199(3)—New trial $\S$ 70—Court exercises judicial discretion in determining probability of existence of needed evidence.

The trial court exercises judicial discretion in determining the probability of the existence of the evidence needed.

Appeal from District Court, St. Louis County; Bert Fealer, Judge.

Action by John Scanlon against John Wanless and another, in which defendant Henry E. Webster, against whom the verdict was rendered, moved in the alternative for judgment notwithstanding the verdict or a new trial. New trial was awarded, and judgment non obstante denied, and Webster appeals. Order affirmed.

Baldwin, Baldwin, Holmes & Mayall, of Duluth, for appellant.

Samuelson, McHugh & O'Donnell, of Duluth, for respondent.

HOLT, J. Plaintiff recovered a verdict for malpractice against this defendant. The latter moved in the alternative for judgment notwithstanding the verdict or a new trial. A new trial was awarded for errors of law solely, and judgment non obstante was denied. The defendant appeals.

Because a hypothetical question put to plaintiff's medical expert was not so framed as to correctly state the facts respecting appellant's treatment and plaintiff's condition and situation a new trial was granted.

A brief statement of the facts are these: Plaintiff, over 50 years old, while working on a farm a short distance from Cramer, Minn., was kicked by a horse and his heel bone fractured. His employer brought him to appel-

lant for treatment. The foot was put in splints for a week or ten days, then in a cast, which was kept on for some six or seven weeks. After the cast had been on for about three weeks plaintiff, with the approval of appellant, went back to his employer. Plaintiff says he was directed to remove the cast in three or four weeks. Appellant testified that he advised that it be kept on during the journey and removed as soon as plaintiff reached his destination. Plaintiff claims there were sores about the ankle when the cast was removed; that he came down to Duluth to see appellant, who, after examining the foot and prescribing the use of a salve, sent him back. A couple of months thereafter plaintiff became very ill with pneumonia. His employer again brought him to appellant at Duluth for treatment. He recovered, but it was then found that, near the ankle of the injured foot, gangrene had so developed that an amputation of the leg a few inches above the knee was imperative. In general terms the complaint alleged that appellant negligently and unskillfully treated the fracture, and that as a result he "contracted pneumonia and a septic condition of the leg ensued."

The evidence of improper or negligent treatment came from Dr. Wunder, plaintiff's medical expert, and was simply to this effect, that in his opinion the treatment given by appellant was not proper, and that the gangrene, being local, was due to poor circulation and infection. There was no expert testimony that any treatment could have saved the leg or prevented the gangrene. The medical testimony adduced by appellant was that the gangrene was wholly due to poor circulation because of the advanced arteriosclerosis then existing in the leg, and could not have been caused by the abrasions which plaintiff claims were on the ankle when the cast was taken off. There was no expert testimony in contradiction thereof, except that Dr. Wunder considered the gangrene due in part to infection. But appellant by a number of competent doctors also proved that the gangrene which appeared on plaintiff's ankle, and because of which the amputation became necessary, was dry gangrene, and hence could not have come from infection. There was no testimony in contradiction thereof. This is not a case where the jury from their own knowledge and experience could determine what caused the gangrene, or what treatment, if any, a physician exercising ordinary care and skill could have used that might have prevented its formation and saved the leg. As the record now stands the evidence must be held insufficient to support a verdict.

[1, 2] But the conclusion reached does not entitle to a reversal of the order denying the motion for judgment non obstante. The rule is that, "even where there was a total ab-

sence of evidence on some material point, but where it appeared probable that the party had a good cause of action or defense, and that the defect in the evidence could be supplied on another trial," judgment will not be ordered notwithstanding the verdict. *Cruikshank v. St. Paul Fire & Marine Ins. Co.*, 75 Minn. 266, 77 N. W. 958. On this branch of the motion the order of the trial court must be regarded as in some measure discretionary. The only difficulty we have is whether it can be said that the court below was right in holding, as he must have done, that it appeared probable that the defect in the evidence could be supplied at another trial. The probability in the mind of the court of the existence of such evidence might be found in the fact that plaintiff's attorneys, perhaps inadvertently, made no attempt to elicit the opinion of Dr. Wunder as to whether proper treatment could have prevented gangrene, or as to whether the gangrene which developed, being dry gangrene, could have come from the abrasions caused by the cast, or any neglect in their treatment. There is no claim that amputation, when made was not the proper treatment, or that the result was not as good as might be expected, considering the advanced sclerosis of the artery in that leg.

We are unable to hold that it did not appear probable to the learned trial court that the lack of medical expert testimony to make out a case for malpractice can be supplied upon another trial.

The order is affirmed.

KEANE v. BUTNER. (No. 22388.)

(Supreme Court of Minnesota. Oct. 7, 1921.)

(Syllabus by the Court.)

1. Appeal and error $\S$ 1056(1)—Highways $\S$ 184(2)—Evidence held to support verdict for plaintiff for damages from collision on highway; exclusion of evidence held not prejudicial.

In an action for damages suffered by plaintiff as the result of a collision between a vehicle driven by him on a public highway and an automobile driven by defendant, it is held that the evidence supports the verdict, and that the record presents no error in the rulings of the trial court excluding certain evidence offered by defendant, or in the charge of the court to the jury.

2. Highways $\S$ 184(3)—Driving on traveled track to left of center is not negligence as matter of law.

Where the traveled track of a public road is to one side of the center thereof, it is not negligence as a matter of law to drive in such track, though it be upon the left side of the road to the particular driver.

3. Highways $\S$ 175(1)—Drivers meeting on traveled part of highway to one side of center should each turn to right.

In that situation it is incumbent upon drivers of meeting vehicles, when practicable, to turn to the right, so that free passage may be had for each.

(Additional Syllabus by Editorial Staff.)

4. New trial $\S$ 143(5)—Juror's affidavits held not admissible to impeach verdict.

Affidavits of jurors on motion for a new trial that a wrong method was resorted to in arriving at the amount of damages are not admissible to impeach the verdict.

Appeal from District Court, Traverse County; S. A. Flaherty, Judge.

Action by W. S. Keane against Bert Butner. Verdict for plaintiff, new trial denied, and defendant appeals. Affirmed.

Lewis E. Jones, of Breckenridge, for appellant.

Murphy & Anderson, of Wheaton, for respondent.

BROWN, C. J. Plaintiff was driving along a public highway with his team of horses and buggy. It was in the nighttime and quite dark. Defendant at the same time was driving his automobile on the same road, coming from the opposite direction. There was a collision. The automobile struck one of the horses, inflicting an injury, a broken leg, which made it necessary to shoot and kill the animal to end its suffering. This action was subsequently brought to recover the value of the horse; the ground thereof being the alleged negligent operation of defendant's automobile. At the trial the plaintiff had a verdict for the value of the horse, and defendant appealed from an order denying a new trial.

The assignments of error present the question whether there was error in the rulings of the court on the admission of evidence, whether the court erred in its instructions to the jury, and, finally, whether the evidence supports the verdict, all of which we have attentively considered, and find no sufficient reason for interference with the order denying a new trial.

[1] The evidence is amply sufficient to justify the conclusion that the accident was caused by the negligence of defendant in the operation of his automobile, and that plaintiff was free from contributory negligence. The case is not unusual in its facts, and the evidence need not be discussed. A careful reading thereof leads to the conclusion stated, and there we may dismiss the subject. There was no prejudicial error in excluding the evidence tendered by defendant that a witness repaired to the scene of

the accident the following morning and there discovered broken glass on the road at a point claimed by defendant, disputed by plaintiff, as the place of the accident. The issue as to the collision, as to what part in the road it occurred, was fully threshed out by the several witnesses, and the claims of the respective parties clearly laid before the jury, and it is quite apparent that, had the particular item of evidence been admitted, the verdict of the jury would have been the same. Its exclusion was not prejudicial; therefore not ground for a new trial. 2 Dunnell's Dig. 7181, 7182. There was no departure on the trial from the issues presented by the pleadings. There is usually a dispute as to the precise place and manner of accidents of this kind when the evidence comes in, but that does not create a departure from the pleaded issues.

[2, 3] It appears that the traveled track of the particular road was to one side of the center; a situation often found in our graded highways. Plaintiff was driving his team in that track, which as to him lay on the left side, while defendant was approaching also in the same track. In that situation no conclusion of negligence can follow as a matter of law against the persons thus driving. There was evidence that defendant in approaching turned abruptly to the left instead of the right, as the law requires. The verity of that evidence was for the jury. The court properly left the question to the jury, saying to them that in a situation of the kind stated those thus meeting on the road should, when practicable, turn to the right far enough to permit the passage of both vehicles. The instructions were in harmony with G. S. 1913, § 2552. It was claimed by defendant that the traveled track was within two feet of the ditch extending along the road, and that he could not turn out in that direction. The charge of the court properly covered that feature of the case and expressly stated that he was not required by the law of the road or otherwise to run his automobile into the ditch; all that was required of him was to turn to the right if it was practicable to do so. The charge of the learned trial judge, taken as a whole, though a little long, was a clear and fair presentation of the case to the jury, and we discover no reasonable cause for complaint by defendant.

[4] The further contention is made that the jury in arriving at a verdict resorted to the plan, sometimes claimed to be resorted to by juries, of taking the amount deemed fair by each, dividing the total thereof by 12, the number of jurors, and reporting the result as the damages awarded. The record does not sustain the point. The affidavits of the jurors to thus impeach the verdict were not admissible. 2 Dunnell's Dig. 7109;

McDonald v. Pless, 238 U. S. 264, 35 Sup. Ct. 783, 59 L. Ed. 1300.

The evidence sustains the verdict, and the record presents no grounds for a new trial, and the order denying defendant's motion for a new trial is therefore affirmed.

BUTCH v. SHAVER. (No. 22505.)

(Supreme Court of Minnesota. Oct. 7, 1921.)

(Syllabus by the Court.)

1. Master and servant $\S$ 385(11¼)—Injured employé held entitled to compensation as for loss of eye.

Where an employé sustains a personal injury by accident arising out of and in the course of her employment which irrecoverably destroys the sight of her right eye, though with extra artificial means she may have fair vision, she is entitled to compensation as for the loss of the eye, under the provisions of section 8207, G. S. 1913, as amended by chapter 442, Laws of Minnesota for 1919.

2. Master and servant $\S$ 405(4)—Compensable injury shown.

In this proceeding, under the Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230), the testimony supports the finding that the injury complained of arose out of and in the course of respondent's employment.

Certiorari to District Court, Hennepin County; Frank M. Nye, Judge.

Proceeding under the Workmen's Compensation Act by Helen A. Butch against C. H. Shaver. The district court rendered a judgment allowing compensation, and defendant brings certiorari. Affirmed.

Cray & Eaton, of Minneapolis, for relator.
A. A. Tenner, of Minneapolis, for respondent.

QUINN, J. Certiorari to review a judgment of the district court of Hennepin county, decreeing that respondent is entitled to judgment against relator for compensation under the Minnesota Workmen's Compensation Act (Laws 1913, c. 467 [Gen. St. 1913, §§ 8195-8230]) at the rate of \$12.52 per week for 100 weeks, beginning July 3, 1920, with interest, and \$182.55 as expenses, and costs and disbursements.

It appears that the respondent, Helen A. Butch, a married woman 16 years of age, entered into a contract of employment with the relator at Minneapolis as a kitchen servant in a restaurant which he operated at the railroad station in Spooner, Wis. Respondent's working hours were from 7 o'clock in the morning until 7 p. m. during the serving of meals upon the arrival of trains. Her

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husband was employed at the same place. The employees, including respondent, were permitted to use the laundry in the basement of a hotel operated by relator, for doing their personal laundry. For her services respondent received \$40 per month and board and room, aggregating \$80 per month. Relator furnished the laundry fully equipped with tubs, water, stove, clothesline, soap, etc., for use by his employés.

Upon the trial respondent introduced testimony tending to show, in effect, that on June 26th, while engaged in the course of her employment, she was directed by the management of the restaurant to wash the dish towels; that accordingly she went to the laundry in the basement of the hotel and started to wash the towels, and at the same time included some of the clothes of herself and husband; that when she had finished washing she undertook to replenish the fire in the laundry stove; and that while in the act of breaking a stick of wood for the fire a splinter flew into her right eye, inflicting the injury complained of. The respondent also testified that she was required to and did wash dishes, scrub floors, prepare vegetables, wash dish towels, and do other kinds of work about the restaurant.

Dr. Wood, an eye specialist, was the only doctor examined upon the trial. He testified, in effect, that he first met and examined the respondent on July 2; that at that time there was a small wound on the cornea of the right eye, with marked inflammation; that the wound was leaking fluid, and the lens back of the cornea was opaque, cataractous, shutting off the complete view so she had only shadows in the eye; that the lens was out of place and there was a wound in the lens itself, letting the fluid into the lens, making it opaque, a traumatic cataract; that respondent was then placed in a hospital, and on July 8 he removed the lens, which was absolutely necessary; that respondent had no vision at all in that eye, so when one would shake his hand in front of the eye she would see the shadow; that the lens shut off the light and vision from the back of the eye; that when he removed the lens there was still a little splinter there that came out with it; that on account of the absence of the lens she is unable to use the right eye for the purpose of seeing; that the eye will not improve at all, though with extra artificial means she will have fair vision, but without glasses the eye is practically useless; that the traumatic condition is one of the common causes of such conditions.

The trial court found as facts that the respondent while in the course of her employment was engaged in washing clothes in defendant's laundry, and while in the act of breaking a piece of kindling to keep the fire

alive in the laundry stove a splinter flew and struck her right eye with great force and violence and penetrated the same, "thus and thereby irrecoverably destroying the sight of plaintiff's right eye." This finding is supported by the testimony.

[1] It is contended on behalf of relator that respondent is not entitled to compensation as for the loss of an eye; that the lens does not furnish sight, but accommodation to distance; that she could see with the injured eye to some extent after the removal of the lens, and with properly fitted glasses would have a two-thirds vision. We are unable to concur with this proposition. Section 8207, G. S. 1913, as amended by chapter 442, Laws of Minnesota for 1919, contains a schedule of compensation for injuries sustained. It provides:

"For the loss of an eye, sixty-six and two-thirds per centum of daily wages during one hundred (100) weeks. * * * In all cases of permanent partial disability [within the foregoing schedule], it shall be considered that the permanent loss of the use of member shall be equivalent to and draw the same compensation as the loss of that member."

The foregoing provisions apply, and we hold that compensation so fixed and determined will not be diminished by reason of the fact that the disability may in a measure be overcome by artificial means.

[2] There was ample testimony to support the finding that the injury complained of arose out of and in the course of respondent's employment.

Affirmed.

ALLIANCE HAIL ASS'N v. PLATZER.

(Supreme Court of North Dakota. Sept. 23, 1921.)

(Syllabus by the Court.)

Insurance — § 865(1) — Evidence held to sustain findings for plaintiff for part of relief.

In an action involving loss sustained under a hail insurance policy, the evidence is examined, and it is held, that the findings of the trial court have substantial support in the evidence.

Appeal from Renville County Court; Crewe, Judge.

Action by the Alliance Hail Association against Joseph B. Platzer. From the judgment rendered, plaintiff appeals. Affirmed.

C. S. Buck, of Jamestown, for appellant.

B. H. Bradford, of Minot, and J. E. Bryans, of Mohall, for respondent.

CHRISTIANSON, J. Plaintiff brought this action to recover on a note executed and

delivered by the defendant to the plaintiff in May, 1910, in the sum of \$151.68. The defendant in his answer admitted the execution and delivery of the note, and, by way of counterclaim, alleged that the plaintiff is an insurance corporation organized under the laws of this state, engaged in the business of writing hail insurance; that the note in suit was executed and delivered by the defendant to the plaintiff as a premium for an insurance policy issued by the plaintiff to the defendant wherein it insured the defendant against loss or damage by hail, during the year 1910, in the sum of \$2,500 upon 100 acres of barley, 100 acres of oats, and 400 acres of wheat sown, planted, and raised on certain lands in sections 29, 31, 32, and 33, township 160 north of range 85 west in Renville county in this state; that the defendant was the owner of all crops so insured and that by said insurance policy the plaintiff promised and agreed to pay the defendant all damages occasioned to such crops by hail during the year 1910, not exceeding the sum of \$8 per acre; that on or about the 1st day of August, 1910, and while said policy of insurance was still in force, all of said crops heretofore mentioned were damaged and partly destroyed by hail; that by reason of such destruction the defendant was damaged in the sum of \$1,000; that defendant has fulfilled all of the conditions of the insurance policy on his part required to be kept and performed and gave plaintiff due notice and proof of such loss; that, although said plaintiff examined such loss, it failed, refused, and neglected to pay the defendant therefor. The plaintiff interposed a reply, wherein it alleged that upon notification of the loss it sent its adjuster, who, on or about August 19, 1910, adjusted the loss at \$66, and that said amount was credited upon the note. In the reply it is further alleged that, inasmuch as the defendant did not notify the secretary of the plaintiff association that he was dissatisfied with the adjustment and demanded a readjustment, the adjustment so made became binding upon him by virtue of the provisions of the by-laws of the association. The cause came on for trial upon the issues framed by these pleadings. At the conclusion of all of the testimony both parties moved for directed verdicts. The court thereupon discharged the jury and made findings of fact in favor of the defendant and against the plaintiff. The court found that defendant had been damaged in the sum of \$1,000 and ordered judgment in his favor for that amount. The plaintiff has appealed from the judgment entered upon such findings.

The only question argued on this appeal relates to the sufficiency of the evidence sub-

mitted by the defendant as to the amount of damages sustained. A careful consideration of the evidence leads us to the conclusion that there is substantial evidence in support of the findings of the trial court. It is true the defendant admitted that he did not remember the value per bushel of the grain at and prior to the time of the hailstorm, but in answer to the last questions asked him he testified positively that the crop destroyed was worth at least \$8 per acre. He also testified that up to the time of the hailstorm the crops looked good; that he threshed only 175 bushels of wheat; and that prior to the hailstorm he figured the wheat was good for 10 bushels to the acre. Elsewhere he testified that he originally estimated his loss at about 90 per cent, but on sending in a report of the loss put in a claim wherein the loss was stated to be in amounts ranging from 40 per cent. on flax and barley to 80 per cent. on wheat.

Plaintiff attempts to demonstrate that defendant's loss, according to his own testimony, could not have been as much as the court allowed. This is based upon taking the number of bushels of grain which the defendant later threshed and the percentage as stated in the notice of loss on the other. This was doubtless an argument to be used in considering defendant's testimony. But it was for the trial court to pass upon the testimony, and, as already stated, the very last testimony of the defendant upon the subject contained in the record was to the effect that the crop destroyed was worth at least \$8 per acre, and according to this testimony, if he sustained the percentage of loss stated, both in his testimony and in the notice of loss submitted to the company he sustained a greater loss than that allowed by the trial court. In this connection, it should be stated that the testimony of the defendant as to the amount of the loss is undisputed. The plaintiff did not see fit to put in any testimony whatever tending to contradict the defendant's testimony on this point. Ordinarily, an owner is competent to testify to the value of his own property, and upon the record before us we cannot say that the findings of the trial court as to the amount of damages sustained by the defendant is not supported by substantial evidence.

It follows from what has been said that the judgment appealed from must be affirmed.

It is so ordered.

BRONSON, ROBINSON, and BIRDZELL, JJ., concur.

GRACE, C. J., being disqualified, did not participate.

MARTIN v. LUDOWESE, Police Magistrate.

(Supreme Court of North Dakota. Sept. 26, 1921.)

*(Syllabus by the Court.)***Certiorari** §4—Will not lie where magistrate is acting within statutory authority and other remedy is available.

Where a magistrate is acting within his statutory authority and there exists otherwise a remedy available, a writ of certiorari will not issue.

Appeal from District Court, Williams County; Moellring, Judge.

Action by O. C. Martin against N. B. Ludowese, Police Magistrate of Williston, N. D. From an order of the district court vacating an order of the magistrate, and denying a writ of certiorari, plaintiff appeals. Order affirmed, with costs.

Fisk & Shafer, of Williston, for appellant.
Ivan V. Metzger, of Williston, for respondent.

BRONSON, J. The appellant, on April 5, 1921, found upon his premises and within the vicinity of his residence ten head of horses. He took them as estrays, and within two days thereafter published a notice under the estray law. Section 2658, C. L. 1913. On April 11, 1921, the appellant and one Egge, the owner of the horses, appeared before the respondent, who is a police magistrate in Williston. Over the objection of the appellant, questioning the jurisdiction of the magistrate, Egge offered an undertaking for the payment of all costs and expenses that might be awarded to appellant and all damages sustained through trespass of the horses, pursuant to section 8503, C. L. 1913, relating to trespassing animals. The magistrate approved the undertaking and ordered the immediate delivery of the horses by appellant to Egge. Thereupon the appellant secured an order requiring the respondent to certify fully to the district court all proceedings had and to temporarily refrain from executing the order made for delivery of the horses. Upon the hearing of the order the district court found that the statutory authority of the magistrate was confined to the approval or disapproval of the security offered without any right to try an issue as to whether the horses were held for trespass or as estrays and that the applicant (the appellant herein) had his remedy in the courts to fully protect his rights. The order issued was vacated and a writ of certiorari denied. The appellant has appealed therefrom. He contends that the magistrate was without authority to approve the undertaking for the reason that the horses were taken under the estray law (section 3657 et seq., C.

L. 1913); that it was made clear to the magistrate before he acted that the appellant claimed no damages under the provisions of the act concerning trespassing of animals which alone provides for furnishing such undertaking (section 8500 et seq., C. L. 1913); that the newspaper advertisement provided for estrays served as notice concerning estrays alone.

We are of the opinion that the findings and order of the trial court are proper. Upon the issue involved, it would serve no useful purpose to discuss the relative uses and purposes of the statutes upon estrays and trespassing of animals. In the affidavit of the appellant for a writ of certiorari it is alleged that the appellant found and took upon his premises the horses. Although he published notice as if such horses were estrays only, still he might otherwise contend that such horses were trespassing animals under the provisions of section 8500 et seq., C. L. 1913. The order is affirmed with costs.

ROBINSON, C. J., and BRONSON, BIRDZELL, and CHRISTIANSON, JJ., concur.
GRACE, J., concurs in the result.

COHN v. WYNGARDEN.

(Supreme Court of North Dakota. Sept. 26, 1921.)

(Syllabus by the Court.)

Appeal and error §1031(1), 1170(1)—**New trial** §55—Prejudicial error not presumed; error disregarded unless affecting substantial rights; misconduct of juror must be objected to at trial.

This is an action for a grave assault and battery. Defendant appeals from a judgment for \$1,500, with interest and costs. While he alleges error in the conduct of a juror and in the charge of the trial court, he does not bring any evidence before the court. The verdict and the judgment is presumed to be in all respects just and righteous. As the Code provides, the court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

Appeal from District Court, Kidder County; J. A. Coffey, Judge.

Action by Reuben Cohn against Nick Wyngarden for assault and battery, and from a judgment for plaintiff and an order denying a new trial, the defendant appeals. Affirmed.

E. T. Burke, of Bismarck, for appellant.
Knauf & Knauf, of Jamestown, for respondent.

ROBINSON, C. J. This is an action for a grave assault and battery. Defendant appeals from a judgment for \$1,500, with interest and costs, and from an order denying a motion for a new trial. The motion is based on alleged errors in the charge of the court to the jury and on alleged misconduct of a juror. The charge is that pending the trial defendant and his witness slept in the same bed and in a room occupied by a juror, and that during the night the juror heard defendant talk in whispering tones to his witness concerning the testimony he should give. The juror makes affidavit that he was not influenced by the conversation and did not disclose it to any other juror until they had agreed on the verdict. The juror made affidavit thus:

"I heard Wyngarden talk to witness and tell him to testify that he did not see him kick Cohn, but that he had turned to mind his horses, or words to that effect. I decided the case on the evidence and never told any one of the occurrence till the verdict was signed."

The motion for a new trial was not made on a statement of the case nor on the minutes of the court. There was no evidence submitted, only depositions taken by the plaintiff in regard to his injuries and the time he was unable to work. There is the deposition of his doctor in Chicago showing that for two or three months the doctor treated him for a fractured rib. The doctor's charge was \$250; the hospital charge, \$57. For aught that appears from the record, it may have been clearly proven that defendant committed a brutal assault and battery on the plaintiff and that the damage was much greater than the verdict. The presumptions are all in favor of the judgment. The purpose of the law is to administer justice between man and man and not to pile up a nice technical system of practice. By the Code trivial defects of procedure must be disregarded. "The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Code, § 7485. If the defendant had no defense on the merits, then his rights were not affected by any of the matters alleged as error. If he had a defense, there was no way of proving it without producing the evidence. The presumption is that if produced the evidence would be adverse to him. Code, § 7936. Allowing full force and

effect to the alleged errors, there is no showing that the judgment is not in all respects just and righteous beyond a question or a peradventure. If it be true, which it is not, that one of the jurors was prejudiced by accidentally overhearing defendant drilling his witness, it was no fault of the plaintiff; and defendant knew of the occurrence long before the close of the trial and he did not object to the juror. One who consents to an act is not wronged by it. Code, § 7249. Acquiescence in an error takes away the right of objecting to it. Code, § 7250. No one can take advantage of his own wrong. Code, § 7251. No one should suffer by the act of another. Code, § 7254.

Judgment affirmed.

BIRDZELL and GRACE, JJ., concur.

CHRISTIANSON, J. (concurring specially). I concur in an affirmance of the judgment and of the order denying a new trial.

Appellant contends that the judgment and order should be reversed, and a new trial awarded him on account of: (1) Misconduct of the jury; and (2) erroneous instructions.

1. The only basis for the first ground are affidavits made by jurors and an affidavit of defendant's counsel as to statements alleged to have been made to him by a juror. There is no contention that one or more of the jurors were induced to assent to the verdict by a resort to the determination of chance, and under our statute it is only in such case that the verdict of a juror may be impeached by the affidavit of jurors. See subdivision 2, § 7660, O. L. 1913. Not only does that seem to be the plain meaning of our statute, but that was the interpretation placed thereon by this court in *Johnson v. Seel* 26 N. D. 299, 144 N. W. 237.

2. In this case defendant made a motion for a new trial. In such motion no complaint was made of the court's instruction to the jury. In other words, error in the instructions was not assigned as a ground for a new trial. This being so, the error, if any will be deemed waived, and cannot be asserted in this court. *State v. Glass*, 29 N. D. 620, 151 N. W. 229.

While I believe that the two decisions cited above are determinative of the questions raised on this appeal, I deem it proper to say that, upon the record before us, it could in no event be said that the defendant was denied a fair trial.

BRONSON, J., concurs.

PEOPLE v. GARNER. (No. 130.)

(Supreme Court of Michigan. Oct. 13, 1921.)

Criminal law ¶1182—Refusal to exclude jurors who admitted having opinions as to defendant's guilt affirmed by divided court.

In a prosecution for rape, court's refusal to excuse, on challenge for cause, jurors who admitted on examination before acceptance that they had an opinion as to defendant's guilt from reading newspaper accounts of previous trial, and that it would take some evidence to remove such opinions, affirmed by divided court.

Error to Circuit Court, Oakland County; Kleber P. Rockwell, Judge.

Robert Garner was convicted of assault with intent to commit the crime of rape, and he brings error. Affirmed by divided court.

Argued before STEERE, C. J., and MOORE, WREST, FELLOWS, STONE, OLARK, BIRD, and SHARPE, JJ.

Charles S. Matthews and Pelton & McGee, all of Pontiac, for appellant.

Glen C. Gillespie, Sp. Pros. Atty., and A. Floyd Blakeslee, Pros. Atty., both of Pontiac, for the People.

SHARPE, J. On the first trial of this case defendant was convicted of the crime of rape on a female under the age of 16 years. A reversal was had in this court, and a new trial ordered. *People v. Garner*, 211 Mich. 44, 178 N. W. 75. A new trial has been had, and the defendant found guilty of assault with intent to commit the crime of rape. The case is again before us for review on writ of error.

The assignments are grouped in the discussion of counsel under the following headings: (1) Errors in the selection of the jury. (2) Denial of the motion for a change of venue. (3) Errors in the admission and rejection of testimony.

1. The proceedings incident to obtaining a jury occupy more than 300 pages of the printed record. Defendant's counsel exercised all their peremptory challenges. It is insisted that six jurors who sat upon the panel should have been excused on defendant's challenge for cause, and that the challenge to several others, who were afterwards excused peremptorily by the defendant, should have been sustained. In order to determine the competency of a juror, it is necessary to consider all the questions put to and answered by him. We do not determine the weight to be given to the testimony of a witness from detached questions and answers. We cannot, within the limits of an opinion, set forth the examination of all these jurors, but we quote substantially in full that of

the first two of them, to which reference is made in defendant's brief, and which are, we think, fairly illustrative of them all. Among the six was Fred Skinner. He was called while one of defendant's counsel was examining the jury, and in answer to questions put by him said:

"Q. Now, based on what you have heard of the case, did you form any opinion as to the guilt or innocence of this respondent? A. Yes; I might say that I have.

"Q. Such an opinion as would require evidence to remove? A. It would depend on whether I heard any evidence to convict him.

"Q. Well, take it now, as the case stands; I think you said at the time you heard it talked of you formed an opinion as to the guilt or innocence of this respondent? A. Yes, sir.

"Mr. Lynch: Your answer was, 'Yes'? A. Yes, sir.

"Q. Have you that same opinion now? A. Yes, sir.

"Q. Is that such an opinion as would require some evidence to be offered to change it? A. It would.

"Q. Now in the talk that you heard at the time of the trial, you knew the parties who were talking about it? A. Yes, sir. It was talked of quite freely in my neighborhood, and opinions were rather freely expressed as to the guilt or innocence of the respondent.

"Q. Do you know or did you learn the source of the information of the parties who were talking; doing the talking? A. Well, they just read it from the newspapers; they read it from the newspapers and were at the trial.

"Q. Did you know that part of the testimony was reported from day to day in the *Press-Gazette*? A. I didn't take the paper.

"Q. No; but from the talk that you heard in your neighborhood? A. Yes, sir.

"Q. And as you sit here in court approaching the trial of this case, you have in mind that opinion that you formed when you heard the case talked of at the former trial? A. Yes, sir.

"Q. Your answer is, 'Yes, sir'? A. Yes, sir.

"Q. And it would be necessary for some one to offer some evidence to change or modify that opinion, would it not? A. I would want to hear something to convince me before—

"Q. Whatever that opinion is that you have, it would require some proof to be offered one way or the other to change it, would it not? A. Well, I might say yes.

"Q. Yes? A. Yes.

"Mr. McGee: Now I challenge this juror for cause.

"The Court: Is your opinion of such a fixed character that you cannot give Mr. Garner the benefit of the presumption of innocence and render a verdict based on the law and the evidence as you hear it in open court? A. I would not want to say it was as firm as that.

"Q. In other words, would you look upon him as being innocent, and not be influenced by anything you may have heard in the past? A. Yes, sir.

After several other jurors had been examined, Mr. Skinner was interrogated by the prosecuting attorney as follows:

"I live in Highland township and am not acquainted with Robert Garner, and do not know any of his friends or relatives.

"Q. Now in answer to Mr. McGee's question, I think you said you read something about the case? A. I don't recall reading it; I don't recall reading anything in regard to the trial, only a notice of the trial. I heard the case discussed at the time of the former trial.

"Q. Have you any personal knowledge of the facts of the case? A. No, sir. I never talked with any one who claimed to have personal knowledge of the facts. So the opinion or impression that I formed are based on what I heard and read and heard discussed, and those discussions grew out of the newspaper reports of the trial. I think I could lay aside the opinion that I have and decide this case solely upon the evidence given in open court, without reference to my previously formed opinion, and without reference to anything I heard or read in the past. The opinion I have would not prevent me from giving the respondent the benefit of a presumption of innocence in his favor through the course of the trial. I feel I could sit here and render a fair and impartial verdict based solely upon the law and the evidence, regardless of what I may have read about the case in the past. I know of no reason why I could not serve as a juror and render a fair and impartial verdict based on the law and the evidence. I think I could start upon the trial with the presumption that the respondent is innocent in my mind, and retain it until removed from my mind by the evidence offered here in open court."

Some time later he was further examined by the prosecuting attorney as follows:

"Q. In answer to our question last week, I think you said you had some sort of an opinion. Is that correct? A. Yes, sir.

"Q. Is that opinion of a definite nature? A. No, sir.

"Q. Is it sufficient so that it amounts to a settled conviction? A. No, sir. I do not recall reading anything about the case and have not heard anything about it since the former trial other than that the case was called for trial again. I have no definite recollection of the facts upon which my opinion of a year ago was based.

"Q. Is that opinion sufficiently fixed in character so that it would leave a bias in your mind that would preclude you from giving the defendant the presumption of innocence as the court has instructed you that surrounds the respondent throughout the trial? A. No, sir. I believe I could lay aside that impression and decide the case wholly upon the evidence given here in open court without any reference to any opinion that I had previously formed.

"Q. Is that impression which you formed sufficient so as to embarrass you or prevent you from giving this respondent the presumption of innocence in his favor throughout the trial? A. No, sir.

"Q. And do you feel that you could enter upon the trial of this case with your mind open, bearing in mind that under the law the respondent is presumed to be innocent of the crime until his guilt actually has been established beyond a reasonable doubt, and render a fair and impartial verdict based solely upon the law and evidence? A. Yes, sir."

Later, he was questioned by the trial judge as follows:

"Q. Do I understand from what you have read about the case that you have formed and expressed some opinion as to the merits of the case? A. I never read anything about it; I take the Pontiac paper but I do not recall reading it; possibly I might have noticed that he was on trial or something of that kind.

"Q. But if you have read anything about it you have forgotten it? A. Yes, sir.

"Q. Have you heard any comments about the case or any discussion at any time in the past, as far as you can recall, that would influence you in any way in the trial of this case? A. No, sir. At this time I have no bias or prejudice or opinion whatever with reference to the matter. I don't think I have any opinion one way or the other, and I feel that I could enter upon the trial of the case and give the respondent the benefit of a presumption of innocence that the law allows that attends him during the entire trial."

Juror M. El Stenton was first examined by one of defendant's counsel. He said he had read what appeared in the paper at the time of the arrest. He had heard it talked of at different times and had heard people express opinions as to the guilt or innocence of the defendant. He further said:

"Q. Did you take any part in the talk? A. In the arguments, you mean, or the conversation?

"Q. Yes. A. Oh, I have talked back and forth the same as the rest of them did.

"Q. From what you have heard of the case and from what you read about it, did you form any opinion as to the guilt or innocence of this respondent? A. Oh, I cannot say that I have any strong opinion.

"Q. Well, at the time you heard opinions expressed and heard the case talked about, at that time did you form any opinion as to guilt or innocence of the respondent? A. Well, I might say I did; I thought it was funny thing.

"Q. And was that such an opinion at that time that would require some evidence to remove? A. Why, sure; I would have to have evidence to remove it.

"Q. Have you such an opinion now as would require evidence to remove? A. Well, I cannot say really. I would have to hear both sides. I am not biased in my mind; I could give a man a square deal, I guess, if tried before me.

"Q. Then, at the outset of the case, having heard of it and formed an opinion—expressed an opinion—whether or not it would require some evidence to change the opinion that you have? A. You mean evidence to change my mind? I could listen to the evidence, and if I thought it was right I would change my mind.

"Q. But it would require some evidence to do that? A. Yes; it would require some evidence to change it at the present time.

"Q. In other words, your opinion is definite? A. All set; yes.

"Q. And of a positive nature which would require some evidence to change it? A. Yes, sir.

"Mr. McGee: I challenge this juror for cause.

"The Court: Assuming that the court should advise you, which he will, that this man is pre-

sumed to be innocent, and that it is not necessary for him to establish his innocence, but it is necessary for the people to establish his guilt; in other words, you start in upon this trial with the presumption of his innocence, now, with those instructions the court will give you, provided you are permitted to sit as a juror in this case; now do you say at this time that your opinion is of such a fixed character, that you cannot give the respondent the benefit of a presumption of innocence and try the case wholly and solely upon the evidence that will be submitted to you in open court; could you not do that? A. I could do that; yes.

"The Court: I will overrule the motion. (Exception.)"

"The Court: I will ask you another question. You would not feel that impression that you have at this time is of such a fixed character that you cannot look upon this respondent as being innocent? A. It could be changed; yes; my opinion could.

"The Court: I will overrule the challenge.

"Mr. McGee: It would require some evidence to change that opinion though, wouldn't it? A. Yes.

"Q. And as you look upon the respondent in this court, it would require some evidence to change the opinion you hold as to his guilt or innocence? A. Yes, sir.

"Mr. McGee: I now renew the challenge.

"The Court: Same ruling. (Exception.)"

Later, when examined by the prosecuting attorney, he said:

"I have lived in Highland township six and a half years, and formerly lived in Detroit. My family consists of a wife and six children.

"Q. Now, in answer to Mr. McGee's question, I think you said you had formed some sort of an opinion about the case? A. Well, I formed a slight opinion; yes.

"Q. Have you any personal knowledge of the facts in this case? A. No, sir.

"Q. You know nothing at all regarding what the facts are or what the testimony was at the former trial? A. No, sir. I have never talked with any one who claimed to have any personal knowledge of the facts. The impression or opinion that I had at one time was formed from hearing people talk about the case and reading about it. It is not based on personal knowledge.

"Q. What do you say as to whether or not that opinion is of a positive nature, so that it would take evidence to remove it from your mind? A. Not necessarily.

"Q. Well, would it at all? A. I don't know. I could sit here and listen to the case; I could set the opinion aside while the case was being tried, and forget about it.

"Q. Is that opinion sufficient so that it amounts to a settled conviction? A. Not necessarily. I did not read about the sentence in the former case, nor the statement of the judge at the time the sentence was passed.

"Q. The opinion you had is just an impression you instinctively gained as you read about it in the paper and hearing people discuss it? A. Exactly. I did not hear much of it.

"Q. Have you any clear recollection in your mind what you read about the case? A. All I could remember is about the time of the arrest.

"Q. Have you any clear recollection in your

mind what people said about the case? A. I heard the remark said that this man—

"Mr. Lynch: We object to that.

"Mr. Gillespie: That would not be proper.

"Q. As far as you can recall now, have you in your mind any present recollection of the facts upon which you based that opinion? A. No.

"Q. You could not go back now and recall what you heard about the case a year ago? A. No.

"Q. Now, do you honestly and conscientiously believe you could hear the testimony in this case as an impartial juror and give an impartial verdict without reference to any previous impression or opinion that you have formed? A. Yes, sir.

"Q. You believe you could lay aside that impression and decide the case solely upon the evidence given in open court here? A. Yes, sir.

"Q. And is that impression that you formed such as might tend to embarrass you or prevent you in giving the respondent the presumption of innocence in his favor throughout the trial? A. Not a particle.

"Q. Would you feel that you could enter upon the trial of this case with your mind open, bearing in mind that under the law the respondent is presumed to be innocent until his guilt has been established beyond a reasonable doubt, and give him a fair and impartial trial based solely upon the law and the evidence given in open court? A. Yes, sir.

"Q. Do you know of any reason at all why you could not sit here as a juror and render a fair and impartial verdict based on the law and the evidence? A. No, sir."

Finally, and apparently a short time before the jury were sworn, he was asked by the trial judge:

"By the Court: Mr. Stenton, in reply to Mr. McGee's question last night, I think you said you did form some opinion with reference to the merits of the case? A. Yes, sir.

"Q. Based on what you heard and read? A. Yes, sir.

"Q. And was that opinion of such a fixed nature that it would require some evidence to remove? A. I don't think I said that, your honor.

"Q. Well, that's what I want to ascertain. You do not think you have any fixed opinion, then, at the present time? A. No, sir; no fixed opinion.

"Q. Have you an opinion at all that would require evidence to remove? A. No, sir.

"Q. You feel you could enter upon the case then without any bias whatever? A. I do.

"Q. And freely so, as though you had never heard of the case? A. Yes, sir. I could give the respondent the presumption of innocence and decide this case according to the law and evidence given here in open court.

"The Court: You have not heard anything that purported to have been the trial court's remarks in the trial of the case in any way? A. No, sir."

The nature of the opinion which a juror must have formed regarding the guilt or innocence of a person charged with crime in order to disqualify him for service has been so many times considered and discussed by this court that we feel we can add nothing

thereto of benefit to the profession or the trial courts. The questions and answers are never the same in any two cases. If, however, the examination of the juror set out at considerable length in the opinion in *People v. Quimby*, 134 Mich. 625, 96 N. W. 1061, be compared with those of the two jurors quoted above, a striking similarity will be observed. While the juror in that case said that he had an opinion "fixed and abiding" in his mind, which it would require evidence to remove, yet, it not appearing that such opinion had been formed on information of such a reliable source as would cause settled conviction of mind, and the juror having said that it would in no way prevent him from according to the defendant the presumption of innocence to which he was entitled, or affect his judgment in determining defendant's guilt or innocence, it was held that the challenge for cause was properly overruled. We have no inclination to overrule this decision, as in our opinion the conclusion reached was justified on the record presented.

As was said in *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501:

"The sources of such information are important in determining the effect likely to have been produced upon the mind of the juror, and the influence likely to be exerted upon his judgment."

In this day and age, when the daily newspaper may be found in almost every home, owing to the free delivery of the mail in the cities and rural communities, and the people so frequently gather in churches, community work, school entertainments, meetings of the grange, and gleaner organizations and other societies, there are few persons summoned for jury duty who have not read or heard more or less concerning the serious crimes alleged to have been committed in the county in which they reside. From the information thus acquired, it is but natural that an impression more or less fixed in its character, and usually called an opinion, should be formed concerning the matter read or talked about. A juror may, in answer to a leading question, say that it is "a fixed opinion; one such as will require evidence to remove," but if it appears that such opinion is founded on neighborhood talk or newspaper reports, or both, it is a reflection upon the man's intelligence and integrity to find that, notwithstanding such opinion, he will not be able to base his verdict solely on the proofs submitted and the law as given him by the court, if he swears that he can and will do so. As was said in *Holt v. People*, 13 Mich. 224:

"To require that jurors shall come to the investigation of criminal charges with minds entirely unimpressed by what they may have heard in regard to them, or entirely without information concerning them, would be, in many cases, to exclude every man from the panel who was fit to sit there."

None of the persons so challenged had any personal knowledge of the facts alleged. Neither had they talked with persons who claimed to have such knowledge. The opinions formed were based on newspaper reports and conversation with persons who had heard about the case. As has been said, we cannot hope to lay down any more helpful rule than has been heretofore stated by this court. We can but add that the trial court sees the juror, hears his answers and is thus able to apply those tests which occur to us instinctively, when listening to testimony, as to the frankness, fairness, and credibility of the person testifying. He is thus possessed of an advantage superior to that we may obtain from the printed record. The discretion exercised by him in determining whether or not a juror is disqualified should not be interfered with by us unless it is apparent that the constitutional rights of the defendant have been invaded.

The decisions of this court referred to and quoted from are, we believe, in harmony with the weight of authority in the several state and federal courts. In a note to *Scribner v. State*, 3 Okl. Cr. 601, 106 Pac. 422, reported in 35 L. R. A. (N. S.) 985, many cases are reviewed. To it we invite attention. We content ourselves with a particular reference to a few of the decisions of the Supreme Court of the United States.

In *Spies et al. v. Illinois*, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80, a case of national interest arising out of the Haymarket riot in Chicago, the examination of several of the jurors is set forth at considerable length. The juror Denker stated that he had formed and expressed an opinion. In answer to the question:

"Is that opinion such as to prevent you from rendering an impartial verdict in the case, sitting as a juror, under the testimony and the law?"

—he answered, "I think it is." On being questioned by the prosecutor, he said:

"Q. If you were taken and sworn as a juror in the case, can't you determine the innocence or the guilt of the defendants upon the proof that is presented to you here in court, regardless of your having any prejudice or opinion? A. I think I could."

In answer to the following question by the court:

"Can you fairly and impartially try the case and render an impartial verdict upon the evidence as it may be presented here and the instructions of the court?"

—he replied, "Yes; I think I could." The challenge for cause was thereupon overruled. He was afterwards examined at length by one of defendants' counsel. It appeared that he had no personal knowledge of the facts, and that he had formed his opinion from what he had heard and read in the news-

papers. It was held that the challenge was properly overruled.

In *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244, the duty of an appellate court in the premises was discussed at length. Speaking through Chief Justice Waite, the court said:

"It is clear, therefore, that, upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."
* * *

"In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case."

See, also, *Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 706; *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

We conclude the discussion of this question with the following from 24 Cyc. 298, quoted approvingly in *People v. Swift*, 172 Mich. at page 480, 138 N. W. 605:

"Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called upon to pass upon the merits of a case in the light of evidence given under oath; and it is now a well-settled rule that a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice and can try the case impartially according to the evidence, and the court is satisfied that he will do so."

We feel constrained to hold that no error was committed in overruling the several challenges for cause.

2. Change of venue: After several days had been spent in selecting a jury, defendant's counsel moved for a change of venue. The only reason assigned therefor was "be-

cause a fair and impartial jury cannot be secured in Oakland county." As we have concluded that a fair and impartial jury was secured, it is unnecessary to discuss the assignment of error based on the court's denial of such motion. The question presented is not similar to that in *People v. Swift*, 172 Mich. 473, 138 N. W. 662, and *People v. Gage*, 188 Mich. 635, 155 N. W. 464, in both of which the claim was made that the defendant could not obtain a fair and impartial trial in the county in which the venue was laid.

3. Error is assigned on the refusal to permit defendant's counsel to cross-examine the complaining witness "as to her whereabouts and mode of life a short time previous to July 6th, the date complained of in the information." It was not permissible to prove that the complaining witness, she being then under 16 years of age, had been theretofore unchaste, but this court has quite recently held that, "subject always to the proper discretion of the court," such an examination may be had for the purpose of affecting her credibility, even though her answers may reveal a lack of chastity on her part. *People v. Outler*, 197 Mich. 6, 163 N. W. 493. In that case, the authorities are reviewed and discussed at length by Mr. Justice Bird, and the rule announced must be considered as the settled law of this state on the subject. From a reading of the entire record, we are satisfied that the jury were fully informed as to the character and habits of the complainant. She herself admitted, as hereinafter stated, that she and Grace Strong had spent the Wednesday night following with two men at a hotel in Detroit. We think it may well be said that the restriction of the examination complained of was not such an abuse of discretion on the part of the trial judge as should call for reversal, and that, in view of the entire record, the ruling was without prejudice to the rights of the defendant.

Counsel contend that error was committed—

"in permitting the witnesses Grace Strong and Virginia Stockwell to testify as to the acts and happenings subsequent to the date alleged in the information [Sunday, July 6th]."

On the redirect examination of Grace Strong she was permitted, over objection of defendant's counsel, to testify that she and Virginia remained in the Garner apartments until the following Saturday. No questions were asked her as to any occurrence during that time. On the recross-examination, defendant's counsel examined the witness fully as to what occurred during that week, eliciting the fact that the two girls spent one night at a hotel in Detroit with two other men, and a denial that any subsequent act of intercourse took place between the defendant and Virginia during that time. In view of this cross-examination, the court permitted Virginia to be recalled, and to state, in sub-

stance, what occurred during that week. There is no question about the rule of evidence that, while acts of intimacy prior to the date charged may be shown, such acts subsequent thereto may not be. *People v. Davis*, 175 Mich. 594, 141 N. W. 667, and cases cited. The prosecuting attorney did not ask any question about a subsequent act nor do we think the jury would necessarily draw such an inference from the fact that the girls remained several days at the defendant's apartment. The particulars were brought out on further cross-examination of counsel for the defendant. In view of the fact that both girls denied that any subsequent act of intercourse took place, we do not think such testimony so prejudicial as to necessitate a reversal of this case.

The errors assigned on the charge of the court and the denial of a motion for a new trial are not discussed in the brief of counsel. We have, however, examined the record with such assignments in mind, and find no reversible error disclosed therein.

The judgment is affirmed.

STEERE, C. J., and STONE and CLARK, JJ., concurred with SHARPE, J.

BIRD, J. I am at variance with the conclusions reached by Mr. Justice SHARPE in this case, because I am convinced that defendant did not have what is guaranteed to him in the Michigan Constitution; namely, "an impartial jury." Article 2, § 19. The trial court has the common-law right to determine the qualifications of a juror, but in doing so the constitutional provision should be observed. As an aid in determining the qualifications of a juror the trial court has the following legislative provision:

"That the previous formation or expression of opinion or impression, not positive in its character, in reference to the circumstances upon which any criminal prosecution is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, such opinion or impression not being positive in its character, or not being based on personal knowledge of the facts in the case, shall not be a sufficient ground of challenge for principal cause, to any person who is otherwise legally qualified to serve as a juror upon the trial of such action: Provided, the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial: Provided, further, the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror." C. L. 1915, § 15820.

Under these provisions, if the proffered juror has an opinion or impression he is not thereby disqualified, unless the opinion or impression is positive in its character, or unless

it is based in whole or in part on personal knowledge of the facts. If the opinion or impression is of a positive character, or is based in whole or in part upon personal knowledge of the facts, then the proffered juror is disqualified, and should be rejected. It is difficult to prescribe any rule which will serve as a test in determining the qualification of jurors in all cases. Each case rests upon its own particular facts and circumstances. Much is therefore confided to the good sense and discretion of the trial court. This court has dealt with these questions in several cases, but only in one of them is there any rule promulgated. This rule is general in character, and is not very helpful. It provides that:

"The opinion entertained by a juror which disqualifies him is an opinion of that fixed character which repels the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already." *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

In reaching the conclusion which he did in the present case, Mr. Justice SHARPE was much influenced by the case of *People v. Quimby*, 134 Mich. 626, 96 N. W. 1061, where the examination of the juror was very similar to the present one. There is an important difference between the *Quimby* Case and the present one, which I think Mr. Justice SHARPE has overlooked. While the examination in the *Quimby* Case is very similar to the present one, the circumstances surrounding them were widely variant. The *Quimby* Case is an extreme case. It was so recognized by the writer of the opinion, as he states in the opinion that it is a border line case. Were the surrounding circumstances, however, in the present case the same as those in the *Quimby* case, I should be in favor of affirming it. The difference between the cases lies in this: The *Quimby* Case was the first trial of the case. The question here arose on a second trial. What the public had read in the newspaper before the *Quimby* Case was tried were items of street gossip, rumors, and the respective claims of the parties, as is usual in criminal cases. In the present case the public had read the court proceedings of the first trial, and also the testimony which was printed in the *Pontiac Press*, and other papers. It had read the exhortation which the trial court administered to defendant in pronouncing sentence. Every one of the six jurors complained of testified he had read more or less of the court proceedings. Juror Herbison testified that he had read all the paper had printed from the beginning to the end of it. If Herbison would have been disqualified had he talked with the witnesses before the trial, would he not be disqualified by reading their sworn testimony? In either way he would be getting his information from one

who had personal knowledge of the facts. Had this feature been added to the objections in the *Quimby Case*, it is not to be supposed that that case would have been decided the way it was. This distinction is an important one, and one which has been recognized and acted upon by the courts. It is said in *Cyc.* that:

"A juror is not incompetent merely because he has read the evidence at a former trial, if he has formed no opinion therefrom as to the merits of the case or the guilt or innocence of defendant; but he is incompetent if he has formed such an opinion from hearing or reading such evidence, and this notwithstanding the juror states that he can disregard the opinion so formed and render a fair and impartial verdict." 24 *Cyc.* 301.

The question has been discussed in the cases of *Laidlaw v. Sage*, 2 App. Div. 374, 37 N. Y. Supp. 770; *Staup v. Commonwealth*, 74 Pa. 458; *Greenfield v. People*, 74 N. Y. 277; *People v. Thacker*, 108 Mich. 352, 66 N. W. 562.

In *Greenfield v. People*, *supra*, the proposed juror testified that he had read in a newspaper the account of the evidence for the prosecution upon a former trial of the prisoner under the same indictment, whereon the jury had failed to agree, and had heard others talk about the trial a good deal; that he had never expressed an opinion, but had an impression, from what he had heard and read, which led him to that opinion as to the prisoner's guilt, so that at the time he had an impression, opinion, or belief which would take evidence to remove; that he believed he could render a fair and impartial verdict upon the evidence, meaning by that that he would endeavor to weigh the evidence impartially and render a verdict accordingly; that he would enter upon the discharge of his duties as juror with an impression as to the guilt of the prisoner, which it would take evidence to remove, but he thought his previously formed opinion or impression would not bias or influence his verdict at all, and that he could decide the case fairly, etc. In the trial court the challenge was overruled, but the Court of Appeals held this was error, and reversed the case. In doing so, it was said in part:

"We are of the mind that one who has formed an opinion or impression from the reading or report, partial or complete, of the criminal testimony, against a prisoner, on a former trial, however strong his belief and purpose that he will decide the case on the evidence to be adduced before him as a juror, and will give an impartial verdict thereon, unbiased and uninfluenced by that impression, cannot be readily received as a juror indifferent towards the prisoner and wholly uncommitted. We have already given the views of judges upon this matter. How can it be determined or assumed, that the mind, which has already yielded to the force of facts presented to it through the medium of sworn witnesses, and has formed

an opinion thereon, will, on a second hearing of the same facts through a like medium, come to a different conclusion, or even so far command itself as to calmly and judicially weigh them again in the balance of a fresh and unbiased judgment? Can that mind be unbiased in the second pondering, of the same testimony, which has already caused it to preponderate and settle to or towards a conclusion? We think not. Therefore we are of the opinion that the challenge to the juror should have been sustained."

It might be well to note in connection with this case that New York has the statute heretofore quoted. Ours was probably taken from it.

In *Staup v. Commonwealth*, *supra*, the proposed juror answered to the questions put to him that he had formed and expressed an opinion as to the guilt or innocence of the prisoner; that he read evidence of a former trial, and that he still entertained that opinion which it would take some evidence to remove. He further stated that this opinion would not bias or influence his judgment if he were sworn as a juror. This opinion was formed from reading evidence of a former trial. The challenge was overruled. The Supreme Court, in reversing the case, said in part:

"Whenever, therefore, the opinion of the juror has been formed upon the evidence given in the trial at a former time, or has been so deliberately entertained that it has become a fixed belief of the prisoner's guilt, it would be wrong to receive him. In such a case the bias must be too strong to be easily shaken off, and the prisoner ought not to be subjected to the chance of conviction it necessarily begets."

In *People v. Thacker*, *supra*, a proposed juror had talked with a juror who served on the coroner's jury, and received from him his understanding of the facts. The challenge was overruled, and this court held it error.

We then have at least four jurors who had built up an opinion on what they had heard and read in the papers. One juror said his opinion was based upon what he had read and what he had heard from those who attended the trial. Four admitted that they had opinions as to the guilt or innocence of defendant, and they testified their opinions were such that it would take evidence to remove them. Juror Stenton testified as follows:

"Q. In other words, your opinion is definite? A. All set. Yes.

"Q. And of a positive nature which would require some evidence to change it? A. Yes, sir."

It can hardly be supposed that the Legislature of 1873, which enacted section 15820, contemplated that, when a proposed juror admitted that his opinion was definite and "all set," and of a positive nature which would take evidence to change, he would be

qualified to sit as a juror under this statutory provision. Furthermore, I am unwilling to believe that a panel made up in whole or in part of jurors of this character is the quality of "impartiality" which was in the minds of the framers of the Constitution when they framed the provision guaranteeing to every person an "impartial jury."

But it is said these jurors modified their statements and concluded that they would, or would try, to lay aside their opinions and decide fairly between the people and the prisoner. There is no doubt but the honest juror would attempt to do this, and if it were a slight impression or opinion he might be able to do it, but we all know how difficult it is to wear away an opinion where it is definite and "all set." A juror whose mind is in that state would involuntarily take all the evidence which tended to support his previous opinion at its face value, while evidence which ran contrary to it would either be rejected or accepted with a misgiving. The ability of a juror to get away from his previously formed opinions is well commented upon by Mr. Justice Coolsey in *Stephens v. People*, 38 Mich. 739:

"The question on this record is, whether that jury can be an impartial one whose members are already so impressed with the guilt of the accused that evidence would be required to overcome such impressions. It seems to us that this question needs only to be stated: it calls for no discussion. This woman, instead of entering upon her trial supported by a presumption of innocence, was in the minds of the jury when they were impaneled condemned already; and by their own statements under oath it is manifest that this condemnation would stand against her until removed by evidence. Under such circumstances it is idle to inquire of jurors whether or not they can return just and impartial verdicts; the more clear and positive were their previous impressions of guilt the more certain may they be that they can act impartially in condemning the guilty party. They go into the jury box in a state of mind that is well calculated to give a color of guilt to all the evidence; and if the accused escapes conviction, it will not be because the evidence has established guilt beyond a reasonable doubt, but because an accused party, condemned in advance, and called upon to exculpate himself before a prejudiced tribunal, has succeeded in doing so. It is clear to our minds that this woman has not had an impartial jury trial, and the judgment must be reversed, and the cause remanded."

This is an important question to the prisoner at the bar, and is important to every man and woman in Michigan who may be called upon at some time to answer to a criminal charge, and a rule ought not to be fixed by this court which will endanger in the future their constitutional rights. I think there were at least four disqualified jurors who sat in the case, and for this rea-

son the judgment of conviction should be set aside and a new trial ordered.

WIEST, FELLOWS, and MOORE, JJ., concurred with BIRD, J.

DENNIS v. SLYMAN et al. (No. 7.)

(Supreme Court of Michigan. Oct. 18, 1921.)

1. Exchange of property $\S$ 8(4)—Evidence held not to prove fraud as to existence of incumbrance.

In action to rescind contract for exchange of lands, evidence held insufficient to prove that plaintiff was defrauded by representations as to existence of incumbrance.

2. Exchange of property $\S$ 3(1)—A contract read to and signed by purchaser not set aside in absence of good reason.

A land exchange contract will not be set aside at the instance of one who signed contract after having heard it read, on the ground that he was misled as to contents, unless some very good reason exists for so doing, even though he could not read or write English.

3. Cancellation of Instruments $\S$ 10—Failure to receive interest in crops transferred not grounds for rescission.

Where one party to land exchange contract included in his transfer to the other his interest in crops grown on adjoining land worked by the first party, the other's failure to receive such interest was not ground for rescission on the ground of fraud; the other party having a remedy in an action at law.

4. Exchange of property $\S$ 3(1)—Breach of agreement to protect from chattel mortgage foreclosure not basis for rescission for fraud.

Chattel mortgagee's breach of agreement to protect one receiving in exchange a farm and personal property thereon, from foreclosure within a year following the purchase of the land, resulting in loss of the personal property, did not constitute the basis for an action to rescind for fraud; the agreement being simply a promise to do something in the future.

Appeal from Circuit Court, Macomb County, in Chancery; Guy M. Chester, Judge.

Bill by Hiram Dennis against Mohammed E. Slyman and others. Decree for plaintiff, and defendants appeal. Reversed and dismissed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

A. L. Moore, of Pontiac, for appellant Slyman.

Lynn M. Johnston, of Mt. Clemens (Warren S. Stone, of Mt. Clemens, of counsel), for respondent.

BIRD, J. In the year 1918 defendant Mohammed E. Slyman was a farmer, living upon a farm of 120 acres, in the township of Shelby, Macomb county. He did not have title to the farm. He had a contract with defendants Lungerhausen and Hosner to purchase it. There was due upon the contract \$6,900. Defendant Slyman had personal property by way of live stock, tools, team, and crops on the farm, variously estimated up to \$6,000 in value, upon which defendants Lungerhausen and Hosner held a chattel mortgage for \$3,300. He also had an arrangement with Lungerhausen and Hosner that when he paid the \$3,300 they would release the chattel mortgage and would assign to him their land contract to the farm which had been given them by the Washington bank. The Washington bank held the title to the farm and had sold it upon a land contract to Lungerhausen and Hosner. Defendant Slyman, being in the situation of owing \$6,900 on the farm and \$3,300 on his personal property, concluded in the fall of 1918 that he would like to sell out or make a change. He listed his property for sale with Craig, of Pontiac, a real estate broker.

At the same time plaintiff, Dennis, was the owner of a house and lot in the city of Pontiac. He and his son-in-law wanted to go farming. He listed his house for sale or trade with Mr. Houck, another Pontiac real estate dealer. These two brokers brought plaintiff, Dennis, and defendant Slyman together. Slyman and Dennis examined each other's property, talked the matter over, and agreed, as they thought, upon a basis for a trade. They then went to the law office of Peter B. Bromley, of Pontiac, and stated to him the terms of their agreement. Mr. Bromley reduced it to writing. With the omission of some of the immaterial parts, it reads as follows:

"The first party agrees to convey to the said second parties the following property in exchange for the property of the second parties hereinafter mentioned, to wit: A farm of one hundred and twenty acres in Shelby township, Macomb county, Michigan, known as the Slyman farm, subject to a mortgage of sixty-nine hundred dollars, but he is to pay all interest on the same to the date of the consummation of deal; also the following personal property, to wit: (Then follows a recital of the personal property); also all my one-fourth interest in all crops now growing on the one hundred and thirty-acre farm of one Disk, in said town, except the crop of oats, the said personal property is subject to a chattel mortgage of thirty-three hundred dollars, which the second parties assume, but the first party agrees to pay all unpaid interest on said amount up to the time this deal is closed.

"The said parties of the second part, in exchange for the said property of the party of the first part, agree to sell and convey to said first party the following property, to wit: House and lot owned by them, being number 186 Perry street, in the city of Pontiac, Michigan, free and clear, but said first party may

place a mortgage on said property of three thousand dollars, but first party agrees to give back to second party a second mortgage of one thousand dollars on the said property now owned by parties of the second part in the city of Pontiac, due on or before one year, with interest at the rate of six per cent.

"It is further agreed that each party shall make good and sufficient conveyance of his or her property, and furnish an abstract of title showing a good merchantable title thereto, and subject only to the incumbrances herein mentioned, said conveyances to be made within five days. * * *

Following this a deed of the Pontiac house and lot was drawn to Slyman. He, in turn, gave back a mortgage to Dennis for \$1,000, in accordance with the agreement. Other papers were then drawn and signed by Lungerhausen and Hosner and Slyman and Dennis, by which Lungerhausen and Hosner agreed to relieve Slyman of his personal obligations and substitute Dennis in his place, and Dennis agreed to pay the same. Soon after the papers were made Dennis moved onto the farm and Slyman moved to Pontiac. Dennis had not lived on the farm long before he learned of a chattel mortgage on the personal property owned by one McCafferty. Being pressed for payment, he paid \$164 thereon. Later the mortgage was foreclosed and the property sold to satisfy McCafferty's claim for \$876. Defendants insist, and it does not appear to be disputed, that the McCafferty mortgage was included in the Lungerhausen and Hosner mortgage for \$3,300, and that Lungerhausen and Hosner agreed with Dennis to give him one year in which to make payment of said mortgage. Plaintiff claims he left after learning from a neighbor that the farm was subject to a claim of \$6,900. He claims he thought he was trading his house and lot for the farm and that all the indebtedness he assumed was the \$3,300 on the personal property. His claim is that Slyman misrepresented the state of the title and said nothing about the \$6,900, and that he was thereby defrauded. He filed this bill for a rescission of the agreement, and the court granted it and placed the parties back in the position which they were in except the \$3,000 mortgage which Slyman had given to Malcolm on the Pontiac property after acquiring title thereto. The court held this mortgage valid and gave a decree against Slyman for the amount and made it a lien upon whatever interest he (Slyman) had in the farm.

[1] 1. It is a strain upon our credulity to accept as true the statement of plaintiff that he did not know he was buying the farm subject to a claim of \$6,900. He and Slyman talked over their deal and agreed, as they thought, upon a basis for a trade. They went to the law office of Peter B. Bromley, an attorney, and advised him what their agreement was, and he reduced it to writing.

When he had finished he read it over to them and they approved and signed it. This agreement expressly provides that plaintiff takes the farm "subject to a mortgage of sixty-nine hundred dollars." The matter did not end here. This agreement was carried out. Plaintiff and Slyman went to Lungerhausen and Hosner, and arrangements were made whereby Dennis should take over the interest of Slyman and become the debtor of Lungerhausen and Hosner as to the personal property, and they promised in writing that when the \$3,300 was paid they would release the chattel mortgage and assign to plaintiff the land contract of the farm. Mr. Lungerhausen testified that—

When plaintiff and Slyman called on him with reference to the matter, "we talked about what claims were against the personal property and against the real estate. I went to the safe and got my contract and the other papers and read them to the parties; I told them there was \$6,900 against the farm and approximately \$3,300 against the personal property which would be \$10,200 which would have to be paid before the property was clear."

The first time plaintiff and Slyman called upon Mr. Lungerhausen he was not at home, and his son John, who is an attorney, talked with them. He explained to them that there was \$6,900 due on the real estate and \$3,300 on the personal property.

Homer Colvin, an attorney, who drew some of the papers, testified that he heard plaintiff and Slyman talking about the incumbrances on the farm and personal property. Daniel Houck, the real estate broker who figured in the deal, testified he heard Slyman tell plaintiff that there was an indebtedness on the farm of \$6,900.

[2] When one makes an agreement and puts it in writing and it is afterwards read over to him and he signs it, some attention ought to be paid to it, and its provisions ought not to be frittered away or set aside unless some very good reason exists for so doing. It is said Mr. Dennis could not read or write English, and the same claim is made for Mr. Slyman. We fail to see how this can alter the situation. Plaintiff and Slyman agreed upon something before they went to Mr. Bromley's office. They told Mr. Bromley what they had agreed upon. The only information he had when he drew the agreement was the information which he had gotten from them. They were both present, and after the agreement was made Mr. Bromley read it over to them and they announced themselves satisfied and signed it.

The respective values of the properties were gone into at some length at the hearing. These tend to show that plaintiff understood that he was buying the farm subject to the claim of \$6,900. The testimony shows that the farm was fairly worth \$11,000 or \$12,000; that the house and lot was worth between \$6,000 and \$7,000. Calling the house

and lot worth \$7,000, and deducting the \$1,000 mortgage given back to plaintiff, leaves a value of \$6,000. Just how plaintiff thought he was going to purchase a farm worth \$11,000 or \$12,000 with \$6,000 is not quite clear to us. If we call the farm worth \$12,000 and the personal property worth \$3,300, then plaintiff received \$15,300 in property. Deducting therefrom the amount due on the real estate, \$6,900, plus \$3,300 on the personal property, leaves a balance of \$5,100 to be paid by a conveyance of the house and lot. Calling the house and lot worth \$6,000 and deducting the \$1,000 mortgage given to plaintiff would leave \$5,000 to take care of this \$5,100 balance. These figures are persuasive that plaintiff understood he was buying the farm subject to the claim against it of \$6,900. The latter figures are within the range of the testimony and are more consistent than the claim of plaintiff that he was trading the \$7,000 house subject to a mortgage of \$1,000 for a farm fairly worth \$11,000 or \$12,000.

2. There is no disagreement as to the consideration which was to be paid for the personal property. Plaintiff was to pay \$3,300 and that was to include the McCafferty chattel mortgage. Lungerhausen and Hosner gave plaintiff one year to pay it. Before the year expired the McCafferty mortgage was foreclosed and the whole amount of personal property was sacrificed in payment of the mortgage. The record does not show that plaintiff, Lungerhausen, or Hosner, made any effort to protect the property against sale. In the event that Lungerhausen and Hosner have not kept faith with Slyman, they can settle their differences in an action at law.

[3] 3. In 1918 Slyman worked an adjoining farm of 130 acres. Included in this transfer to plaintiff was his interest in the crops on the 130 acres. To secure this Slyman was to put up a deposit or a bond of \$400 in the bank. Slyman did not do this and his interest in the crops amounted to nothing after the landlord had gotten his pay. If Slyman is liable to plaintiff on this phase of the transaction, he has his remedy at law to right it.

[4] 4. We are of the opinion that plaintiff understood that he was buying the farm subject to the claim of \$6,900, and that he understood he was buying the personal property subject to a chattel mortgage of \$3,300. His agreement in writing shows this and is corroborated by the surrounding circumstances. It is true Lungerhausen and Hosner did not protect him as they agreed to do with reference to the chattel mortgage. Neither did Slyman with reference to the crops on the rented farm, but these failures could not be used as a basis for an action of fraud. They were simply promises to do something in the future. Whether the bargain was a good or bad one we do not know, and with

that question we are not greatly concerned. Having made the bargain in writing and having voluntarily attested it by his signature, the plaintiff should be held to its terms even though he suffers loss by reason of it.

The decree is reversed, and plaintiff's bill is dismissed, with costs to defendant Slyman.

HOLCOMB v. ALPENA POWER CO. (No. 30.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Appeal and error $\Leftrightarrow$ 1099(3)—Question of damage caused by dam, decided twice, held *res judicata*.

Where it has been decided twice that plaintiff's land was damaged by overflow caused by a dam maintained by defendant, one of the judgments having been affirmed on appeal, the question of the effect of maintenance of the dam is *res judicata*.

2. Waters and water courses $\Leftrightarrow$ 178(2)—Award of \$6,555 for overflow of farm land held excessive.

Where a farm of 140 acres was worth from \$6,500 to \$8,500 if unaffected by overflow, and as affected was worth about \$6,000, and 92 acres were entirely unaffected by water, an award of \$6,555 damages held excessive.

3. Evidence $\Leftrightarrow$ 150—Tests from observation and experience are competent evidence against scientific measurements and theories.

Tests from observation and experience are competent evidence against scientific measurements and theories, and are often more satisfactory, when the two are brought in conflict.

4. Appeal and error $\Leftrightarrow$ 1198—Remand, limiting matter to be considered, held binding on trial court.

In a previous appeal, where the case was remanded for an award of damages based on "the value of plaintiff's property as it is and as it would be if the dam had remained as it was in 1905," the trial court is limited to this basis in awarding damages, and erroneously awarded damages to growing crops.

5. Waters and water courses $\Leftrightarrow$ 178(2)—Award of \$1,800 for overflow of 60 acres of land held excessive.

An award of \$1,800 for damage by overflow to 60 acres of land, worth, if unaffected by overflow, from \$15 to \$25 per acre, held excessive, and should be reduced to \$1,200.

Appeal from Circuit Court, Alcona County, in Chancery; Albert Widdis, Judge.

Suit for injunction by Samuel Holcomb against the Alpena Power Company. From a decree assessing damages, defendant appeals. Modified and affirmed.

See, also, 175 Mich. 500, 141 N. W. 534; 198 Mich. 165, 164 N. W. 470.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Henry & Henry, of Alpena, for appellant.
W. S. Cobb, of Jackson, for appellee.

STEERE, C. J. Hubbard Lake is a body of water between 7 and 10 miles in length, within conflicting statements, and approximately from 1 to 2½ miles wide, located in the northern portion of Alcona county, Mich. Its only outlet is the south branch of Thunder Bay river, which flows northerly out of the north end of the lake. A dam has been maintained at this outlet for many years. It was originally built and used to raise water in the lake for floating logs and other forest products out of the lake and down Thunder Bay river to Alpena. In 1906 defendant acquired the ownership and control of this dam, which it rebuilt, and has since utilized to store water in the lake for use during the dry season of the year at dams and industries on Thunder Bay river near Alpena.

In 1904 plaintiff purchased from a Mr. Gorsuch for \$2,200 a 160-acre farm lying to the east and not far from Hubbard Lake, upon which were farm buildings and from 60 to 70 acres of cleared land. In 1906 he bought an adjoining fractional description of 65 acres, for which he paid \$175, the total cost to him of his 225-acre holding being \$2,375. None of the land bordered on Hubbard Lake; the nearest being over three-quarters of a mile from its shores. In 1910 plaintiff first brought an action against defendant to recover damages to his crops, caused by raising the water of Hubbard Lake. The case was tried before a jury in Alcona county, and he recovered a verdict of \$1,080.70 for injury to his crops in 1907, 1908, and 1909. The case was brought to this court for review on assignments of error, and affirmed as having been properly submitted to the jury. 175 Mich. 500, 141 N. W. 534. In the subsequent action of like nature he recovered a verdict and judgment of \$1,398 for damages to his crops in the years 1910, 1911, 1912, and 1913, which defendant paid. In April, 1916, he filed this bill of complaint in the circuit court of Alcona county in chancery, asking for injunctive mandate to compel defendant—

"to lower and take down the dam at the outlet of said Hubbard Lake; * * * that said dam may be abated and said defendant perpetually enjoined by an order and injunction of this honorable court from keeping, maintaining, or operating said dam at the point hereinabove described on lot 2, section 4, township 28 north, range 7 east, and from in any manner whatever preventing the natural flow of the water out of said Hubbard Lake."

Upon the first hearing of this suit in the trial court the injunctive relief asked was

granted, and defendant appealed the case to this court where the decree was reversed, this court holding that plaintiff was estopped by his conduct from the extreme remedy asked, but under the prayer in defendant's cross-bill remanded the case to take proofs and determine the question of damages in full, to be "computed upon the basis of the difference in value of plaintiff's property as it is, and as it would be if the dam had remained as it was in 1905." 198 Mich. 165, 164 N. W. 470. On remand of the case further hearing was had in the circuit court and proofs taken at great length. An opinion was filed by the circuit judge, discussing the testimony and awarding damages to the amount of \$6,555 made up of damages to the land, \$4,420; damage to crops for the years 1914, 1915, 1916, and 1917, \$2,135.

Defendant has again brought the case here for review contending as in previous cases that the great weight of convincing evidence is against plaintiff's claim that the water of Hubbard Lake invades and injures his land, which lies over three-quarters of a mile away from the lake shore; that the proofs do not sustain damages to the amount awarded by the court for injury to the land, and the award is made on a wrong basis, contrary to the directions of this court, which did not contemplate damage to the crops, but a full and final determination of all damages done to plaintiff's land on the basis of difference in value between the land in its present condition and what it would be, had the dam remained as in 1905.

Plaintiff's farm is shown to be comparatively low and level land for the most part, lying near the head of an indentation or lobe of the lake called East Bay, into which a small stream which passes through a portion of his land empties. With the lake at its normal level, this stream has sufficient fall to afford him proper drainage. It is his claim and evidence that even the old dam, with its lower head, raising the level of the lake 4 or 4½ feet, killed the current of the stream and backed the water up, until it stopped the drainage and flooded his land in part, but did comparatively little harm, as the dam was only used for logging purposes, and the water released early in the spring, restoring the normal level of the lake in time for planting his crops, while the new dam, raising the lake to a much higher level and used to conserve water for hydraulic purposes, maintains as high a level as possible throughout the year, keeping his land so wet as to largely destroy its productivity.

[1] That such is the result to a degree is *res adjudicata*. It was twice so determined by judgments in the circuit court of Alcona county, which have not been set aside or reversed; one of them having been appealed to this court and affirmed. Although holding for the reasons stated that the trial court erred in granting the drastic relief by in-

junction prayed for in the instant case, this court in effect affirmed its conclusions on the proposition that the height at which defendant maintained the level of the lake worked material damage to plaintiff's farm and remanded the case for determination of the damages in full on a stated basis advisedly adopted, with all which had been claimed and shown by both sides of the protracted litigation before the court as disclosed by two ample records.

[2] In any aspect of the case we are impressed that the decree is excessive. This farm cost plaintiff \$2,375 at about the time defendant acquired its dam. Peterson, the supervisor of his township, called by him as a witness, testified he had assessed it for the current year at \$4,000, and unaffected by the water it would be worth \$6,500 to \$7,000. A neighboring farmer, named Gillard, called by plaintiff, testified that the farm would be worth, if unaffected by the water, \$8,500, and as affected was worth \$6,000. Plaintiff appraised his farm, unaffected by the water, at \$10,000, and placed the value of his building and orchard at \$3,000. He conceded that the portion of his farm where the orchard and buildings were was not affected by the high water. The trial court found plaintiff had at least 140 acres of "usable" land, 92 of which were entirely unaffected by the water; that the buildings were old, not large, and "commensurate with the size of that part of the farm unaffected by the water." If this award should stand, plaintiff will have recovered damages from defendant, including previous awards by juries, amounting to \$9,033.70, and yet owns the farm.

[3] The court entertained plaintiff's claim for damage to crops, and for the preceding four years awarded \$2,135. This was in addition to his award based on determination of "the value of plaintiff's property as it is and as it would be if the dam had remained as it was in 1905." The decision and direction of this court in remanding the case confined the award to that basis, which does not include damages for crops.

Defendant's evidence consists mainly of testimony by engineers, who took levels and made observations from which they testified that nearly all of plaintiff's land is from 4 to 5 feet above the water level of the lake, when raised by the dam to its highest capacity. Plaintiff produced no engineer to directly contradict this testimony as to levels, but introduced testimony of old settlers, farmers and neighbors, as to their experience and observation from year to year touching the height of the water and conditions of the soil resulting from different levels of the lake, observed by them before and after defendant acquired the dam. Much of the testimony is direct and positive to the effect that, since the dam was raised and the water retained the year round, plaintiff was un-

able to raise good crops upon the land as before, detailing facts and circumstances which they had particularly noticed from year to year, sustaining their assertions that raising the level of the lake by defendant had done serious damage to plaintiff's place. Their testimony as to these facts is not in the main met by any direct testimony of defendant, although each party by its evidence indirectly contests that of the other. If the direct testimony from plaintiff's witnesses be true, that raising the water to the level shown and retaining it there impeded the draining of plaintiff's land and set the water back upon and through it, flooding and saturating the soil to an extent which seriously injured large portions of it, as said by Justice Campbell in *Treat v. Bates*, 27 Mich. 390:

"No theory can change the facts, and we need no aid of science to confirm the proofs of eyewitnesses."

[4] The law is well settled in this state, as well as elsewhere, that tests from observation and experience are competent evidence against scientific measurements and theories, and often more satisfactory when the two are brought into conflict. *Turner v. Hart*, 71 Mich. 128, 38 N. W. 890, 15 Am. St. Rep. 243; *Brookway v. Hydraulic Power Co.*, 175 Mich. 339, 141 N. W. 693. Plaintiff's witnesses testified in detail as to the several descriptions of land, the acreage, portions injuriously affected by the raised water in whole or in part, values of the same if unaffected, and as affected. The trial court went over these several descriptions in his findings and determined the injury, if any, as to each description. The record affords testimony to sustain them in the main. The trial judge had the advantage of seeing, listening to, and examining the witnesses as he wished, and viewing the premises with their stories in mind.

[5] After a careful examination of this record, we conclude, as before, that the dam as maintained is a substantial damage to plaintiff's farm, and are only disposed to disturb the award as to the fractional W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 7, being the 65 acres plaintiff bought for \$175 in 1906, paying the fair market value at that time, as he stated, and further testified that since that time land in that region has doubled, and some of it trebled. Apparently disinterested witnesses called by him testify this description, with the exception of from 5 to 7 acres, which are cleared, is low, flat land, seriously affected by the water and of scant value except for the timber upon it, and that it has "always been affected by the water some." They place its value, if unaffected by the water, at from \$15 to \$25 per acre. The court awarded \$1,800 for the damage done this description by raising the water. We

conclude that under plaintiff's evidence, favorably considered, \$20 per acre for the 60 acres said to be overflowed is an ample award. From the court's award of \$8,555 must be deducted \$600 on this description, and \$2,135 erroneously included for damages to crops, reducing the same to \$3,820.

A decree may be prepared accordingly, with costs of this court to defendant.

RUBENSTINE et al. v. POWERS et al. (No. 42.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Mortgages $\S$ 32(2)—Absolute deed may be shown intended as mortgage.

A deed absolute on its face may, by parol testimony, be shown to have been intended as a mortgage, in which case it will be regarded and treated in equity as a mortgage.

2. Mortgages $\S$ 38(2)—Proof absolute deed intended as mortgage must be clear and convincing.

Where a deed is absolute on its face, one who alleges that it was intended to operate as a mortgage must prove such intention by clear and convincing evidence.

3. Mortgages $\S$ 38(1)—Evidence held insufficient to prove absolute deed a mortgage.

Evidence held insufficient to prove that deed, absolute on its face, to grantee, who, contemporaneously with execution of deed, agreed to sell the land to third party, was intended, as between grantee and such third person, as a mortgage.

4. Vendor and purchaser $\S$ 95(3)—Accepting payment from purchasers in default waived notice of forfeiture.

Vendors' acceptance of delinquent payment after service of notice of forfeiture upon purchasers operated as a waiver of the notice of forfeiture.

5. Principal and agent $\S$ 137(1)—Vendor signing purchaser's contract to sell to third persons estopped from denying purchaser's right to contract and accept payments.

Vendor, having signed purchaser's contract to sell portions of the land to third persons, was estopped from denying purchaser's right to make the contract and accept payments thereon.

6. Vendor and purchaser $\S$ 298—Statute as to writs of restitution held inapplicable.

Comp. Laws 1915, $\S$ 13253, as amended by Pub. Acts 1917, No. 243, relating to writs of restitution, held inapplicable to action in which question of possession was not involved, and where it did not appear that any of the parties were actually living upon the land or in actual occupancy thereof.

Appeal from Circuit Court, Genesee County, in Chancery; Fred W. Brennan, Judge.

Suit by Philip Rubenstine and others against Walter W. Powers and Neil J. Berston, in which the first-named defendant files cross-bill against last-named defendant. Judgment for defendant Powers on his cross-bill, and defendant Berston appeals. Decree affirmed as to plaintiffs, but reversed as to defendant Powers, and cross-bill dismissed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Carton, Roberts & Stewart, of Flint, for appellant.

George W. Cook, of Flint, for appellee, Powers.

Parker & Wilber, of Flint, for other appellees.

STONE, J. The principal controversy in this case is between the defendants Powers and Berston, and arises under the cross-bill filed by defendant Powers on November 26, 1919, in which he asks for certain relief from defendant Berston. The facts are somewhat involved, and the right of Powers to file a cross-bill is questioned by defendant Berston. The history of the several transactions between the parties will be stated.

Prior to December 9, 1916, William M. Donnelly and others were the owners of certain described premises, consisting of a farm of about 80 acres in the township of Mt. Morris, county of Genesee, Mich., which premises were outside the city limits of the city of Flint. On September 28, 1916, said William M. Donnelly and others made and delivered to John Thornton and Walter W. Powers a 60-day option, in writing, to purchase said real estate at the price of \$31,600. This option was, on November 27, 1916, extended to December 9, 1916. On December 8, 1916, said Powers, being without means and unable to take up said option, made an arrangement with defendant Berston by which the property should be deeded by the Donnellys direct to Berston, who was to give back a mortgage to the Donnellys for \$15,600, and pay the balance of \$16,000 in cash to the Donnellys. Berston was to make and execute to Powers a land contract, by the terms of which Powers was to pay Berston \$18,000 on or before February 9, 1917, and was to assume and pay the mortgage given by Berston to the Donnellys. It will be noted that the consideration provided for in said contract was \$2,000 more than the amount paid by Berston to the Donnellys. For the purpose of securing the payment of said \$18,000 and assuming and paying said mortgage, Powers agreed to assign to Berston, as collateral security, his equity in 66 lots in Moore & Veale's subdivision, in Greenfield township, Wayne county, which had been sold upon contracts, upon which contracts there remained unpaid the sum of

\$25,034.98. Powers had purchased this property upon contract for \$20,000, upon which there had been paid \$8,040. This contract was also to be assigned to Berston.

Pursuant to this arrangement the Donnellys deeded direct to Berston the property described in the opinion, on December 9, 1916. Berston gave to Donnelly a note for \$15,600, secured by real estate mortgage upon the same property, payable three years from date, with interest at 6 per cent. per annum, payable semiannually, and on the same day Powers made and delivered to Berston, as collateral security for the payment of said \$18,000, and assumption and payment of said mortgage an assignment of his equity in the 66 lots above referred to. To this assignment was attached a list of the lots sold upon contract, the purchasers' names, the price for which the lots were sold, and the balance due and unpaid upon the contracts. These contracts were delivered to Berston. At whose suggestion this assignment was made is in dispute, Powers claiming that Berston requested it, and Berston claiming that Powers proposed in the first instance to make it as collateral security to the contract. On December 8, 1916, a land contract for \$33,600 was made and signed by both Berston and Powers, by the terms of which Berston agreed to convey said real estate to Powers upon payment to him of \$18,000 on or before February 8, 1917. This contract provided for the payment of the balance of the purchase price (\$15,600) by assuming the payment of the Donnelly mortgage. It did not bear interest, and contained the usual forfeiture clause, and gave Powers the right to the possession of the premises. This contract was delivered the following day, at the same time the deed, mortgage, and collateral assignment were delivered.

Not being able to raise the \$18,000, Powers obtained a verbal extension for 30 days. On March 10, 1917, Powers, being unable still to raise the \$18,000 then due on the land contract of December 8, 1916, had an interview with Berston which resulted in the making of a new contract in the place and stead of the former one. By the terms of this contract Berston agreed to convey the same property to Powers, for and in consideration of \$47,500, of which Powers was to pay \$5,000 in cash, \$2,000 or more on or before the 10th day of March, 1918, \$4,000 or more on or before March 10, 1919, \$7,000 or more on or before March 10, 1920, \$7,000 or more on or before March 10, 1921, and the balance of \$6,000 on or before March 10, 1922, Powers also agreeing to assume the Donnelly mortgage of \$15,600, and to pay the interest on all unpaid balances on said contract, at the rate of 6 per cent. per annum, payable annually. The contract also provided that Powers should have the priv-

illegality of subdividing said property, and dealing with it in any way he saw fit. Berston agreed to sign whatever plat or plats of the property that were laid out. The contract further provided that:

"In case it is desired to pay up in full upon any lot or lots of the said plats, the said first party agrees upon request to release such lots from this contract, and to give warranty deeds therefor under the following conditions, viz.: Release price shall be fixed at \$67 per lot in the beginning, and the basis of lots 50x100 feet, or six lots to the acre, and shall be reduced by \$2 for every \$1,000 paid on principal under this contract. It is mutually understood and agreed that the sums paid from time to time to make up the release price for any lots released shall be credited on the next succeeding payment on this contract."

It was provided that Powers should have possession of the property. The \$5,000 was paid by Powers to Berston, and Powers also paid the first installment of interest on the Donnelly mortgage. The assignment of contracts for the 66 lots, was surrendered to Powers before or at the time of the making of the new contract.

A plat was prepared by Powers dividing the property into 480 lots. No development work was done, except that Powers had the streets plowed, some trees cut and cleared away, and he put up a sign on the front of the property, giving the name of the plat, with Powers' name thereon. The plat was not recorded. About 20 lots were sold on contract, and 3 deeds of lots were made. Just how much Powers realized out of these sales does not appear, but it is claimed by Berston that Powers sold timber and collected substantial amounts from the three lots deeded and the 20 lots sold on contract, sufficient to reimburse him. Eleven of these lots were sold to the plaintiffs on contract dated January 5, 1917. The consideration was \$5,535. Of this \$285.71 was paid upon the execution of the contract, and the balance was made payable in installments of \$300 or more each, to be paid on the 5th days of May, September, and January in each year, with interest at 6 per cent. per annum, commencing January 5, 1920. This contract gave the vendees the right of possession, and was signed by the plaintiffs and by Powers and Berston, the name of the latter, however, not appearing in the body of the instrument. Plaintiffs went into possession of the property, which was described by metes and bounds, and they planted potatoes thereon for two or more years.

This contract also included three lots in another plat put on by Powers, and in which Berston had no interest. Plaintiffs paid \$300 on May 5, 1917, and made no further payments until May 26, 1919, when they paid \$1,873, claiming that to be the amount then due. Before this last sum was paid Powers

caused notice of forfeiture to be served on all of the plaintiffs. This notice was served about the 22d day of May, 1919. The payment of \$1,873 was accepted by Powers after service of this notice. Later notice of forfeiture signed by Berston was served upon plaintiffs. No proceedings were instituted by either Powers or Berston against the plaintiffs to get possession of the 11 lots described in plaintiffs' contract. About a week before plaintiffs began this suit, they made a tender, or attempted to make a tender, of the balance due upon this contract to both Powers and Berston.

Powers having made default in the payment of the \$2,000 due March 10, 1918, Berston caused to be served upon him a notice of forfeiture. This notice is dated July 30, 1918. It contained this clause:

"Now, therefore, notice is hereby given that if said nonperformance of the conditions of said contract, or any of them, shall remain in default for a period of sixty days on and after this date, Neil J. Berston, Jr., party of the first part in said above-named contract, will declare the said contract void, and without further force and effect."

On or about the 15th day of October, 1918, Powers still being in default, Berston caused to be served upon him a second notice of forfeiture, in which the contract was declared forfeited and void, and immediate possession of said premises was demanded. This notice of forfeiture bears date October 14, 1918, and was signed by Berston. No suit or further proceedings were taken against Powers to obtain possession of the property. However, it appears that later Berston and those holding under him went into possession of the property, and, so far as this record shows, are now in possession thereof.

The bill of complaint herein was filed October 1, 1919. Both Powers and Berston were made defendants, and the bill prayed for specific performance of the contract of January 5, 1917. Powers, on November 26, 1919, filed his answer and cross-bill making Berston defendant to such cross-bill. Berston filed his answer to plaintiffs' bill of complaint, and later made a motion to dismiss the cross-bill of Powers, which motion was denied, and thereafter he filed his answer to said cross-bill. The case was heard upon the issues thus formed. Counsel for defendant Berston made a motion to dismiss the cross-bill of Powers upon the grounds, viz.: (1) That it was in no way germane to the original bill; (2) that it was an attempt by way of cross-bill to introduce into the case and excuse the default of Powers, to the injury of Berston, and to place the entire burden upon the latter, wrongfully and without any fault upon his part, and was therefore without equity; (3) for the reason

that Powers was attempting to use a receipt by him of \$1,873 paid by the plaintiffs to Powers in such manner as to have it work a waiver of the default on his part of his contract with Berston, which latter contract was no part of the litigation in the case, and which attempt was without equity and good conscience; (4) for the reason that the cross-bill was not part of the material and relevant defense to said original bill, and raised no issue by its allegations in any way connected with the issues involved in the original bill.

The court below having denied this motion, and testimony having been taken, and the case heard upon its merits, we are disposed to consider the merits of the case as presented to the court below. The court granted relief to Powers, and Berston has appealed.

It is the claim of cross-plaintiff Powers that this entire transaction was his deal; that the only interest Berston had in the matter was to advance the money for the payment to the Donnellys; that the title to the land was deeded to Berston direct upon Powers' orders, in order to secure Berston for the money advanced by him for Powers' benefit, and that therefore the whole proposition, viewed from every standpoint, was a security deal; and that the only interest Berston had in the land was that of a mortgagee, and Powers invokes the doctrine of "once a mortgage always a mortgage."

It is conceded by cross-plaintiff Powers that the deed from Donnellys to Berston, and the contract from Berston to Powers, appear to be absolute upon their face, but it is said that it has been held by this court many times, that parol evidence is admissible to show that a deed absolute upon its face is in effect a mortgage, and numerous of our decisions are cited in support of this position. It is the claim of Powers that the testimony and surrounding circumstances in the case show clearly that this was a security transaction. It is contended that a deed of conveyance of land absolute and unconditional on its face, but intended and understood by the parties to be merely a security for the payment of a debt, or the performance of some other condition, will be regarded and treated in equity as a mortgage, giving to the parties the relative rights and remedies of mortgagor and mortgagee, and nothing more.

It is urged that it is a settled doctrine of equity that the form of a transaction will never preclude inquiry into its real nature, but that in all cases the intention of the parties must control, irrespective of form; and consequently, if a conveyance is made as a security for money, in whatever form the conveyance is made, or whatever cover may be used to disguise the transaction and hide its real character from others, as between the parties and as to all persons

who have notice that the property is merely his collateral security, it will be treated as a mortgage (citing cases in support of this position).

[1] We think there is no question about the law as claimed by cross-plaintiff's counsel. The only question is as to its applicability to the facts in this case. The true doctrine was well stated by Mr. Justice Lamar in the case of *Wallace v. Johnstone*, 129 U. S. 58, 9 Sup. Ct. 243, 32 L. Ed. 619. In that case the jurist said:

"A deed of lands, absolute in form, with general warranty of title, and an agreement by the vendee to reconvey the property to the vendor or a third person, upon his payment of a fixed sum within a specified time, do not of themselves constitute a mortgage; nor will they be held to operate as a mortgage, unless it is clearly shown, either by parol evidence or by the attendant circumstances, such as the condition and relation of the parties, or gross inadequacy of price, to have been intended by the parties as a security for a loan or an existing debt."

So that the pertinent question here is: Was the deed given to Berston as security, or was the transaction what it appeared upon its face to be?

[2] Upon the question of the burden and standard of proof generally required, the rule is stated in 19 R. C. L. at pages 263 and 264:

"The authorities are unanimously agreed that the burden of proving that an absolute conveyance, unaccompanied by any written stipulation for reconveyance, was intended to operate as a mortgage rests on the party alleging that intention. Furthermore, evidence is not sufficient to establish such a conveyance to be a mere mortgage unless it is clear and unambiguous. It must be, according to various statements, clear and convincing; clear and satisfactory; plain and convincing; clear, satisfactory and conclusive; or clear, unequivocal, and convincing. It will not suffice if composed of loose and random statements, or of facts and circumstances of doubtful import; but it must be of such a character as not to leave the nature of the transaction in reasonable doubt, though there is apparently dissent as to the proposition last stated. The reason for the exaction of this high degree of proof is not far to seek. If a less rigorous rule obtains, no man would be safe in taking a deed of property. When it had doubled or trebled in value it would be only necessary for the grantor to bring witnesses to testify to an agreement that the deed was regarded as an equitable mortgage, to enable him, on payment of the purchase price and interest, to redeem."

It is urged by counsel for defendant Berston that the last sentence in the above paragraph is the keynote to the whole case, as in the instant case the property has enhanced in value many fold according to the testimony of a number of witnesses, and is now within the city limits, and in an im-

proved district. The vital question in this case is whether the cross-plaintiff has sustained the burden of establishing that this warranty deed, on its face conveying the absolute title, was between the parties, a mortgage. In the recent case of *Mintz v. Soule*, 182 Mich. 564, at page 571, 148 N. W. 769, 771 (L. R. A. 1916 B, 15) this court, speaking through Justice Steere, said:

"It is well settled that such question is open to litigation, and the courts may so declare when the testimony impels to that conclusion. In passing upon the proof, courts favor written evidence, rather than oral, but are required to consider together the writings, relations of the parties, surrounding facts and conditions generally, to arrive, if possible, at the real intent, understanding, and agreement of the contracting parties."

In *Dalton v. Mertz*, 173 Mich. 153, at page 156, 138 N. W. 1055, 1056. Justice Bird, speaking for this court, said:

"We are of the opinion that the complainant has failed to discharge the burden of proof which rested upon him in making out his case. The proof should be clear and convincing before an instrument which, on its face, purports to be an absolute conveyance is declared to be a mere security. For complainant's failure in this respect he must be denied relief."

[3] We have given the record, briefs, and oral arguments in this case close attention, and we are of opinion that the cross-plaintiff has failed to discharge the burden of proof which rested upon him. The rule to be applied may also be found in *Tilden v. Streeter*, 45 Mich. 533, at page 540, 8 N. W. 502, 505, where Justice Graves said:

"The natural and prima facie effect of a conveyance expressing no condition, and regularly executed in the presence of attesting witnesses, and duly acknowledged as an absolute deed, ought not to be controlled and qualified by oral evidence, and brought down to the effect due to a mere security, on a slight showing. The great current of authority is distinct in holding that the party thus seeking to modify the operation of the instrument and prove himself entitled against the terms of his own deed to an equity of redemption is not only bound to make out that the transaction was in truth and justice nothing more than the giving of security, but is required to do so by force of evidence sufficient to command the unhesitating assent of every reasonable mind. Unless the testimony, say the Supreme Court of the United States, is entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. *Howland v. Blake*, 97 U. S. 624-626"—and citing many other cases.

See, also, *Etheridge v. Wisner*, 86 Mich. 166-173, 48 N. W. 1087; *Abbott v. Gruner*, 121 Mich. 140-147, 79 N. W. 1065,

A diligent search of this record has not enabled us to find one sentence of documentary evidence going to show that the deed and land contracts in this case were intend-

ed to operate as security, in the sense in which the word is used in the authorities, or as a mortgage. The case of cross-plaintiff Powers is made to rest mainly upon his own uncorroborated testimony as to conversations had with Berston from time to time. A proper scrutiny of that testimony leads us to the conclusion that he has not sustained the burden cast upon him by the law. Much of that testimony is as consistent with the claim of the defendant Berston that the deed in this case was given as an absolute conveyance, with an ordinary land contract of sale of these premises, as with the other view of the case. Powers' conduct should be considered. From the time when the last notice of forfeiture was served upon him until the filing of his cross-bill, a period of more than one year, there is no evidence showing that Powers made any claim of any further rights in this property. He seems, by his conduct, to have acquiesced in the claim that his rights therein were forfeited, "and he abandoned the proposition." He left the city and was in Muskegon much of the intervening time. During that time the value of this property had enhanced. Berston had paid off the Donnelly mortgage, and had entered into contract relations with other parties in regard to the sale and disposition of the land and he seems to have acted in perfect good faith toward Powers in all the dealings both before and subsequent to the service of notice of forfeiture. The lands had been syndicated, and the stock or shares sold; and to now decree the relief as prayed for by Powers in his cross-bill, there is evidence in the record, uncontradicted, to show that Berston would suffer damages in more than \$50,000. It certainly should require strong evidence under such circumstances to lead a court of equity to set aside the plain language of written documents, and hold that the parties did not mean what they said when they signed the instruments relating to dealing in real property. The testimony is too lengthy to be quoted at length. It has all been read and considered, and in our opinion relief by way of cross-bill should be denied, and the cross-bill of cross-plaintiff Powers should be dismissed, with costs to defendant Berston.

Even if we were to hold that the deed and first land contract constituted a mortgage, there is much authority to the effect that the making of a new contract, founded upon a new and adequate consideration, both fair and reasonable in its terms, and free from fraud and undue influence, would change the relation of the parties. The new contract of March 10, 1917, might be held to be such a contract. In section 923 of *Jones on Mortgages* (7 Ed.) is found the following language:

"But where a bond of defeasance was executed by the grantee of land to the grantor, which was afterward surrendered, and a new bond given upon a consideration partly new, by which the grantee agreed to reconvey upon the payment within an additional time of a larger sum, it was held that the grantor thereby abandoned his title as mortgagor, and that the grantee became owner of the land in fee"—citing cases.

See, also, section 252 of Jones, and the many cases there cited.

But we adhere to the view that the deed and first contract constituted an absolute sale to Berston, and a contract to sell to Powers.

[4] This brings us to the claim of the original plaintiffs in this suit. We have reached the conclusion that the plaintiffs are entitled to a specific performance of their contract. It is true that they were in default at the time the notice of forfeiture was served upon them, but subsequent to that time they paid to the defendant Powers, and he accepted, the sum of \$1,873 as the amount then due upon the contract. This sum was accepted by Powers as applying upon the contract. We think that this payment operated as a waiver of the notice of forfeiture. See *Waller v. Lieberman*, 214 Mich. 428, 183 N. W. 235.

[5] It is true that the name of Berston does not appear in the body of that contract. He, however, signed the contract together with Powers. The reason for doing so seems to have been that the plaintiffs, being aware that the legal title to the property was in Berston, would not accept a contract that did not contain his signature. He seems to have signed it acquiescing in that view. He should be estopped from saying that Powers had not the right to give the contract when it was given, and to accept payments thereon. In his cross-bill Powers prays that the court direct the disposition of the \$1,873 then in his possession. The same seems to have been paid to him, and to have had application, upon the entire contract, which contained 8 other lots besides the 11 lots involved in this suit. We gather from the testimony that all the lots in the contract were substantially of equal value. Three-fourteenths of the amount should be retained by Powers as applying upon the 3 lots outside the property in question. Eleven-fourteenths of that amount should be delivered to defendant Berston.

We affirm that portion of the decree below which awards specific performance to the plaintiffs upon the terms therein named, the time for payment being extended to 60 days from the filing of this opinion; the amount to be determined upon the basis of the decree below, and such deed to be signed by both Powers and Berston. The plaintiffs will recover their costs in this

court, to be taxed against both Berston and Powers. The amount to be paid by plaintiffs will be paid three-fourteenths to Powers and eleven-fourteenths to Berston.

[6] We do not think that Act No. 243 of the Public Acts of 1917, amending section 13253, Comp. Laws 1915, relating to writs of restitution, has any application to this case. The question of possession of the premises is not here involved, nor did the cross-bill tender any such issue. It does not appear that any of the parties was actually living upon the land, or in actual occupancy thereof.

The decree below, in all other respects than that relating to the claim of the plaintiffs, will be reversed and the cross-bill dismissed, with costs to defendant Berston as against cross-plaintiff Powers.

CRAWFORD v. HUBER et al. (No. 3.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. False Imprisonment ⚡14—Malicious prosecution ⚡22—Advice of prosecuting attorney held a good defense.

One who in good faith fully and fairly stated all the material facts within his knowledge to the prosecuting attorney, and acted solely on his advice, is not liable for instituting criminal proceedings either in action for malicious prosecution or false imprisonment.

2. Sunday ⚡29(1/2)—Statute imposing fine, but not denouncing the act as a misdemeanor, will not support a warrant of arrest.

Under Comp. Laws 1915, § 7764, providing that it shall be unlawful for a person to be present at dancing on Sundays, and that "every person so offending shall be punished by fine, not exceeding \$10, for each offense," the penalty may only be collected by civil action, and there is no authority for the issuance of a warrant of arrest for violation of the statute.

3. False Imprisonment ⚡7(3)—Issuance of warrant under statute imposing no criminal responsibility is not a judicial act.

In an action for false imprisonment against a constable for making an arrest, the defense that the justice of the peace, in determining that a warrant should issue, performed a judicial function, and he and the officer who executed the writ are protected thereby, is not valid where the warrant was issued under a statute which merely authorized the issuance of a civil process to enforce a penalty.

4. False Imprisonment ⚡7(3)—Warrant issued under Sunday law held not fair on its face.

Where a constable made an arrest on a warrant issued by a justice of the peace for conducting a dance hall on Sunday in violation of Comp. Laws 1915, § 7764, which does not authorize the issuing of a warrant, but imposes no more than a civil liability, the complaint

showed upon its face that the warrant was unauthorized, and the writ was not a protection to the officer serving it, since it was not "fair on its face."

5. False imprisonment §30—Advice of counsel may be shown in mitigation of punitive damages.

In an action for false imprisonment, advice of counsel and good faith may be shown in mitigation of punitive damages.

Error to Circuit Court, Calhoun County; Walter H. North, Judge.

Action by Charles Crawford against William Huber and others. From judgment for defendants, plaintiff brings error. Reversed, with new trial.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Howard W. Cavanagh, of Battle Creek (James M. Powers, of Battle Creek, of counsel), for appellant.

James Cleary and Joseph L. Hooper, both of Battle Creek, for appellees.

FELLOWS, J. Plaintiff conducted a dance hall at Goguac Lake in Battle Creek township, near Battle Creek. Defendant Huber was a constable of that township. The other defendants are his bondsmen. Plaintiff conducted his dance hall on Sunday, and was arrested for violating section 7764, G. L. 1915. The complaint was drawn by the prosecuting attorney, and defendant Huber acted upon his advice. The complaint was sworn to by Mr. Huber, and the warrant was served by him. Plaintiff was subsequently discharged, and brings this action, counting on malicious prosecution, false imprisonment, and abuse of criminal process. In the final disposition of the case the trial court held that there was no evidence of abuse of process; that, defendant having acted under the advice of the prosecuting attorney after a full statement of all the facts, he could not be held either for malicious prosecution or false imprisonment for what he did in instituting the proceedings, and that the writ was fair on its face, and protected him as an officer in making the arrest. There was no testimony of an abuse of process.

[1] The court correctly held that defendant, having in good faith fully and fairly stated all the material facts within his knowledge to the prosecuting attorney, and having acted solely on his advice, could not be held for his act in instituting the proceedings under either the count for malicious prosecution or false imprisonment. *Murphy v. Walters*, 34 Mich. 180; *Smith v. Tolan*, 158 Mich. 89, 122 N. W. 513; *Rogers v. Olds*, 117 Mich. 368, 75 N. W. 933; *Wakely v. Johnson*, 115 Mich. 285, 73 N. W. 238; *Huntington v. Gault*,

81 Mich. 144, 45 N. W. 970; *Thomas v. Bush*, 200 Mich. 224, 186 N. W. 894. In *Murphy v. Walters*, supra, it was said by this court, speaking through Mr. Justice Campbell:

"It seems to be considered that in criminal proceedings a person who simply lays facts before a magistrate, and leaves all further action to the unbiased and unsolicited conduct of the latter, is not liable in trespass for false imprisonment, unless he takes some part in furthering the arrest, or urging the detention."

The meritorious question in the case, and the one to which the briefs are in the main directed, is whether defendant, as an officer, was protected in making the arrest by the warrant, whether the writ was fair on its face.

[2] The statute under which plaintiff was prosecuted provides:

"And every person so offending shall be punished by fine not exceeding ten dollars for each offense."

This penalty may only be collected by civil action; the violation of the statute is not a misdemeanor, and may not be prosecuted by criminal process. *Yerkes v. Smith*, 157 Mich. 557, 122 N. W. 223. There is, therefore, no authority in the statute for the issuance of the warrant upon which plaintiff was arrested.

[3] Counsel for defendant argue that the justice, in determining that a warrant should issue, performed a judicial function, and that he and the officer who executed the writ are protected, even though his determination was erroneous, and *Gardner v. Couch*, 137 Mich. 358, 100 N. W. 673, 101 N. W. 802, 109 Am. St. Rep. 684, and kindred cases, are cited. In the *Gardner* Case we said on motion for rehearing:

"In the case at bar defendant had jurisdiction of the subject-matter, and it was his duty to judicially determine whether or not a warrant should issue. Had he determined that it should not issue, surely that determination would have been a judicial act, which might have been corrected if erroneous. His determination was none the less judicial because he erroneously decided that the warrant should issue. To hold him civilly responsible for such an erroneous decision would not only be unjust, but injurious to public interests. In deciding whether or not a warrant should issue, the magistrate should be free to act according to his judgment."

But in that case the justice had authority to issue a warrant. To determine whether the facts in the particular case were sufficient required of the justice the exercise of his judicial functions; that he performed that judicial function erroneously did not create liability. Manifestly where the authority exists in a justice to issue a warrant his determination that sufficient facts have been made to appear to justify its issuance

is a judicial act. But here there was no authority in the justice to issue the warrant. The act was one beyond his power—beyond his jurisdiction. He might issue civil process to enforce the penalty but he was without authority to issue criminal process for that purpose. This distinction was noted in *Wheaton v. Beecher*, 49 Mich. 348, 13 N. W. 769, where we held that the officer was not required to look back of his writ—that he was protected by what appeared on the face of it; but we there said in the majority opinion:

"Where a criminal warrant is issued by a magistrate in a case where he has no authority to issue process of that nature, ordinarily no question could arise; but where jurisdiction is given him over the subject-matter, his warrant 'reciting the substance of the accusation' will not always show upon its face whether the magistrate did or did not have the necessary jurisdictional facts before him. And the officer is not required for his protection to inquire into the facts back of his warrant."

Counsel for defendant also challenge our attention to the holdings of this court and those of other courts where, in accordance with the weight of authority (19 Cyc. 345), it is held that a warrant under an unconstitutional enactment protects the officer. See *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137. But that class of cases is bottomed, as is the class last referred to, upon the exercise of a judicial function by the justice in holding the enactment valid; and in *Ortman v. Greenman*, 4 Mich. 291, this court quite caustically commented on the propriety of the action of a justice of the peace in determining that an act of the Legislature was unconstitutional.

2 Cooley on Torts (3d Ed.) p. 883, has been frequently quoted by this and other courts of last resort upon the question of whether a writ is fair on its face. We again quote what is there said:

"The process that shall protect an officer must, to use the customary legal expression, be fair on its face. By this is not meant that it shall appear to be perfectly regular, and in all respects in accord with proper practice, and after the most approved form; but what is intended is that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, that process may be said to be fair on its face which proceeds from a court, magistrate, or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it is issued without authority. When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it."

Among our own cases, that of *Wachsmuth v. Bank*, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278, is upon principle nearest in point. The order to hold to bail in a *capias* case

was made by a circuit court commissioner, an inferior officer. The affidavit upon its face showed that the plaintiff in the case was not entitled to the order to hold to bail. In disposing of the case it was said by the court, speaking through Mr. Justice McGrath:

"It is contended that the order to hold to bail protects the defendants. The officer indorsing the order was one of special and limited jurisdiction. The affidavit disclosed that the resolution was offered by plaintiff as a member of the common council to that body, and related to a matter in the line of plaintiff's duty as a public officer. In other words, the affidavit, upon its face, showed that the resolution charged as libelous was, as a matter of law, absolutely privileged. So far from setting forth any facts and circumstances tending to show grounds for granting the order, the affidavit expressly negated any liability whatever to the plaintiff. The defect was therefore jurisdictional, and the order was absolutely void, and affords no protection to the parties instituting the proceedings, procuring the order, and delivering the process to the sheriff for execution. An arrest and imprisonment in a civil case upon void process is as one without process, and cannot be justified. Good faith, honest belief, and the advice of counsel may be shown to rebut the presumption of malice, and to avoid punitive damages, but not to justify an arrest and imprisonment under an absolutely void process [citing authorities]."

[4] So here the complaint showed upon its face that the warrant was unauthorized, and the warrant itself negated the authority to issue it; and here, as there, the action was by an officer of limited jurisdiction. In *Thomas v. Rosecrantz*, 193 Mich. 357, 159 N. W. 514, we pointed out the distinction between the effect of an order to admit to bail in a *capias* action made by a circuit judge and one made by a circuit court commissioner.

In the recent case of *Larson v. Collins*, 195 Mich. 492, 162 N. W. 86, the commitment did not show that there had been a conviction of any offense known to the law. It was held that it did not afford protection to the officer, and it was there said by the late Justice Brooke:

"While we agree with counsel for appellant that actions of this character against officers of the law should not be encouraged, we are yet constrained to hold that the commitment recited a conviction of no offense known to the law, and was therefore void upon its face, and insufficient to afford protection to the officer who executed it."

A somewhat analogous case is that of *Kramer v. Lott*, 50 Pa. 495, 88 Am. Dec. 556. In that case the complaint and warrant disclosed a trespass, not a violation of the criminal law; a civil liability, not a criminal one. It was held that an action for malicious prosecution could not be maintained, but that an action for an unlawful arrest could be maintained, that the warrant was void, and that plaintiff's action was

not in case, but in trespass, and it was said by the court:

"Now neither the substance of the information given, nor the warrant, do more than describe a trespass, viz. the breaking open the schoolhouse with force. No violence, threats, or menaces towards any one is alleged and set forth, and thus the warrant did not describe the offense of forcible entry, much less of forcible detainer, but only a trespass. I apprehend it could not be successfully contended, that an indictment using no other words than those contained in the warrant, namely, 'breaking and opening a certain schoolhouse with violence and taking possession of the same in said district contrary to law,' would be good. It makes no allusion to any person in possession, either actually or constructively, or that the violence was other than that used in opening the door, it being locked. If nothing else than this occurred, the act was manifestly a trespass only, and the warrant describing merely a trespass was void. The plaintiffs' remedy was therefore for an arrest without authority of law, and that was by action of trespass, and not case."

In *Gurney v. Tufts*, 37 Me. 130, 58 Am. Dec. 777, it was said by the court:

"The warrant must, on its face, show the magistrate's authority to commit, for no presumptions are to be made in favor of his jurisdiction. However important it may be that an officer should be protected, it should never be forgotten that the citizen has his rights, and that they are rights under the law, and entitled to its protection. When an officer acts under the authority of a magistrate having jurisdiction, and that fact is disclosed on the face of his precept, he should not be held responsible for the previous omissions of such magistrate. He should not be required to ascertain or determine the validity of prior proceedings, or to look beyond the command of his precept. But if the magistrate issues precepts or orders arrests for acts not known to the law as offenses; if he imposes illegal punishments, as if he commands a plain and obvious violation of the law—he can, when thus transcending the bounds of his authority, afford no more protection to an officer than could one not a magistrate."

In the instant case the warrant not only failed to show a justification for the arrest of the plaintiff, but it affirmatively showed a want of such justification. It not only failed to show that he had committed any act calling for his arrest on criminal process, but it affirmatively showed that the act committed by him was one for which he could not be arrested by criminal process. Under these circumstances the writ was not a protection to the officer serving it—it was not fair on its face.

[6] Advice of counsel and good faith may be shown in mitigation of punitive damages, but neither is a justification for an actual trespass upon the rights of the individual.

The judgment must be reversed, with a new trial. Plaintiff will recover costs of this court.

DIAMOND LUMBER CO. v. ANDERSON

1st Sal. (No. 1.)

(Supreme Court of Michigan. Oct. 3, 1921.)

1. Logs and logging ~~§~~34(1)—On buyer's refusal to perform unless seller did more than contract provided, seller may rescind.

Under a contract for the sale of logs, to be delivered decked along a railroad or along a spur track to be built by the sellers, the buyer agreeing to pay \$2,000 June 1, \$2,000 June 15 if \$1,000 worth of logs were decked, \$2,000 July 1, and, after sufficient logs had been decked to cover such advances, to pay on the 10th of each month for all logs delivered the previous month, where the buyer, on the sellers' request, though they failed to report the quantity of logs decked prior to June 15, forwarded the second advancement, thereby waiving such condition, but refused to accept or use the spur track built by the sellers unless they put in a wye or a passing track, the sellers could rescind the contract, though the buyer's subsequent failure to pay the final advance was only an anticipatory breach, the buyer's refusal to accept or use the spur being a refusal to perform its part of the contract unless the sellers did more than the contract required of them.

2. Specific performance ~~§~~68—Buyer's remedy for breach of contract for sale of logs held not in equity, but at law.

Where a lumber company purchasing a quantity of logs had been a going concern for a long time, and there was nothing to indicate its status was changed because of the making of the contract, any more than it would have been by the purchase of any other equal quantity of logs, its remedy for the seller's breach of the contract was in an action on the law side of the court, and not in equity for specific performance.

Appeal from Circuit Court, Ontonagon County, in Chancery; George O. Driscoll, Circuit Judge.

Suit by the Diamond Lumber Company against Robert E. Anderson and others. Decree dismissing bill, and plaintiff appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Charles M. Humphrey, of Ironwood (Samuel H. Cady, of Green Bay, Wis., of counsel), for appellant.

Walter G. Van Slyck, of Ontonagon (John J. Walsh, of Marquette, of counsel), for appellees.

MOORE, J. This is a bill of complaint filed to compel the specific performance of a contract. From a decree dismissing the bill of complaint, the case is brought here by appeal. At the outset we cannot do better than quote freely from a carefully prepared written opinion filed by the chancellor before whom the case was tried. We quote:

"The plaintiff, before and in 1919, was engaged in operating a large sawmill at Green Bay, Wis., as well as in logging operations at a place called Camp Tolfree, on the White Pine branch of the Chicago, Milwaukee & St. Paul Railway, in Ontonagon county, Mich. It had a large logging equipment at Camp Tolfree, including a locomotive engine and log loaders. Its sawmill plant and business conditions at Green Bay were and are such that it cannot store many logs near its mill. It was and is required to so arrange that a continuous flow of logs will arrive at its mill throughout the year. These logs are shipped in by rail, and plaintiff's practice has been to procure its logs at such places that it would not have to depend on one railroad for its mill supply. It can better control the supply of logs for its mill if it itself loads its logs onto the railroad cars for shipment. It owns considerable standing timber on the White Pine branch, and employs in its camps there from 100 to 250 men; but most of its timber is so situated that it cannot very well be shipped during the winter months when the snow is deep. In the spring of 1919 it was short of a supply of hemlock logs which it needed to fill its orders. The Chicago, Milwaukee & St. Paul Railway runs from Green Bay to Camp Tolfree, and the freight rate is very favorable for the shipment of logs from the White Pine branch to plaintiff's mill. The defendants, Anderson and Corwin, of Ontonagon, Mich., in said spring, purchased a tract of mixed timber, consisting of nine 40's and about 3,000,000 feet of logs, located near Camp Tolfree on the White Pine branch. This timber ran strong to hemlock, was of a kind and character needed by plaintiff in its sawmill business, was so located that it could use its log loaders and locomotive, kept at Camp Tolfree, to load and move it after it was hauled to the track, and that it could be shipped for use at its mill when it would be difficult (if not impossible) to get its log supply from its own holdings on the White Pine branch. By reason of these and other facts this timber was very desirable for use at plaintiff's sawmill. Mr. Phillips, residing at Green Bay, Wis., was plaintiff's general manager and treasurer, and Mr. Boyd, residing at Ontonagon, or at Camp Tolfree, Mich., was its woods superintendent, and had charge of its affairs on the White Pine branch.

"On or about May 24, 1919, Mr. Corwin, of Anderson & Corwin, went to Green Bay and there met Mr. Phillips, representing plaintiff, and made a deal with him for the sale by Anderson & Corwin to plaintiff of this 3,000,000 feet of timber, as a result of which a contract in writing was entered into between plaintiff and Anderson & Corwin, which reads as follows:

"This agreement, made in duplicate this day, May 24, 1919, between R. E. Anderson and E. T. Corwin, of Ontonagon, Michigan, party of the first part, and the Diamond Lumber Company of Green Bay, Wisconsin, party of the second part.

"The first parties agree to sell and the second parties agree to buy a quantity of logs recently purchased by the first parties, consisting of nine forties in sections 23, 25, and 26, 51-41, estimated at three million feet more or less. It is agreed that the first parties are to make delivery of said logs decked in roll-

ways along the Chicago, Milwaukee & St. Paul right of way, some being the proper distance away from the present rails of the track and not more than 110 feet from the same, or along a spur track which is to be put in by said first parties before September 1, 1919. * * *

"The timber is to consist of the following estimated amounts: * * *

"All logs are to be cut in a workmanlike manner, hemlock where necessary, to be long butted. All hardwood logs are to be 10 inch and up in diameter; 12, 14 and 16 feet lengths, with a strong percentage of 16 feet, with the exception of a very small per cent. of 10 feet if necessary to conserve the timber. It is also agreed that a small per cent. of hardwood logs if straight and smooth be taken down to 8 inches.

"All softwood logs are to be 8 inch and up except a small per cent. of smooth and straight will be taken down to 6 inch: The lengths of the spruce, cedar and pine to be 12, 14 and 16 feet with as many 16's as it is possible to make without waste of timber. The lengths of the hemlock to be 12, 14, 16 and 18 feet, cutting first as much of the 18 feet as possible, the balance strong to 16 feet. For such logs so decked, said second parties agree to pay first parties: Per thousand feet: * * *

"It is further understood that hemlock logs suitable for peeling, cut after November 15th and before April 1st and decked in rollways separate from the other mixed logs, the said second parties agree to pay \$2 per thousand feet more than the above-named prices.

"It is understood that the said second parties expect to place one of their loading machines at this operation during the winter, in all probability about the holidays, and will no doubt load out many of these logs as they are brought in to the landing, saving the first parties the expense of decking the same where possible. In that case the logs will be scaled as put upon the cars.

"The said second parties further agree to pay said first parties \$2,000 advance June 1st, \$2,000 June 15th, providing the first parties have \$1,000 worth of logs decked at the rollways, \$2,000 July 1st. After sufficient logs have been decked as specified in this contract to cover these advances, the said second parties agree to pay upon the 10th of each month for all logs so delivered the previous month.' * * *

"The record does not show any of the conversations had between Mr. Corwin and Mr. Phillips while negotiating this deal, except that Mr. Corwin testified that he (Mr. Corwin) told Mr. Phillips at the time the deal was being made that Anderson & Corwin needed the advances provided for in the contract; also that he told Mr. Phillips at that time that they (Anderson & Corwin) were figuring on putting in the spur track mentioned in the contract in the way and at the place they afterwards actually did, and that Mr. Phillips replied to this that if they did so he would have Mr. Boyd connect it up.

"The contract was executed and the \$2,000 advance paid by plaintiff to Anderson & Corwin before June 1st, and Anderson & Corwin commenced to work at building camps, making roads, cutting and swamping logs, and building a narrow gauge railway for use in getting out the timber. Mr. Phillips had instructed Mr. Boyd to keep his eye on their operations, and was satisfied that they were in good faith

proceeding to carry out their part of the contract, when on June 13, 1919, he, for plaintiff, wrote Anderson & Corwin as follows:

"June 13, 1919.

"Anderson & Corwin, Ontonagon, Mich.—Gentlemen: Will you kindly advise us what you have done regarding the decking of logs at the track, as next week will be time for further advances upon your contract. Have you got the scaler at work? Kindly give us what information you can by return mail.

"Yours truly,

"Diamond Lumber Company,

"JTP/S By —."

"On June 16, 1919, Anderson & Corwin, through Mr. Corwin, replied as follows:

"June 16, 1919.

"Diamond Lumber Co., Green Bay, Wis.—Dear Sirs: We have your letter the 13th; no; we have not got the scaler at work yet, we will start to skid the last of this week or first of next; we have been laying our narrow gauge track, which is the way we will take out one eighty.

"We have between four and five thousand logs cut and swamped and roads all cut as well as landings at track, this on 80 acres.

"We did not understand that you expected we were going to make any report of logs decked until after the 1st of July. If there is any further information you would like advise us, we beg to remain,

"Yours very truly, Anderson & Corwin,
"By E. T. Corwin."

"On June 19, 1919, plaintiff, through Mr. Phillips, replied as follows:

"June 19, 1919.

"Anderson & Corwin, Ontonagon, Mich.—Gentlemen: We have your letter of the 16th. We were more interested in finding out if you have any logs decked along the railroad than anything else. We believe our contract provides for our making certain payments providing you had them out there. It is evident from your letter that you are not in need of additional money at this time but the next \$2,000 would be payable July 1st. Unless we hear from you to the contrary we will send you \$2,000 at that time.

Yours truly,

"Diamond Lumber Company,

"JTP/S By J. T. Phillips."

"On June 24th defendants caused the following letter to be sent to plaintiff:

"June 24, 1919.

"The Diamond Lbr. Co., J. T. Phillips—Dear Sir: The writer was requested by E. T. Corwin, who is in the woods, to write you the following answer to your recent letter. Mr. Corwin showed your letter to Mr. Anderson and he said the contract called for \$2,000 to be paid by June 15th. Mr. Corwin also said you would receive a full report of logs by July 1st. By June 25th they expect to start skidding.

"Trusting this is satisfactory.

"Corwin & Anderson.

"Mr. Corwin hoped you could send check by return mail."

"On June 25th, plaintiff, through Mr. Phillips, replied as follows:

"June 25, 1919.

"Anderson & Corwin, Ontonagon, Mich.—Gentlemen: We have your letter of the 24th. Do not know who it was written by. We are

enclosing our check for \$2,000 as requested. We believe the contract states that we were to pay \$2,000 June 15th, providing you had that amount of logs decked at the railroad track. We would be glad to see you begin to get the logs to the track.

"Yours truly,

"Diamond Lumber Company,

"JTP/S By —."

"Plaintiff's letters just quoted were written at Green Bay, and Anderson & Corwin's at Ontonagon. While this correspondence was being carried on Anderson & Corwin were engaged in putting in the spur track provided for in the contract. All of the other spur tracks on this White Pine branch (which was quite generally down grade from Camp Tolfree to Ontonagon) had been put in so as to connect with the C., M. & St. P. tracks at the north end; but Anderson & Corwin, in good faith and as a measure of economy and convenience to themselves, in getting out their logs and bark and handling supplies, were putting in this spur (which was between Camp Tolfree and Ontonagon) so as to connect with the C., M. & St. P. tracks at the south end. This would somewhat increase the danger of taking loads of logs out of the spur, and would not be as convenient for plaintiff's use in getting out the logs as if connected as the others were. This element of danger and inconvenience could be avoided by putting in another track so as to form a Y, or by putting in a passing track. Mr. Boyd, having observed or learned how they were putting in this spur, spoke to Mr. Corwin and objected to the way they were putting it in. Up to this time Mr. Boyd did not know anything about Mr. Corwin's talk with Mr. Phillips concerning the spur, but Mr. Corwin then told him about it. Not getting a satisfactory answer from Mr. Corwin as to whether or not they would change the spur, and deeming it best to put the matter in writing, on June 19, 1919, Mr. Boyd wrote Anderson & Corwin, from Ontonagon, the following letter:

"Main Office and Mills, Green Bay, Wis.

"Diamond Lumber Company, Woods Department.

"Ontonagon, Mich., June 19, 1919.

"Mr. E. T. Corwin, Ontonagon, Mich.—Dear Sir: We have been thinking quite a little about your proposed railroad at your camps and unless you put in a connection from the north end and connect up with your present proposed track, forming a Y, we will have to refuse to go in there on account of the switching, as we are compelled to keep our engine on the north end of the loads at all times.

"We understand you are busy loading out logs at Ontonagon and as soon as you can arrange we would like to meet you at your camps and try to arrange the railroad tracks satisfactory to you and the Diamond Lumber Co.

"Yours truly,

"Diamond Lumber Co.,

"By E. H. Boyd, Woods Supt."

"Anderson & Corwin kept on with their work, and apparently made no reply to plaintiff's last-mentioned letter, but Messrs. Boyd and Corwin subsequently met and talked about it, during which Mr. Boyd still insisted on the change. Later, and between July 6th and July 10th (the exact time is not certain), Mr. Phillips made a

three days' visit to Camp Tolfree and vicinity. During this visit he met and had several talks with Mr. Corwin, and also went over to the spur track in question with Anderson & Corwin's foreman, Mr. Russell. This spur track was about 4,400 feet long. During these talks with Mr. Corwin the spur track was discussed, during which Mr. Phillips endeavored to compromise the matter. Concerning this he testified:

"Q. Was anything said about the way the spur track should be built? A. Oh, yes; quite a little.

"Q. That is what I want to know. Just state what that was; what conversation you had with him about that. A. We objected to that way of putting in the spur. We wanted it to lead in as the other spurs along the line did, and couldn't see any reason for their going in there as they proposed.

"Q. Did you state that to Mr. Corwin? A. Yes, sir.

"Q. What did he say about it? A. Mr. Corwin isn't a man that says very much of anything. You can never get him to commit himself in any way.

"Q. Did he say anything about it? A. He didn't say he would or he wouldn't, as I recollect it, but he didn't intimate that they were going to change their plans in any way.

"Q. Did he at any time say anything to give you any reason to believe that Anderson & Corwin weren't going ahead and carry out their contract with you? A. Well, I don't know that he did. I would say that when I was at the back end of that spur with Mr. Russell, their foreman, he told me that—

"Here witness was interrupted. Later he testified:

"Well, later the next day, I think it was, when we were trying to get them to build the track so that it would be what we considered serviceable, I offered to switch their cars of bark without charge while we were loading logs, providing they would put the other piece of track in or change the track around. I offered to bring them some steel down that I understood they owned up at White Pine Junction.

"Q. Now why did you offer to do that when Mr. Corwin brought this matter up? A. Well, I was trying to do everything I could to hold the logs. * * * My proposition was made to him and he agreed to take it up with Mr. Anderson, and advise me what they concluded to do. * * * I never had any talk with Mr. Anderson on this contract whatever.

"Q. What was the result of your conversation with Mr. Corwin on the 9th or 10th of July, as to what he would do? A. He stated he would talk it over with Mr. Anderson and advise us.

"Q. And did he advise you? A. No; we never heard anything from him about that part of it.

"Q. Did he make any report to you as the result of that talk with him? A. No, sir."

"It is undisputed that plaintiff wanted Anderson & Corwin to change the spur, or put in a Y or passing track at their expense, and that it would cost somewhere around \$700 to do this. While Mr. Corwin in his testimony admitted that he told Mr. Phillips, in the July conversation, that he would go back and talk the matter over with Mr. Anderson, and let him (Mr.

Phillips) know, he testified, on cross-examination by plaintiff's counsel, as follows:

"Q. On the 10th of July Mr. Phillips didn't tell you that he wouldn't go ahead with the contract if you didn't change that spur, did he? A. No; I don't think so.

"Q. When you left him on the 10th of July you fully expected to go ahead and carry out the contract, didn't you? A. I think that evening we met down here, I told him we certainly wouldn't spend money to change that track.

"Q. When you left him at that time they didn't say they wouldn't go ahead and carry out their part of the contract, and you fully expected and intended to go ahead and carry out your part of the contract? A. I fully made up my mind and told him that we wouldn't spend any money to change it."

"At the first time Mr. Anderson had anything to do with the attempted rescission of the contract, he told Mr. Corwin that if he (Corwin) couldn't agree with Mr. Phillips—that if Mr. Phillips was "unreasonable"—they would try and rescind the contract and sell the logs to somebody else. No \$2,000 advance payment was made by plaintiff on July 1st, or after June 25th. When Mr. Phillips was at Camp Tolfree, Mr. Corwin, referring to this, told him he thought they had some more money coming. Mr. Phillips' only reply to this was that he "didn't care anything about that part of it." The conversation then turned to the subject of the spur track. Mr. Corwin thought he was going to send the money. Mr. Phillips returned to Green Bay and from there sent to Mr. Corwin some money which plaintiff owed Corwin (not Anderson & Corwin) on another matter, but did not send the \$2,000 for the July 1st advance to Anderson & Corwin. Thereupon Anderson & Corwin, through Mr. Corwin, under date of July 12, 1919, wrote plaintiff as follows:

"July 12, 1919.

"Diamond Lumber Co., Green Bay, Wis.—Dear Sirs: Inasmuch as you seem to be dissatisfied and have not made your payments according to contract we have concluded to send back what money you have paid, amounting to \$4,000, and you should find our check inclosed.

"Further, you said to the writer and our Mr. Russell that you would not accept our spur as we have it laid out. We have not been in the habit of doing business in this manner; it is very evident to us that you want to break the contract and do not want the logs.

"The essence of the contract was that you advance us certain money, which you have not done, so we figure we haven't any contract with you anyway. Not receiving the money as agreed has placed us in a very embarrassing position. Kindly advise receipt of check, and oblige,
Yours truly,

"Anderson & Corwin,

"Per Edw. T. Corwin."

"July 15th, 1919, plaintiff, through Mr. Phillips, replied as follows:

"July 15, 1919.

"Anderson & Corwin, Ontonagon, Mich.—Gentlemen: We acknowledge receipt of your letter of the 12th and are herewith inclosing your order, as we have no idea of releasing you of your contract with us upon these logs.

"We are not so much surprised at the receipt

of this letter as the writer was of the opinion that you did about everything you could last week while I was there to get me to cancel the contract. It is very evident to us that you are doing your utmost to be released from the contract, but we have no idea of releasing you.

"You say we have not made payments according to the contract. We would call your attention to the fact we sent you \$2,000 before June 1st. The contract provides that we are to send you \$2,000 June 15th, providing you have \$1,000 worth of logs decked at the rollways. You did not have them decked at that time and in fact did not have them there by July 1st, although we sent you another \$2,000 about the 20th of June; we haven't the exact date before us. The contract further specifies that after a sufficient number of logs have been decked covering these advances, that we agree to pay on the 10th of each month for all logs so delivered the previous month, and unless you notify us what the amount is, we are unable to pay you anything further. We have complied fully with our part of the contract, and intend to do so in the future, and shall expect you to do so also.

"We were dissatisfied with the way that you have put your spur track in, and why you should go ahead and lay it out without saying something to our Mr. Boyd, who you expect will have to run over it, is beyond our comprehension. It is very plain to any one that all of the spurs upon that line are put in leading toward the south, and not toward the north. The writer before leaving Ontonagon last Thursday evening told you what we would do as a compromise and in so doing it would cost us more to handle your carloads of bark than it would to put the switch in as we asked. The only thing for you to do is to get busy and live up to your part of the contract, and if we have not complied with our part of it, we are willing to leave it to the courts to decide.

"Yours truly,

"Diamond Lumber Company,

"JTP/S. Dictated—not revised."

"Afterwards, under date July 23, 1919, Mr. Corwin, with the assistance of counsel, replied to plaintiff as follows:

"July 23, 1919.

"The Diamond Lumber Co., Green Bay, Wisconsin—Gentlemen: Your favor returning our check for \$4,000 at hand. I am returning same herewith, which will be honored and paid by the First National Bank of Ontonagon, at Ontonagon, Michigan, on demand.

"You have broken your contract dated May 24, 1919, with us, for the purchase of logs. You agreed to pay us an advance of \$2,000 on July 1, 1919. You have not made this payment, and your letter of July 15 clearly states that you claim same should not be paid, and that the payment of \$2,000 June 1st, and same amount June 20th is full compliance of your agreement as to advance payments.

"The contract provides that the logs shall be decked in rollways along the C., M. & St. P. right of way or along a spur track, connecting therewith. We have gone to the expense of building this spur, and you now claim you will not go on with the spur unless we build a Y in connection therewith. This is another breach of the contract and we hereby notify you that we now declare the contract rescinded, and

this check is to return to you the amount of money we have received from you on account of the contract.

"If you do not care to receive the inclosed check we are ready and willing and offer to pay you at once that amount of money, \$4,000, which will place you where we found you.

"Yours very truly,

"Anderson & Corwin,

"ETCE-ENCL. By Edward T. Corwin."

"The price of logs had materially advanced at this time, and Anderson & Corwin, through Mr. Anderson, sold to defendant Spies-Thompson Lumber Company, under contract dated July 25, 1919, 'about three million feet of woods run logs,' which, although the contract does not so state, were apparently conceded at the trial to be the same logs here involved. On August 4, 1919, plaintiff, through Mr. Phillips, wrote Anderson & Corwin as follows:

"August 4, 1919.

"Anderson & Corwin, Ontonagon, Mich.—Gentlemen: We are inclosing our check for the estimated amount due you as per our contract. We find that the average price as per the estimated amounts given us is \$18.30 per M. Mr. Corwin told the writer on Wednesday evening, the 3d, that you had about 275,000 decked at the track and that you were putting in 13,000 or 14,000 a day, so we have endeavored to figure very liberally with you on the amount you have there in making payment. Of course, it is up to you to notify us what the amount you have there is, but to protect ourselves we are inclosing a check for the amount due.

"On May 28, we sent you \$2,000 covering the first payment as per contract and on June 15 you had not started to deck logs at the track, so there was nothing due you, and on June 24 we sent you \$2,000 covering payment due July 1st. This is all in accordance with the terms of the contract.

"We trust that you will very soon get the scaler on there to work, complying with your part of the contract, so that we may know what is being done. We should have our reports promptly the same as we always had them from Corwin & Riley.

"Yours truly,

"Diamond Lumber Company.

"JTP/S."

"Afterwards defendant Spies-Thompson Company began to ship out some of the logs, and this bill was filed on or about September 6, 1919. The bill prays a decree for specific performance of the contract, an injunction to restrain the shipment of the logs, and an accounting as to the logs delivered to and shipped by defendant Spies-Thompson Company. Answer was filed praying affirmative relief, viz. that the contract of May 24, 1919, be annulled and held for naught. The case was heard upon pleadings and proofs.

"Questions Involved.

"There are two main questions involved, viz.: (a) Whether the contract in question is one a specific performance of which could in any event be decreed; and (b) Whether or not, if the court has jurisdiction, the proofs entitled plaintiff to a decree.

"(a) Both parties construe the contract in

question to be one for the sale and delivery of personal property. Defendants contend that this case is not properly brought in equity, because, they say, the plaintiff, if wronged, has an adequate remedy at law; and further, that the particular contract here involved is so vague, indefinite, and uncertain in its terms that the court could not in any event decree specific performance of it, citing, among other authorities, *Blanchard v. Railway Co.*, 31 Mich. 43, 18 Am. Rep. 142, and 6 Ruling Case Law, 59, while plaintiff cites in opposition *Williamson v. Neeves*, 94 Wis. 656, 69 N. W. 806; *Bull v. Bell*, 4 Wis. 54; *Docter v. Hellberg*, 65 Wis. 415, 27 N. W. 176; *White Marble Lime Co. v. Consolidated Lumber Co.*, 205 Mich. 634, 172 N. W. 603; *Dells, etc., Co. v. Lbr. Co.*, 170 Wis. 19, 173 N. W. 317; *St. Regis Paper Co. v. Santa Clara Lbr. Co.*, 186 N. Y. 89, 78 N. E. 701.

"There can, I think, be no doubt that this court has full jurisdiction of the subject-matter of this suit. The Uniform Sales Act (C. L. 1915, § 11899) provides:

"*Specific Performance.*—Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just."

"But specific performance of a contract is not a matter of absolute right. It rests in the sound judicial discretion of the court. *McMurtrie v. Bennette*, Har. 124; *Weed v. Terry*, 2 Doug. 344, 45 Am. Dec. 257; *Smith v. Lawrence*, 15 Mich. 499; *Chambers v. Livermore*, 15 Mich. 381; *Rust v. Conrad*, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720; *Chapman v. Morgan*, 55 Mich. 124, 20 N. W. 820; *Hicks v. Turck*, 72 Mich. 311, 40 N. W. 339. Where specific performance will remedy the breach more adequately than damages, it may be decreed. *Peer v. Kean*, 14 Mich. 354; C. L. 1915, § 11899. However, it will not be decreed where continuous duties of regulation or supervision would rest on the court. *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514; *Blanchard v. Ry. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Voorhies v. Frisbie*, 25 Mich. 476, 12 Am. Rep. 291; *Buck v. Smith*, 25 Mich. 125. And the contract must be complete. No specific performance is granted where essential details are omitted. And the court will not decree specific performance of a part only of a contract, unless such part is clearly severable from the remainder. *Gates v. Gamble*, 53 Mich. 181, 18 N. W. 631; *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514; *Wardell v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814; *Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374; *Maynard v. Brown*, 41 Mich. 298, 2 N. W. 30; *Baldwin v. Fletcher*, 48 Mich. 604, 12 N. W. 873; *Wiegert v. Franck*, 56 Mich. 200, 22 N. W. 303; *Munro v. Edwards*, 86 Mich. 91, 48 N. W. 689; *Blanchard v. Railway Co.*, *supra*. As stated in the latter case:

"The jurisdiction of equity in specific performance proceeds on the supposition that the parties have not only agreed, as between them-

selves, upon very material matters, but that the matters so agreed on are of such a nature, and the subjects of enforcement so delineated or indicated, either directly or by reference to something else, or so raised to view by legitimate implication, that the court can and may collect, and in their proper relations, all the essential elements, and proceed intelligently and practically in carrying into execution the very things agreed on and standing to be performed."

"See, also *Wiegert v. Franck*, 56 Mich. 200, 22 N. W. 308.

"*Dells & Co. v. Lumber Co.*, 170 Wis. 19, 173 N. W. 317, is clearly distinguishable from this case on the facts. There was a 10-year contract, quite specific in its provisions, and made more specific and certain by a 3 years' course of dealings thereunder by the parties. See *Engle v. White*, 104 Mich. 15, 62 N. W. 154. *White Marble Co. v. Consolidated Lbr. Co.*, 205 Mich. 634, 172 N. W. 603, is more in point than the *Dells Case*, but the contract there is also much more definite in terms and had been proceeded under for some time. Each of the last-mentioned cases—that is, the *Dells Case* and the *White Marble Case*—is clearly distinguishable from the case at bar in this: That here quite a satisfactory showing is made that there was other timber of like kind available (though at a higher price) in the vicinity where the logs in question were situated, and the plaintiff made no effort of any consequence to get logs elsewhere, while in the other cases just mentioned it was quite conclusively proven that the very existence and continuance of the respective plaintiff's business depended upon their getting the very commodity which they sought the aid of the court to obtain. I find it unnecessary in this case, however, to decide whether or not the terms of the contract are such that a decree for specific performance of the same could be entered.

"The undisputed testimony shows that the timber in question was, when the contract in question was entered into, recently purchased by *Anderson & Corwin*. Mr. Corwin testified:

"Q. Now, when you entered into the contract with Mr. Phillips, or the Diamond Lumber Company, was there any peculiar feature regarding that deal that induced you to enter into the contract at those prices? * * * A. Yes; there was.

"Q. What was that? A. We needed the advances.

"Q. Did you or did you not advise Mr. Phillips that you needed advances? A. Yes; while we made the deal.

"Q. And was that why it was entered into the contract that the advances should be made? A. Yes, sir."

"Mr. Phillips was sworn as a witness, but did not (directly at least) deny this. Mr. Corwin also testified without contradiction:

"Q. When did you first talk with any one about the way that spur would be installed, the one that you agreed to install under the contract? A. Before we made the contract there was some talk about it.

"Q. With whom? A. With Mr. Phillips.

"Q. That is, that you were going to install a spur from which the cars were to be loaded? A. Yes, sir.

"Was there anything said at that time as to how the spur would lead off? A. Yes; there was some talk about that too.

"Q. What was that? A. I think I made the remark that we figured to put the spur in at about that point on account of loading bark, and it might lead that way.

"Q. You told him at that time? A. Yes, sir.

"Q. And what did he say? A. He said if we did he would have Mr. Boyd connect up from the other way.

"Again, referring to his talk with Mr. Boyd before Mr. Boyd wrote the letter of the 19th, Corwin testified:

"He told me we were heading the spur the wrong way. I told him of my talk with Mr. Phillips. He didn't know anything about that part of it.

"Q. You told him about your talk with Mr. Phillips; that you had told Mr. Phillips you intended to head the spur in leading down grade instead of up grade off the track? A. I told him it might go in that way; we didn't know which way it would go in yet."

"The written contract did not specify how the spur should be put in. The title to the logs was supposed to pass to plaintiff when the logs were scaled by a scaler chosen by both parties and decked at the track. Anderson & Corwin under the contract had nothing to do with the loading or hauling away of the logs. They put the spur in in good faith and in a way which was most beneficial to them. The spur as they put it in was serviceable as such. They were not (especially in view of what Mr. Corwin said to Mr. Phillips) bound to put the spur in in the way which would be most convenient and beneficial to the plaintiff, and thereby render it less beneficial to themselves. It was staked out by the roadmaster of the railway company and was apparently satisfactory to the railway company. It was not put in as the blueprint attached to the contract of the railroad company specified; but this contract and blue print was delivered to Anderson & Corwin long after the spur was laid out and staked out. Some objection was made by Mr. Bell, a C., M. & St. P. railway conductor who worked on the White Pine branch, but his authority to interfere in the matter is not made apparent. How far the work of constructing the spur had proceeded when Mr. Boyd first spoke to Anderson & Corwin about the matter is not clear, but undoubtedly they had then spent considerable money on it. When Mr. Boyd spoke to Mr. Corwin, Mr. Corwin told him of his (Corwin's) previous conversation with Mr. Phillips. Mr. Boyd did not until then know anything about this. Afterwards he wrote Anderson & Corwin the letter of the 19th. About 20 days thereafter Mr. Phillips had the talk with Mr. Corwin. He (although there is no showing that Mr. Corwin was aware of the fact) was then unaware that Mr. Boyd had written the letter of the 19th, because he testified:

"Q. Mr. Boyd had written them, you knew, that you wanted a Y? A. No; we both objected to the way they were putting the track in.

"Q. Mr. Boyd asked for a Y? A. I don't know about that.

"Q. You don't know about that? A. No.

"Q. You thought a passing track should be put in? A. We were trying to figure out the easiest way to handle it."

"The testimony and correspondence shows that both Mr. Phillips and Mr. Boyd were of the opinion that it was the duty of Anderson & Corwin to consult Mr. Boyd, and be governed

by what he determined as to how the spur should be put in; but, even if that duty existed under the written contract (a question I need not and do not determine), it certainly did not exist in view of what Mr. Corwin and Mr. Phillips had said about the matter during the negotiations. According to that Mr. Phillips was to have Mr. Boyd connect the spur up if that was necessary. The spur, if connected up, would be just as convenient for plaintiff's use, and just as safe for everybody as any other spur on the branch. It is undisputed that plaintiff insisted that Anderson & Corwin should put in the Y or passing track at their own expense. The evidence shows that this would cost upwards of \$700. This, especially in view of the fact that the price of timber had materially increased after the contract in question was made, was asking quite a little of Anderson & Corwin. I do not think the plaintiff was justified in taking the position it did with reference to this spur.

"Now, reverting briefly to the advance payment question. The contract provided that a \$2,000 advance should be made (unconditionally) on June 1, 1919; that a further \$2,000 advance should be made on June 15, provided that at that time the sellers had \$1,000 worth of logs decked, and that another \$2,000 advance should be made (unconditionally) on July 1. The June 1 payment was promptly paid. See Exhibit 2. Plaintiff's letter of June 18th called Anderson & Corwin's attention to the June 15th advancement. The provision that the sellers should have \$1,000 worth of logs decked in order to become entitled to this advancement was evidently intended to insure plaintiff that the previous advance money would be expended towards the fulfillment of the sellers' part of the contract. Mr. Phillips' testimony shows that when he wrote the letter of the 13th he believed that the sellers were proceeding in good faith to carry out their part of the contract. Plaintiff had a right, at its option, to insist upon or waive the condition attached to the June 15th advancement. C. L. 1915, § 11842. He had instructed Mr. Boyd to keep his eye on the work, and was in a position to know what was going on at Anderson & Corwin's operations. The latter's letter of June 16th also showed what they were doing. They did not have the scaler at work (in fact it does not appear that the parties ever agreed on a scaler), and had not started to skid; but they were laying a narrow gauge track, had between 4,000 and 5,000 logs cut and swamped, and had loads all cut, as well as landings at the track. They did not understand that plaintiff expected they were going to make any report of logs decked until after July 1st. Plaintiff's letter (written by Mr. Phillips) of July 19th, states: 'We were more interested in finding out if you have any logs decked along the railroad than anything else. We believe our contract provides for making certain payments providing you had them out there.'

"Mr. Phillips apparently was not certain of the contents of the contract at the time. Anderson & Corwin's reply, dated June 24th, takes issue with Mr. Phillips on this belief. It states: 'Mr. Corwin showed your letter to Mr. Anderson, and he said the contract called for \$2,000, to be paid by June 15th.' The postscript to this letter adds: 'Mr. Corwin hoped you could

send check by return mail.' Now, I think it is apparent that this postscript referred to the check due June 15th, and not the one due July 1st, or any other check. Mr. Phillips in reply says: 'We are inclosing our check for \$2,000 as requested,' and he adds, 'We believe the contract states that we were to pay \$2,000 June 15th, providing you had that amount of logs decked at the railroad track.' The contract only required the sellers to have \$1,000 worth of logs decked on June 15th. This contract was made by Mr. Phillips and Mr. Corwin. Anderson personally had nothing to do with its making except to sign it. Corwin, on receiving Phillips' letter of the 19th, referred it to Mr. Anderson. Mr. Anderson said there was \$2,000 due June 15th unconditionally. Corwin causes this statement to be made known to Mr. Phillips who, apparently without taking the trouble to look at the contract and ascertain what it in fact provided, yielded and sent the \$2,000 'as requested,' with the parting shot that he still believed the contract required the logs to be decked on June 15th. It is apparent that plaintiff did not regard the provision in question as material. It would suffer no detriment by waiving the provision. Unless the plaintiff waived this provision it must be held that Anderson & Corwin forfeited the right to the June 15th advancement, which Mr. Corwin testifies they needed. While a waiver of rights, and especially stipulated rights, is not to be implied from slight circumstances, a waiver will be assumed from slight circumstances when no substantial rights are lost thereby, or to avoid a forfeiture. *Bird v. Hamilton*, Walk. Ch. 361; *Gault v. Van Zile*, 37 Mich. 22; *Snyder v. Judge*, 80 Mich. 511, 45 N. W. 596; *Lyon v. Insurance Co.*, 55 Mich. 142, 20 N. W. 829, 54 Am. Rep. 854. Plaintiff, in its letter of June 25th, says: 'We would be glad to see you begin to get the logs to the track.' Anderson & Corwin did this. They had over \$1,000 worth of logs decked at the track on July 1st, when the third and last advance installment became due under the contract. If the sellers had decked \$1,000 worth of logs by June 15th, they would unquestionably have been entitled to a \$2,000 advance on June 15th. They would also, under such circumstances, have been entitled to a further \$2,000 advance on July 1st, even though they had not decked a single log after the 15th. Therefore they were in exactly as good a position (in so far as the decking of logs was concerned) on July 1st, when the last advance payment fell due, as they had a right, under the contract, to be if the sellers strictly complied with the terms of the contract. The provision that \$1,000 worth of logs should be decked on June 15th was therefore waived. The advance payment due July 1st was never paid. Plaintiff breached the terms of the contract by its nonpayment.

"Having concluded that the July 1st advance payment has not been paid, and that the plaintiff did not have the right to take the position which it did regarding the spur, it remains to be determined whether or not either or both of these facts operated to release the defendants, Anderson & Corwin, from their obligations under the contract, and to justify them in refusing to deliver the logs.

"Plaintiff contends that defendant should not be released because it (the plaintiff) did not positively or unconditionally refuse to go on

with the contract if the spur was not changed, and that the failure to pay the July 1st advance, if that obligation existed, being done under misconstruction of the contract, was not such a breach as would operate to discharge the sellers—citing *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 186 N. Y. 89, 78 N. E. 701; *Hardeman & Lbr. Co. v. Hampton Bros.*, 104 Tex. 585, 142 S. W. 867; *Kilgore v. Baptist Educational Association*, 90 Tex. 139, 37 S. W. 598; *Brady v. Oliver*, 125 Tenn. 595, 147 S. W. 1135, 41 L. R. A. (N. S.) 60, Ann. Cas. 1913C, 376, and other cases. The Uniform Sales Act of Michigan (C. L. 1915, § 11896) provides that:

"*When Seller may Rescind Contract or Sale.*—Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer."

"See, also, section 11892, C. L. 1915. This act was passed in 1913. In *Scheible v. Klein*, 89 Mich. 376, 50 N. W. 857, the plaintiff brought suit to recover a sum claimed to be due him under a verbal contract for the construction of a building. The contract price was \$2,275. Plaintiff claimed the arrangement was to be that he was to get the money from the defendant at any time whenever he wanted it, except for the last \$75. Defendant claimed he was to pay all but \$75 at the completion of the job and the remaining \$75 the following spring. Before completion of the building, and after plaintiff had put about \$1,400 of labor and material into it, he asked defendant to pay him \$1,000 that he might pay his men, and for the material. Defendant refused, claiming she was not to pay till the building was completed, but offered plaintiff \$200, which he refused to accept. Plaintiff then quit the job. On the trial the plaintiff claimed he quit the job for another reason; but defendant claimed he quit because she refused to give him the \$1,000 demanded. The court, *inter alia*, said:

"The plaintiff testified that all the money except the \$75 was to be paid as the work progressed, and that he told the defendant at the time the contract was made that he must have his money as the work progressed to pay his men and to pay for the lumber; and that defendant then stated to him that he should have his money whenever he wanted it. It also appeared upon the trial that at the time when plaintiff demanded the \$1,000, the sum of \$1,400 and upwards was due, and that the amount for lumber and material and labor exceeded the \$1,000 which he demanded. * * *

"We think that under the contract as claimed by plaintiff the court might properly have said to the jury that, if they found the contract as plaintiff claimed, then upon the refusal of the defendant to pay the \$1,000 plaintiff was justified in quitting the job."

"See, also, *Town v. Jepson*, 133 Mich. 673, 95 N. W. 742.

"We have not here a case of failure to pay for an installment of goods. This breach affected the entire contract. It went 'to the root of the matter' as the old cases say. The withholding of such an amount of money has often ruined contractors and jobbers like these. The

testimony shows that the sellers in this case, at the time the contract was made, were induced to enter into the contract at the price they did because they needed advances; that they advised plaintiff that they needed the advances; and that that was why it was provided in the contract that the advances should be made. This is undisputed. The testimony of Mr. Corwin is not very clear and positive that he demanded the July 1st payment of Mr. Phillips when Mr. Phillips was at Camp Tolfree. He simply says that he called Mr. Phillips' attention to it, and said he thought they had some money coming, and that Mr. Phillips' only reply was that he 'didn't care anything about that.' Corwin does not say Mr. Phillips refused to pay the money then. On the contrary, he says he thought he would send it when he got back to Green Bay. But when Mr. Phillips went back to Green Bay and sent on the other money without paying this, then Mr. Corwin evidently changed his mind, and wrote, in his letter of July 12th, containing the following: '* * * You seem to be dissatisfied and have not made your payments according to contract. * * * The essence of the contract was that you advance us certain money, which you have not done, so we figure we haven't any contract with you anyway. Not receiving the money as agreed has placed us in a very embarrassing position.' Plaintiff in its answer took the positive position that it was not obliged to pay this because it paid the \$2,000 about June 20th, and states: 'We have complied fully with our part of the contract,' and later, 'If we have not complied fully with our part of it, we are willing to leave it for the courts to decide.' Again, on July 23, 1919, the sellers (or Mr. Corwin for them), with the assistance of counsel, wrote plaintiff calling its attention to these two breaches, and giving notice of rescission because of them, and plaintiff, in its letter of August 4th replied: 'On May 28, we sent you \$2,000 covering the first payment as per contract, and on June 15th you had not started to deck logs at the track, so there was nothing due you, and on June 24 we sent you \$2,000 covering payment due July 1. This is all in accordance with the terms of the contract.'

"Anderson & Corwin, if they have ever done so, did not put it out of their power to fulfill their part of this contract until about July 25th. The situation was unchanged except as to the sellers' notice of rescission. It could have, up to that time, retracted its refusal to go on with the contract and gone on with the same. 9 Cyc. 637; Wigent v. Marra, 130 Mich. 609, 90 N. W. 423. Plaintiff's letter of August 4th indicates that it did not even then know that they had resold the logs. It did not deny when Corwin orally referred to the matter that it did not owe the money. If Mr. Corwin's oral request before July 12th was not a sufficient demand for the money, his letter of the 12th certainly made it incumbent upon plaintiff to pay this advance if it did not desire to suffer the consequences of a refusal to pay the July 1st advance. In Scheible v. Klein, supra, the court said:

"In Grand Rapids & Bay City R. R. Co. v. Van Dusen, 29 Mich. 431, it was held that continued and repeated defaults in payment according to the provisions of the contract justified the contractors in abandoning the work before its completion.'

"Plaintiff could not on July 15th or on August 4th withdraw its waiver of the condition annexed to the June 15th advance. It did not attempt to do so when Mr. Corwin orally requested the money. The failure to pay the July 1st advance must be held to have been a material breach of the contract. Scheible v. Klein, supra; Ry. Co. v. Van Dusen, supra.

"The written contract is silent as to how or where the spur should be put in. The only oral testimony regarding such subject is, in effect, that when the written contract was made plaintiff was told by Mr. Corwin that they might put it in at the place and in the manner which they actually did put it in—that they had not yet decided upon the matter—and that plaintiff replied that if they did so it would connect it up. Instead of doing so plaintiff endeavored to get Anderson & Corwin to do so at their own expense. Mr. Corwin told Mr. Boyd of the original talk with Mr. Phillips when Mr. Boyd first spoke to him. This is undisputed. Yet plaintiff wrote Mr. Corwin on June 19th:

"* * * Unless you put in a connection from the north end and connect up with your present proposed track forming a Y we will have to refuse to go in there on account of the switching, as we are compelled to keep our engine on the north end of the loads at all times.'

"Mr. Boyd afterwards orally substantially reiterated the demand made in this letter. It is true that the same letter suggested a meeting to arrange the matter satisfactorily to both parties, and that Mr. Phillips afterwards suggested a passing track in place of the Y and offered to haul bark and railroad iron in consideration of Anderson & Corwin doing this work. But, as before stated, it would cost a considerable sum to make the change. The installation of a switch alone would require a deposit of \$175. Men were scarce at the time. Anderson & Corwin had a limited time to get out the timber. The value to them of hauling their bark would not be anywhere nearly equal to the expense they would be put to in making the change. The hauling of the railroad iron or changing the tracks would be of no benefit to them. If they needed advances they could ill afford to expend money on such a project as this. Mr. Phillips was evidently aware that he was straining matters by insisting on their doing work. This is apparent from his remark, hereinbefore quoted, to the effect that he was doing everything he could 'to hold the logs.' His remark (see Transcript, 110) that '* * * when I was at the back end of the spur with Mr. Russell, their foreman, he told me that,' is also significant. It is evident that he was aware of the danger of breaking the contract relations by insisting on this change. But he still persisted in his demand. Mr. Corwin wrote him on July 12th that '* * * You said to the writer and our Mr. Russell that you would not accept our spur as we have it laid out,' and he nowhere in his subsequent correspondence denies this. Neither do I discover him to have denied it in his testimony at the trial. The letter of the 12th did not cause plaintiff to change its position. In answer to it in its letter of the 15th plaintiff wrote: 'We were dissatisfied with the way that you have put your spur track in, and why you should go ahead and lay it out without saying something to our Mr. Boyd, who you expect will have to run over it, is beyond our comprehension.' Again, in

their letter of July 23d Anderson & Corwin wrote: 'We have gone to the expense of building this spur and you now claim you will not go on the spur unless we build a Y in connection therewith. This is another breach of the contract,' and (although it apparently did not then know that Anderson & Corwin had resold the logs) it did not in its letter of August 4th deny that it had so refused. The written contract with the Spies-Thompson Company does not, as I read it, cover any specific logs and does not purport to be a contract of Anderson & Corwin, but only of Anderson. It is at least questionable whether or not Anderson & Corwin had, up to August 4th, legally put it out of their power to complete the contract with plaintiff. It seems to me that it must be held that plaintiff positively refused to go in on the spur unless it was changed at considerable expense to the sellers; that such refusal was wrongful; and that its effect (whatever that is) was not changed by the fact that the plaintiff was inclined to compromise the matter by exchanging work, and thereby reducing the expense to the sellers.

'What, then, is the legal effect of such refusal? If the plaintiff had specifically refused to accept and pay for the logs, the question would be clear. Section 11896, supra, clearly grants to the seller the right to rescind under such circumstances. And the rule was the same prior to the passage of that act. *Hosmer v. Wilson*, 7 Mich. 304, 74 Am. Dec. 716; *Platt v. Brand*, 26 Mich. 175; *Wigent v. Marrs*, 130 Mich. 609, 90 N. W. 423. But here plaintiff only refused to accept the spur. Do the above-quoted and similar authorities cover such a situation? This depends, I think, upon the practical effect of the refusal. And what was its practical effect? Under the agreement the sellers were to cut and get out the logs and deck them at the track. They were to be scaled 'by a competent scaler agreed upon by both parties while being put in the decks, and after being so decked' were to become the property of the buyer. They were to be 'decked in roll-ways along the C., M. & St. P. right of way * * * or along a spur track which is to be put in' by the sellers. The spur track which the sellers put in complied with the requirements of the contract. As soon as the contract was made the sellers became entitled to whatever profits they could make, under the prices specified in the contract, by decking logs at this spur, without deduction of the cost of a passing track or the withdrawal of any of their hands from the logging operations for the purpose of putting in a Y or a passing track. At the same time defendant became bound to accept and pay for the logs when scaled and decked at such a spur. The refusal to accept the spur, or go in on the spur, was, then, a refusal to consider the seller's accomplishments as a compliance on their part with the requirement of the contract. It was a refusal on plaintiff's part to perform its part of the contract. It was a demand on plaintiff's part that the sellers do more than the contract required them to, before it would do what the contract required it to do. It was a demand that the contract be materially modified to the seller's detriment and to its material benefit, before it would accept and pay for the property covered by the contract. It was, in substance and effect, a refusal to perform its part of the

contract as it existed, coupled with an implied offer to accept and pay for the property covered by the contract, if, but not unless, the sellers assumed material obligations which the original contract did not impose on them. If there is any difference between the refusal in question here, and an absolute and positive refusal to accept and pay for goods ordered, it is one of degree, and not of kind. I am constrained to hold that the refusal here in question amounted to a renunciation of the contract as made.

'Section 11896, C. L. 1915, provides that 'Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale * * * the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.'

'In *Anson on Contracts* (2d Am. Ed.) pp. 368, 373, 374, it is said: 'It is now settled that a renunciation of a contract by one of the parties before the time for performance has come discharges the other if he so choose. * * * It may also happen that in the course of performance one of the parties may by word or act deliberately and avowedly refuse performance of his part. He may do this by renouncing the contract, or by rendering it impossible of performance. The other party is then exonerated from a continued performance of his promise. * * *'

'In *Hosmer v. Wilson*, 7 Mich. 304, 74 Am. Dec. 716, in speaking of an anticipatory breach of contract by the defendant, the court said: 'The defendants cannot complain that the plaintiff has given credit to their assertion. The law will not require a vain thing. And it is certainly, in such cases, much better for both parties to hold the party thus notified to be fully justified in stopping the work, as it lessens the damages the other party has to pay, and relieves the party who has to do the work from expending further labor, for which he has fair notice he is to expect no payment. And it is certainly very questionable whether the party thus notified has a right to go on after such notice, to increase the amount of his own damages.'

'In the case at bar it so happens that the sellers profited by the resale of the commodity covered by the contract of sale. But this should not be permitted to lead us astray. Supposing there was no other market for the logs in question, that the Y or passing track demanded by the buyer would cost four times as much as it actually would, and that the buyer had (as plaintiff did here) plainly notified the seller that it would not act upon the assumption that the seller had performed his part of the contract unless the seller should construct the Y or passing track. Would it, under such circumstances, be fair or just to require the seller to go on and cut, haul, and deck all those logs in the face of such notice that he need expect no pay therefor, except, perhaps, after a lengthy and expensive lawsuit? I think not. It would, in my opinion, be much more just to rule as was ruled in *Hosmer v. Wilson*, supra, that the refusal 'is to be considered in the same light * * * as an absolute physical prevention' by the plaintiff. See, also, the cases cited in *Roehm v. Hurst*, 33 O. C. A. 550, 91 Fed. 345, which is affirmed in 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

'The language of the court in *L. S. & M. S.*

Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, 46, 47, in which the defendant misconstrued a contract, is apropos: "The evidence tends to show that the defendant * * * manifested and declared its intention to persist in the future in the same course of conduct and to insist upon the same construction of the contract. * * * The correspondence before referred to, as well as other facts shown, may be fairly said to show a fixed determination on the part of the defendant company * * * to persist in and continue the same breaches of its contract in the future of which it had theretofore been guilty—that is, to pursue a course of conduct which would deprive plaintiff's firm of much the larger portion, if not all, of the substantial benefits of the contract. * * * Such construction, in effect, was a repudiation of that part of the contract to be kept and performed by the defendant, and was a denial of the right of plaintiff to have and demand the substantial benefits of the contract as it existed between the parties."

"It follows that a decree must be entered dissolving the injunction heretofore issued herein, and dismissing the bill and releasing the defendants from all liability under the contract of May 24, 1919."

[1] Counsel for appellant say:

"The trial court erred in finding that plaintiff breached the contract by refusing to proceed with its performance unless the defendants Anderson & Corwin constructed a Y or passing track connecting its spur, neither of which was required under the terms of the contract. It is not claimed that there was any actual breach of the contract in question on this subject, but only an anticipatory breach. The plaintiff contends that, under such circumstances, rescission could only be predicated upon an unconditional declaration, in positive terms, of an intention to abandon. They also contend: 'The trial court erred in finding that plaintiff breached the contract by refusing to proceed with its performance unless defendants constructed a Y or passing track connecting its spur, neither of which was required under the terms of the contract.'"

In view of these contentions, even at the expense of prolixity, it may be well to refer to the record again. A reference to the letter of June 13th will show an inquiry was made for the reason, "as next week will be time for further advances upon your contract." June 16th a letter was sent in reply saying in part:

"We did not understand that you expected we were going to make any report of logs decked until after the 1st of July."

June 19th a reply was sent to this saying in part:

"It is evident from your letter that you are not in need of additional money at this time, but the next \$2,000 would be payable July 1st. Unless we hear from you to the contrary we will send you \$2,000 at that time."

June 24th a reply was sent to this letter saying in part:

"Mr. Corwin showed your letter to Mr. Anderson, and he said the contract called for \$2,000 to be paid by June 15th."

A postscript was added, "Mr. Corwin hoped you would send check by return mail." The next day a reply was sent saying in part:

"We are inclosing our check for \$2,000 as requested. We believe the contract states we were to pay \$2,000 June 15th, providing you had that amount of logs decked at the railroad track."

There is not a suggestion in the letter that the \$2,000 is not the June 15th advance, made as requested, and we have no doubt it was so intended and received. Either the plaintiff accepted the construction put upon the somewhat ambiguous language of the contract, or it waived the decking of the logs.

In the meantime a controversy arose about the spur track, and in a letter of June 19th the plaintiff said:

"Unless you put in a connection from the north end and connect up with your present proposed track, forming a Y, we will have to refuse to go in there on account of the switching."

No advance of \$2,000 was made July 1, and the letter of July 12th was sent by defendant. On July 15th plaintiffs replied, saying in part:

"We have complied fully with our part of the contract and intend to do so in the future, and shall expect you to do so also. * * * The only thing for you to do is to get busy and live up to your contract, and if we have not complied with our part of it we are willing to leave it to the courts to decide."

At this time defendants had received but \$4,000 in the way of advances, while they claimed that by the terms of the contract, as construed by the parties, they were entitled to \$8,000 which they needed very much, and that one of the primary reasons for entering into the contract was the matter of the advances, which facts were well known to the plaintiff. The last letter is not an intimation that, if plaintiff has not complied with its part of the contract, it is willing to do so, but it is a plain intimation that a lawsuit is brewing. We think the chancellor was justified in his conclusions, but if there is doubt about the reasons given by him for his conclusion there is another phase of the case that should have attention.

[2] Counsel for the appellee have insisted all the time that, even if there is a breach of the contract, the issue should be tried upon the law side of the court, and not before the equity side. Counsel for appellant invoke relief in equity because:

(a) That the logs in question were so located that the plaintiff could use its loading machinery, men, and locomotives stationed at Tolfree in the loading of such logs; that this consideration was highly important to plaintiff, be-

cause in this way it controlled the flow of logs from the loading points to its mill; that such control is a very great advantage to it as thus it can keep its mill in operation at times when, if the loading were under the jurisdiction of a contractor, such contractor might see fit to load and ship the logs at times when the plaintiff would not require them, or neglect to load at times when it was imperative that plaintiff have logs delivered to its mill in order to keep it in continuous operation.

(b) That it was exceedingly difficult at that time for plaintiff to purchase such logs as those contracted for by the defendants, Anderson & Corwin, and particularly under like conditions.

(c) That if plaintiff's mill were closed down by reason of failure to operate the same, it would be impossible to establish the actual damages caused thereby, and it would seriously affect large numbers of employes of plaintiff.

(d) That the logs contracted to be sold were of the character desired by plaintiff for its manufacturing operations, the same containing, among other things a very high percentage of hemlock, which the plaintiff particularly desired.

(e) That there is no regular market for logs of the kind in question at the place in question, each manufacturer who does not do its own logging, negotiating with various logging contractors for given cuts.

(f) That the terms of the contract were such that it would be impossible to establish the measure of damages resulting from a breach thereof, as, for example, the contract called for several varieties of logs at different prices, and until these logs should be cut and scaled there would be no way of establishing the exact amount of logs of each kind.

They cite in support of this contention a number of authorities, and among them *White Marble Lime Co. v. Lumber Co.*, 205 Mich. 634, 172 N. W. 603. A reference to these authorities will show them readily distinguishable from the instant case.

In the opinion written by Justice Stone in the last-named authority it appears:

"This contract was the reason for, and basis of, the organization of the plaintiff corporation. Pursuant to the plans and agreements of the parties, the Chicago Lumbering Company paid for half of the stock of the plaintiff, which was issued to the stockholders of the lumbering company pro rata, who in that way subsequently received their share of all the profits made by the plaintiff company. Relying upon this contract the plaintiff built a large and expensive plant at Manistique, and has developed a large business."

In the case before us the plaintiff had been a going concern for a long time. There is nothing to indicate its status was changed any more because of the making of this logging contract than it would have been by the purchase of any other 8,000,000 of feet of logs. Counsel for appellant say at the end of their brief:

"The dismissal of the bill was followed by the use of the logs by the Spies-Thompson Lumber Company, so that specific performance is now impossible. It is submitted, however, that the plaintiff ought not to be obliged to institute a new action for relief, and that the proceeding should be remanded to the trial court for assessment of plaintiff's damages."

If testimony is available upon which an equitable assessment of damages can be made, it is difficult to see why it would not be available in an assessment of damages on the law side of the court. The language used by Justice Steere at page 230 of 202 Mich. (168 N. W. 495), in *Toles v. Duplex Power Car Co.*, is very germane here. The case is so recent and so available that we content ourselves by thus referring to it. See, also, *Blanchard v. Railroad Co.*, 31 Mich. 43, 18 Am. Rep. 142.

The decree is affirmed, with costs to the appellees.

TEIG v. LINSTER et al. (No. 22437.)

(Supreme Court of Minnesota. Oct. 14, 1921.)

*(Syllabus by the Court.)***Reformation of Instruments** §44, 45(3)—Evidence held to show mutual mistake in omitting provision; evidence of vendors' increasing insurance held admissible.

The evidence sustains the findings that in the agreement for the sale of a farm there was a provision that the vendor should bear the loss if any buildings thereon should be destroyed before possession was delivered to the vendee, and that such provision was omitted from the written contract through mutual mistake.

There was no error in the admission of certain testimony.

Appeal from District Court, Nicollet County; I. M. Olsen, Judge.

Action by Alfred H. Teig against Nicholas Linster and others. Judgment for plaintiff, and, their motion for new trial or amended findings being denied, defendants appeal. **Affirmed.**

H. L. & J. W. Schmitt and H. W. Volk, all of Mankato, for appellants.

Haycraft & McCune, of Fairmont, for respondent.

HOLT, J. Action for the reformation of a contract for the sale and purchase of a farm. The relief asked was granted, and defendants appeal from the judgment; their motion for a new trial or amended findings having been denied.

Defendants agreed to sell their farm to plaintiff, and on April 12, 1920, they, with plaintiff, went to an attorney to have the agreement reduced to writing and executed. While the contract was being prepared, or just prior to affixing the signature of the parties, the attorney deemed it his duty to advise the parties that under the circumstances of that deal the vendors would have to bear the loss, should the buildings be lost or damaged through fire or other cause. Plaintiff said nothing; but a daughter of defendants, who was there to assist them, demurred to this. Then, at the suggestion of the attorney that they could protect themselves by insurance, and after consulting with defendants, she stated that it was all right and they would take out additional insurance. There is no contradiction on this point, except that the daughter testified that she did not consult with defendants, and they testified they did not hear or understand that the attorney made the statement mentioned. The defendant Mr. Linster was somewhat hard of hearing. Both he and his wife were well advanced in years and understood and spoke the English language with some difficulty. An agent with whom defendants had

listed the farm for sale and another person who had assisted him were also present, and heard what was said when the contract was drawn and signed. Both corroborate plaintiff's claim.

The court found that it was understood and agreed at the time of making the contract, and before signing the same, that the premises described in said contract were to be delivered to plaintiff March 1, 1921, in the same condition as they were on April 12, 1920, reasonable wear and tear excepted, and that any loss or damage to buildings on said premises before March 1, 1921, should be borne by defendants. And also that by mutual mistake and inadvertence of the parties, and because they did believe and understand that the contract as made did so obligate the defendants, the provision above stated was omitted from the contract.

The main contention of appellants is that the evidence does not sustain the findings mentioned. We have examined the record attentively, having in mind the rule that it must be clear and convincing in order to warrant reformation, and reach the conclusion that the findings should stand. That the subject was discussed as to who should bear the loss if the buildings were destroyed before March 1, 1921, was distinctly admitted by the defendants' daughter. The proof is also quite convincing that she acceded to the proposition of the attorney. That she was there to aid and assist the defendants and that plaintiff could rely on what she consented to as their agent is beyond controversy. That the provisions agreed upon, as found by the court, were not inserted in the contract was due to, perhaps, the mistaken notion of the scrivener that in legal effect they were embodied in the instrument he had prepared. He was acting for both parties, and his mistake, if any, which all adopted by acquiescing therein, became a mutual mistake. The authorities are not all one way that the attorney's notion of the law was wrong. 27 R. O. L. §§ 293 and 295, title Vendor and Purchaser. But that is immaterial now. If the provisions were actually a part of the agreement, plaintiff is under the circumstances entitled to have them made a part of the written contract whether they were or were not essential to protect him against the loss the parties had in mind. The rule applicable here is one stated in Wall v. Melke, 89 Minn. 232, 94 N. W. 688, in these words:

"If, however, the parties to an agreement, while in the process of reducing it to writing, fall into error, and the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere, and grant the appropriate relief to the same extent as if the failure of the writing to express the real contract was caused by mistake of fact."

The terms of the deal made it of some importance to the parties that they have an understanding as to who should bear the loss in case of destruction of the buildings. The vendors were to remain in possession and have the use and care of the premises for almost a year, and during that time interest did not run on the unpaid purchase price. It is true, each could protect his interest by insurance. But it was important to know who should secure this protection. The attorney, appreciating the situation, deemed it proper and rightly so, to bring the matter to the attention of the parties. Their attention having been aroused, it is not difficult to reach the conclusion that an agreement was reached with reference thereto.

It is claimed that the court erred in admitting proof that defendants thereafter increased the insurance on the buildings. We think not. Subsequent conduct of a party in relation to a matter may throw some light as to the existence of a prior agreement with reference thereto.

The judgment is affirmed.

WULKE v. WULKE. (No. 22316.)

(Supreme Court of Minnesota. Oct. 14, 1921.)

(Syllabus by Editorial Staff.)

Divorce §172—Cruelty, justifying spouse in living apart, may not entitle to divorce.

The cruelty which justifies one spouse in living apart from the other may not entitle to a divorce, so that a decree denying the wife a divorce for cruelty and misconduct is not res judicata, in the husband's subsequent action based on desertion, as against the wife's defense, that she was compelled by the husband's cruelty to leave his home.

On rehearing. Former decision adhered to. For former opinion, see 183 N. W. 349.

HOLT, J. In the petition for reargument the case of *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766, was cited as decisive of the question that the cruelty alleged in the divorce action brought by this defendant, and determined against her, is res adjudicata on the proposition that she had no just cause to live apart from him, because, if she had such cause, the court should have therein awarded separate maintenance under section 7140, G. S. 1913.

The issue in the instant case was desertion. Unless the wife had willfully deserted the husband he had no cause of action. The court found against him on that issue. Even though the finding in the former case was that her allegations, that she was compelled to leave defendant because of his cruelty and

misconduct, were not true, she might nevertheless be justified in temporarily living apart. The question in the *Wagner Case* was whether the wife, having been denied an absolute divorce on the ground of cruelty could thereafter maintain an action for a limited divorce predicated upon the same acts of cruelty. It was rightly held she could not. There is no difference in the degree of cruelty which justifies a decree for an absolute and one for a limited divorce. But the cruelty which justifies a spouse in living apart from the other may not entitle to a divorce at all. In the instant case the wife was permitted to withdraw her counterclaim for a limited divorce. So that the only issue remaining was whether her living apart was a willful desertion. If the finding that it was not is sustained, and we think it is under the rule of *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668, the judgment must be affirmed, for no error is assigned as to the part granting separate maintenance.

The former decision is adhered to.

ALTON et al. v. MERRITT et al. (SANDIN, Intervener). (No. 22474.)

(Supreme Court of Minnesota. Oct. 14, 1921.)

(Syllabus by the Court.)

Brokers §88(1)—Evidence in action for commission held to present issues of fact for jury.

In an action to recover a real estate broker's commission the evidence is held to present issues of fact for the jury, and that the trial court erred in directing a verdict for defendants.

Appeal from District Court, Martin County; E. C. Dean, Judge.

Action by Fred Alton and others against O. W. Merritt and others, in which Frank A. Sandin intervened. Directed verdict for the defendants, and from an order denying new trial plaintiffs appeal. Order reversed.

Haycraft & McCune, of Fairmont, for appellants.

Allen, Seifert & Allen, of Fairmont, for respondents.

BROWN, C. J. This cause was here on a former appeal where the facts are stated. 145 Minn. 426, 177 N. W. 770. On the remand of the case a trial was had on which plaintiff tendered evidence which he claimed disclosed that he had produced to defendants a purchaser ready, able and willing to purchase the land in question on the terms named by defendants; that they sold the land to him, though at a higher price than that for which

plaintiff was authorized to sell. The evidence presented in the record tends to sustain plaintiff's claim and further that a purchaser for the land was procured by him within the time limit fixed by his listing contract. The court at the conclusion of the trial, both parties having rested on the evidence presented by plaintiff, directed a verdict in favor of defendants. Plaintiff appealed from an order denying a new trial.

We have read the evidence with care and reach the conclusion that the issues presented by the pleadings should have been submitted to the jury, and that the court erred in directing a verdict. Whether plaintiff was the procuring cause of the sale was made by the evidence a question of fact. *Esterly-Hoppin Co. v. Burns*, 135 Minn. 1, 159 N. W. 1069; *Henninger v. Burch*, 90 Minn. 43, 95 N. W. 578; *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426.

In view of a new trial we refrain from discussing the evidence; it is sufficient that we have read it and find therein sufficient to raise a question for the jury, and there we dismiss the subject. The inferences to be drawn from the present state of the evidence may be overcome when defendants are heard in full.

Order reversed.

RENNER v. MODEL LAUNDRY, CLEANING & DYEING CO. et al. (No. 33790.)

(Supreme Court of Iowa. Sept. 30, 1921.)

1. Master and servant §382—Consideration for compensation claimant's covenant not to sue third person held not allowable in reduction of claim.

Under the Workmen's Compensation Act (Code Supp. 1913, § 2477m6), providing that where employé's injury has been caused under circumstances creating a legal liability in some person other than the employer the compensation shall be reduced by amount of damages recovered, the employers of one injured in a collision with a railway company's street car are not entitled to the benefit of a payment to the injured by the company in consideration of his covenant not to sue, unless circumstances creating a legal liability on its part are shown.

2. Master and servant §403—Burden of proof on employer seeking reduction of compensation to employé covenanting not to sue third person.

Under Workmen's Compensation Act (Code Supp. 1913, § 2477m6), authorizing reduction of amount of compensation by amount of damages recovered from third person liable for damages sustained, where the obligation to pay compensation to an employé injured by a third person who has paid him money in consideration of his covenant not to sue is admitted by his employers, who seek to have his compensation from them reduced by that amount, the burden is on them to prove that he has in fact

recovered damages, and not upon him to negative such recovery; and this is a substantive rule of law which cannot be ignored, though under the act (Acts 37th Gen. Assem. c. 270) Industrial Commissioner is not hampered by technical rules of evidence.

3. Master and servant §389—Compensation claimant's covenant not to sue third party held not to defeat subrogation.

Injured employé, entitled to compensation under Workmen's Compensation Act for injuries by a third party, cannot by agreement not to sue third party deprive employer, or his insurer, of the right of subrogation to employé's right to recover damages against third person under Code Supp. 1913, § 2477m6.

4. Release §55—One who claims covenant not to sue to have been intended as unqualified release has burden of so proving.

If a covenant not to sue may be shown to have been intended as an unqualified discharge or release, burden of proof is upon the party seeking to fasten such character upon the instrument to produce evidence justifying such conclusion.

5. Master and servant §382—Compensation claimant's covenant not to sue third person held not a release of liability for "damages."

In the absence of evidence that a street railway company was liable for a wagon driver's injury in a collision, or that he charged it with liability, his covenant not to sue it in consideration of a payment will be given effect "according to its terms, and not as a release of liability for damages" within Workmen's Compensation Act (Code Supp. 1913, § 2477m6), providing that where employé's injury has been caused under circumstances creating a legal liability in some person other than the employer, the compensation shall be reduced by amount of damages recovered.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Damage—Damages.]

6. Release §37—Covenant not to sue does not discharge from liability any person other than the covenantee.

A covenant not to sue unless shown to have been otherwise intended does not operate to release or discharge from liability any person other than the covenantee.

7. Release §7—Covenant not to sue legitimate contract.

A covenant not to sue is a legitimate contract.

8. Contracts §73—Covenant not to sue a sufficient consideration for payment by covenantee.

A covenant not to sue is a sufficient consideration to support payment to covenantor by covenantee.

9. Master and servant §382—Showing required for reduction of compensation to claimant covenanting not to sue third person.

To entitle employers to a credit under Workmen's Compensation Act (Code Supp.

1913, § 2477m6) upon compensation payable to a claimant injured by a private corporation from which he has received money in consideration of his covenant not to sue, declaring in terms that it is not a release, it must affirmatively appear that the money received was in legal effect a recovery of damages; the covenant not amounting to a release, though the covenantee and the employers were not joint tort-feasors.

Appeal from District Court, Black Hawk County; Geo. W. Dunham, Judge.

Action at law to recover compensation under the Workmen's Compensation Statute (Code Supp. 1913, §§ 2477m to 2477m51). Judgment for plaintiff, and defendants appeal. The material facts are stated in the opinion. Affirmed.

Johnson, Donnelly & Swab, of Cedar Rapids, for appellants.

Pickett, Swisher & Farwell, of Waterloo, for appellee.

WEAVER, J. On July 25, 1917, A. B. Bodine, since deceased, was an employé in the service of the defendant laundry company, and in pursuance of such employment was driving a laundry wagon in the streets of the city of Waterloo. While thus engaged, a collision occurred between the wagon and a street car operated by the Waterloo Cedar Falls & Northern Railway Company. In this collision, Bodine was severely injured. Soon after the injury the insurance carrier, Fidelity & Casualty Company, undertook to pay the injured employé compensation at the rate of \$7.61 per week, and did pay him at that rate for a period of about three months. Thereafter said company refused to make further payments, alleging as grounds for such refusal, that Bodine had made a settlement with the street railway company for the same injuries, and received payment therefor to the amount of \$750, being a sum in excess of the amount which the employé could recover as compensation under the statute, and because of such settlement with the railway company the employer and his insurer are both released from further liability.

Upon defendant's refusal to make further payment Bodine applied to the State Industrial Commissioner for the appointment of a committee of arbitration to consider his claim. After hearing the evidence, two of the committee of three united in finding and reporting that—

"Were it not for the connection of the Waterloo, Cedar Falls & Northern Railway Company with the case and the payment by it to claimant on account of his injury, the claimant would be entitled to receive from defendant compensation at the rate of \$8.38 per week, beginning with the date of the accident and continuing 105 weeks."

In addition to such statement, the majority of the committee further found that be-

cause of the payment by the railway company to the claimant the compensation which would otherwise be his due from the defendants should be reduced or diminished by the sum of \$750. The third member of the committee, Judge Williams, filed a minority report, dissenting from the conclusion so announced. The claimant having filed a petition for review, the matter was reheard by the Industrial Commissioner, who sustained the majority report of the committee. It should also here be said that pending this appeal to the Commissioner, the claimant Bodine died, and the administrator of his estate, W. C. Renner was substituted as plaintiff. Further appeal was prosecuted by the administrator to the district court, which upon consideration of the record reversed the ruling of the Commissioner and entered judgment for the plaintiff for the full amount of unpaid statutory compensation which had accrued up to the date of Bodine's death, without any deduction on account of the money received by the deceased from the railway company. From that judgment defendants have appealed to this court.

The evidence as disclosed by the record is very brief. It is conceded that Bodine was an employé of the laundry company, and while engaged in its service suffered an injury in a collision which occurred between the wagon driven by him and a street car. It is also conceded that after the collision the injured man was visited by a representative of the railway company with whom he entered into a written agreement, which after a formal preamble provides as follows:

"The railway company in consideration of the said Bodine covenanting not to sue the said railway company or any of its officers, servants or employes for or on account of injuries sustained by him in the collision referred to in the preamble hereof, hereby agrees to pay to the said Bodine the sum of seven hundred and fifty (\$750.00) dollars and the said Bodine in consideration of the payment to him by the said railway company of the said sum of seven hundred and fifty (\$750.00) dollars hereby covenants and agrees not to sue the said railway company or any of its officers, servants or employes for or on account of the injuries or damages sustained by him in the aforesaid collision, and the said Bodine hereby acknowledges receipt of the said sum of seven hundred and fifty (\$750.00) dollars from the railway company. It is hereby expressly understood and agreed that this instrument is not a release of the said railway company nor to said Bodine's employer or the insurer of said employer under the Workmen's Compensation Act of the state of Iowa, nor to any other corporation, firm, or person, but is simply a covenant not to sue the said railway company, its officers, servants or employes, on account of the injuries above mentioned."

The consideration of \$750 mentioned in the writing was received and retained by Bo-

dine. Prior to this transaction the laundry company's insurer, the defendant Fidelity & Casualty Company as we have already said, had undertaken to pay Bodine compensation at the rate of \$7.61 per week, and did make such payments for a period of three months, when it refused further payment on the ground that it had been relieved of further liability to the extent at least of the sum which Bodine had received from the railway company. Aside from the bare fact that there was a collision between the wagon and the car, and that Bodine sustained an injury therein, there is no testimony as to the attending facts and circumstances, and if either party to such collision was chargeable with negligence or wrong, we are without any evidence of it. There is no evidence that Bodine made or presented any claim against the railway company on account of his injury, and as to the intention of the parties in making the agreement there is no showing except as it is revealed in the writing itself and the testimony of the railway's representative, who says:

"The purpose of the covenant not to sue was not to settle the question of liability."

The Industrial Commissioner adopted the finding of the majority of the arbitration committee that the claimant was entitled to receive compensation under the statute, but that, having received \$750 from the railway company, the compensation so payable should be reduced by that amount. In reaching this conclusion the Commissioner held that the burden was upon the claimant to establish the fact that the money received from the railway company was not a recovery of damages within the meaning of the statute, and laid down the proposition that the payment of the money by the railway company was a "definite recognition of liability."

With the foregoing statement of the substance of the record and attitude of the parties, we turn to the questions of law so presented.

[1] I. The authority for reducing the compensation due to Bodine as was done by the arbitration committee and Industrial Commissioner is to be found, if at all, in that part of the compensation statute which provides as follows (Code Supp. § 2477m6):

"Where an employé coming under the provisions of this act received an injury for which compensation is payable under this act and which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof: (a) The employé or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered. (b) If the employé or beneficiary in

such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employé to recover therefor."

It will be seen from the reading that the first or introductory sentence of the section prescribes the condition under which its provisions shall have application, and that is an injury to the employé "caused under circumstances creating a legal liability in some person other than the employer to pay damages." The remainder of the section provides that (a) when such situation appears, that is, "legal liability in some person other than the employer," the injured employé may proceed against his employer for compensation under this statute and at the same time maintain an action against the other person for damages as at common law, but in such case the compensation recoverable from the employer is to be reduced by the "amount of damages recovered" from the third person. It further provides (b) that if the employé recovers compensation from his employer under such circumstances, that is where the injury was caused under circumstances creating a legal liability in some other person to pay damages, the employer or insurer who has been called upon to pay compensation is "entitled to indemnity from the person so liable to pay damages * * * and shall be subrogated to the rights of the employé to recover therefor."

Counsel on either side have cited and discussed the rules and principles bearing upon the effect of a release of or satisfaction by one or more joint tort-feasors, and of the common-law or equitable right of subrogation in certain cases, but except as these rules and principles may be thought to afford aid by way of illustration or analogy, they are somewhat beside the question with which we here must deal. The rule that the release of one joint tort-feasor works the release of all has its root and origin in the generally accepted doctrine that joint tort-feasors are jointly and severally liable for the damages resulting from their tort, and the law will not undertake to apportion such liability between the individual wrongdoers. The injured party may pursue one or all, and may recover full satisfaction from any one of them; but as he is entitled to only one satisfaction for a single wrong, his release given to, or his recovery of such satisfaction from one operates as a release of all the wrongdoers.

The instant case does not come within this rule, for here there is no joint tort, no common liability. Neither is there any such relation between the parties that Bodine's employer or its insurer can, independent of the

statute, rightfully demand subrogation to Bodine's right of action, if any he had, against the railway company. In short, if the employer or its insurer has or ever had any right to maintain an action against the railway company or to claim the benefit of any payment by the railway company to Bodine, it must be found in the terms of the statute we have above quoted. That statute is to be read into the contract of employment, and if the proved or conceded facts are such as are there provided for, then the defense pleaded is to be held good, otherwise it is without merit. What then does the statute prescribe as the basis or foundation of the right which the appellants assert? The opening declaration of the statute states the first essential condition to be that the employé's injury has been "caused under circumstances creating a legal liability in some person other than the employer." If that condition appears, the employé, while claiming compensation from his employer, may maintain a separate action at common law to enforce the "legal liability" of such person other than the employer; but if he establishes such claim the amount of compensation to which he is entitled from his employer is to be reduced by the amount of damages recovered from "the other person." It is then further provided that if the employer (or insurer) has paid the compensation provided for by the statute he is entitled to indemnity from the person so liable to pay damages, and shall be subrogated to the rights of the employé to recover therefor. The provisions of the quoted section of the act (Code Supp. § 2477m6) are not in the least ambiguous, obscure, or uncertain. The language is not open to construction. The rights and remedies therein provided may be exercised or invoked only where the injury to the employé has been "caused under circumstances creating a legal liability in some person other than the employer." Without this foundation there is nothing upon which to construct the pleaded defense. This record is, as we have before noted, wholly without evidence of the "circumstances" under which Bodine was injured, except the simple fact that it occurred in a collision between the wagon he was driving and a street car. There is neither allegation nor proof of any fact or facts to indicate "legal liability" of the railway company. This alone would seem a decisive objection to the position of the appellants.

[2] II. In considering the question as to the application of this statute to the issue raised by the defendant's answer, the Industrial Commission held that the claimant, having admitted the receipt of money from the railway company, the burden was upon him to show that it was not a recovery of damages, and, having failed in this respect,

defendants are entitled to have his compensation from them reduced by that amount. Such, also, is in substance the position taken by the defendants on this appeal. In this the Commissioner and the appellants are manifestly in error. The claimant's right to compensation had been established and was conceded by the defendants, but in this proceeding they advance an affirmative plea by which they seek to be relieved in whole or in part from its payment. As an affirmative plea in avoidance of an admitted obligation, the burden is upon them to prove that the claimant has in fact "recovered damages" from the railway company, and not upon the claimant to negative such alleged fact. That the statute clothes the Industrial Commissioner with wide discretion to inquire into the "substantial rights of the parties," and emancipates him from observance of the common law or statutory rules of evidence and from "technical and formal rules of procedure," is to be conceded, but it is to be observed that this relates solely to manner and methods of procedure and to common-law and statutory rules of evidence, and the Commissioner is thereby authorized to make his official investigations and inquiries in a manner best suited to ascertain "the substantial rights of the parties." In manner and method of making such inquiries, the Commissioner is not to be hampered by formal or technical rules of procedure or of evidence, but may proceed in the manner which he believes best suited to develop the truth, and thus protect the substantial rights of the parties. But he is not clothed with power or authority to change or ignore the substantive law of the jurisdiction. Bearing on this point, see the case of *Carroll v. Ice Co.*, 218 N. Y. 435, 113 N. E. 507, Ann. Cas. 1918B, 540, where the court, construing a statute quite like our own in this respect, says:

"The act may be taken to mean that while the Commissioner's inquiry is not limited by the common-law or statutory rules of evidence or by technical or formal rules of procedure, and it may in its discretion accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award can be made. * * * There must be in the record some evidence of a sound, competent, and recognizedly probative character to sustain the findings and award made, else the findings and award must * * * be set aside by the court."

If, as we hold, the claim or defense made by appellants for a reduction of the compensation allowed to Bodine must have its foundation in a state of facts presented by the statute, then the right of the claimant to insist upon the laying of such foundation before he is compelled to submit to such deduction is one upon which no theory of the law can the arbitration committee, or

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Commissioner, or the court properly deny or ignore. The very statute (chapter 270, Acts of the 37th General Assembly) which confers upon the Commissioner the enlarged discretion as to procedure and evidence, makes provision for appeal from his rulings and decisions and giving the court express authority to set the same aside: (1) When he acts without or in excess of his powers; or (2) when the order or decree was procured by fraud; or (3) when the facts by him do not sustain his order or decree; and (4) when there is not sufficient competent evidence to warrant him in making the order or decree appealed from. The district court in this case evidently reversed the ruling of the commissioner on the fourth of these statutory grounds, and for the reasons already stated, as well as for those we shall consider in the following paragraphs, we think the court did not err.

[3] III. The arbitration committee and the Industrial Commissioner were evidently of the opinion that the money paid by the railway company to Bodine was received by him in payment of the damages he sustained, and that the written instrument executed was intended to be and is a release and discharge of the railway company from all liability, and that the covenant not to sue was a disguise adopted to conceal the real agreement; or, to use the Commissioner's language, the covenant is a mere "jugglery of words and phrases," a piece of "shrewd phraseology," intended to deprive the employer of his right to a deduction from the compensation and to "sacrifice the employer's right of action against the railway company." Stated in other words, the theory appears to have been: (1) That there is no such thing as a valid covenant not to sue except as it be held the equivalent of a release and satisfaction; and (2) that to sustain the covenant in accordance with its terms is to deprive appellants of their right of subrogation. Taking up these propositions in inverse order, the contention urged by appellants that the covenant not to sue has the effect of a release or full discharge, and thus defeats the defendant's right of subrogation, it is to be said that if appellants had any right of subrogation under the terms of the statute (a situation not yet made to appear) it was not within the power of Bodine to deprive them of it, by any agreement between him and a "person other than his employer." A like question has often arisen in actions upon policies of insurance which reserve to the insurer the right to be subrogated to the insured for the recovery of damages against third persons legally liable therefor, and it is quite uniformly held that in such case a settlement between the insured and the third person without the insurer's express or implied consent will not defeat the right of

subrogation. See *Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Hart v. Railway Corp.*, 54 Mass. (13 Metc.) 100, 46 Am. Dec. 719; 19 Cyc. 895, and note, and *Ins. Co. v. Weller*, 98 Iowa, 734, 68 N. W. 444. The rule is clearly stated in the last-cited case, where we said:

"If insured buildings or other property be destroyed through the negligence of some person other than the owner, the insurance company, upon payment of the loss, will be subrogated to the right of the owner to recover from the wrongdoer. The insured cannot bar the insurer's right of action by executing a release * * * to the wrongdoer."

It follows of necessity that if the effect of the claimant's covenant not to sue is to bar his right to receive the payments allowed him under the Compensation Act it must be for some better reason than that that he thereby deprived appellants of their right, if any they had, to pursue their remedy against the railway company.

The decisions of this court in *Kennedy v. Ins. Co.*, 119 Iowa, 29, 91 N. W. 831, and *Southern Surety Co. v. Railway Co.*, 187 Iowa, 357, 174 N. W. 329, are in no manner inconsistent with this holding. In the *Kennedy* Case, plaintiffs sued upon a policy which by its express terms was to be void and of no effect if it should appear that the owner of the insured property had or should have any contract whereby a third person should not be liable for any act or neglect in causing the fire. On trial it appeared that the property destroyed was a grain elevator on ground leased from a railway company under an agreement by which the owner assumed all risk of loss by fire and agreed to save the railway company harmless from all liability for damage or loss by fire however it might originate. That was the contract under which plaintiffs were occupying the property when the policy thus issued and when the loss occurred. Under such circumstances it was correctly held that the insurance was forfeited. In the *Southern Surety Company's* Case the injured employé, as he lawfully might, sued the railway company by whose neglect he was injured and recovered a judgment for damages to the amount of \$2,300, which was paid and discharged. After that case had been tried and judgment recovered and paid, the employer's insurer which had paid the employé the sum of \$572 under the Compensation Act, sued the railway company for reimbursement, instead of demanding a repayment from the employé who had collected full damages from the company. In a very clear and convincing opinion prepared by the late Mr. Justice Gaynor, we held that the injured employé was authorized by statute to sue the railway company for the damages sustained by him, and it must be presumed that the judgment recovered by him was for the full amount for which the com-

pany was liable, and such judgment having been paid the company could not be subjected to further liability at the suit of the employer or insurer. In other words, the employer and insurer could not stand by while the employé prosecuted the party primarily liable to judgment and collected the damages in full, and thereafter themselves compel the company to pay additional damages. In that case, unlike the one now at bar, there was no question but the employé had recovered full damages from the "person other than his employer," or that the injury to the employé was received under circumstances creating a legal liability therefor in such other person. The payment of that judgment necessarily released the railway company from further liability, and left the insurer's reimbursement for compensation paid the employé a matter for adjustment between them. The employé, having received the compensation and having also recovered full damages from the railway company, would perhaps be liable as a trustee for the benefit of the insurer to the amount of the payments made by the latter. That rule has no application here, unless we hold with appellant that the consideration paid Bodine for his covenant not to sue is a recovery of damages within the meaning of the law.

IV. It is argued for appellants that while the statute does in terms make the existence of circumstances creating legal liability in some person other than the employer essential to its application, yet if it appears that the injured employé has, for a consideration received, covenanted not to sue any third person, such fact without other evidence affords sufficient ground for holding that the receipt of such consideration by the employé is a "recovery of damages" which entitles the employer and insurer to a pro tanto reduction in their payment of compensation under the Workmen's Act. True, counsel do not state their proposition quite so baldly as this, but under the record as here presented it is the one on which the appellants must stand or fall; for, as we have said and repeat, there is not a scintilla of evidence tending to show "circumstances creating a legal liability" in the railway company, or to show that any claim or charge of such liability was made against it. True, a few cases may be found where an injured person having executed to a third party a formal release acknowledging payment and satisfaction of all claims for damage on account of injuries received has been held thereby to release all others, without regard to the question whether the party receiving the release was or was not legally liable, but we think the books are without any precedent for giving that effect to a covenant not to sue. And assuredly no court has yet gone

to the length of holding that an employer seeking to be excused from performance of his statutory obligation to pay compensation to his injured employé may be granted that relief without proof of the facts which the statute makes essential to such relief. That even at common law and under the strict common-law rules as to the effect of a release the question whether the person released was in any manner legally liable to the releasor was a material inquiry is well established. Substantially the only exception to this rule is to be found in cases where a strict formal release under seal has been given, thus excluding all other inquiry into the merits, a rule from which the courts both of England and of this country have largely broken away. *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Matheson v. O'Kane*, 211 Mass. 91, 97 N. E. 638, 39 L. R. A. (N. S.) 475, Ann. Cas. 1913B, 267; *Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618; *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623.

The early case of *Turner v. Hitchcock*, 20 Iowa, 310, an oft-quoted authority upon the effect of a release to one wrongdoer upon a plaintiff's right to sue others, the plaintiff had sued a large number of persons jointly for an alleged trespass. Before the case came on for trial the plaintiff notified a defendant, one Johnson, that no personal claim was made against him, and that plaintiff relinquished all claim for judgment against him. Because of this, the trial court held that all the defendants were discharged. Plaintiff also requested the court to instruct the jury: First, that unless it was found that Johnson was one of the trespassers, his release did not discharge the other defendants; and, second, that the plaintiff may discharge a defendant who is not a trespasser without discharging the trespassers. These requests were denied, a ruling which this court, speaking by Dillon, J., held to be error, saying:

"It is the opinion of this court that these * * * instructions ought to have been given. It was held in *Wilson v. Reed*, 3 Johns. 175, that a release to a person as a joint trespasser who is not in fact liable to the releasor, will not destroy the right of action against those who are liable. This must be so in the nature of things."

Quite in point also is *Thomas v. Railway Co.*, 104 Pa. 511, 45 Atl. 344, decided by the Pennsylvania court. There the plaintiff was suing the Central Railway Company, for the death of an engineer of the Reading Railway Company who was killed in a collision between trains. The defendant offered to show that the administrator had settled with and released the Reading Company, but the evidence was excluded. On appeal it

was held that the ruling was not erroneous because "there was no evidence that the Reading Company was negligent," and the evidence of a release of that company "was therefore irrelevant."

In *Dufur v. Railroad Co.*, 75 Vt. 165, 53 Atl. 1068, the plaintiff was injured under circumstances indicating joint liability therefor on part of one Allen and the Boston & Maine Railroad Company. Plaintiff settled with Allen, and in consideration of a money payment of damages gave him a written release under seal. Later he brought suit against the railway company, and the court, while holding there was clearly a joint tort and the release and satisfaction given to Allen inured to the benefit of the railway company, discussed the law of such cases as follows:

"Upon the allegations in the declaration, the plaintiff clearly had a right of action against the defendant, whether Allen was liable or not; and, to defeat the action, the defendant must allege facts showing that it was not liable, or that it and Allen were jointly liable, and that the plaintiff released Allen from such liability. If Allen was never liable, then the release given him did not affect the defendant's liability. In that case the payment by Allen would be the act of a stranger to the cause of action."

Among the precedents relied upon by appellant is *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107. There the court uses this language:

"If the claim is made against one and is released, all who may be liable are discharged whether the one released was liable or not."

In further elucidation of the rights of the parties, the court says that to make the release operative in favor of the defendant (*Barney*) the identity of the cause of action against *Chase* (the party released) must be shown. "This may be done by showing that the plaintiff had the same cause of action against both, as that they were both in fact concerned in the act complained of, so that whatever action would lie against one would also lie against the other, * * * or by showing that liability for the same act was claimed by the plaintiff against both," thus making a case which is widely out of parallel with the one before us. Moreover, as we shall see, this court has expressly refused to follow the authority of the *Leddy Case*.

In a later case more nearly in point, *Pickwick v. McCauliff*, 193 Mass. 70, 78 N. E. 730, 8 Ann. Cas. 1041, the same court after referring to the general rule that a release to one may effect the release of all, adds:

"But in order to have that effect we think that the party to whom the release is given must be one against whom an action would or might lie, and that a claim has been made for or on account of the alleged tort. It is not necessary that it should appear that he was in fact liable."

To the same effect is the decision in *K. & I. Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219. There the plaintiff, a brakeman on a train operated by the Louisville, Evansville & St. Louis Railway Company, was injured in a collision between his train and one operated by the defendant bridge company. Charging negligence against the latter company, he sued for damages. Before the case was tried, plaintiff had executed a release to his employer, the railway company, but the court refused to give any effect to such release in favor of the defendant, basing such ruling on the fact that the record failed "to show that plaintiff ever made any demand against the railway company for damages on account of the injury, or ever claimed that it was in any way responsible for the accident." To the same general effect, see *Iddings v. Bank*, 3 Neb. (Unof.) 750, 92 N. W. 578; *Railroad Co. v. McWherter*, 59 Kan. 345, 53 Pac. 135; *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548; *Atlantic Dock Co. v. New York*, 53 N. Y. 64; *Siebler v. Amunson*, 78 Wis. 679, 47 N. W. 1128.

The principle was recognized by this court again in *Snyder v. Telephone Co.*, 135 Iowa, 227, 112 N. W. 780, 14 L. R. A. (N. S.) 321. The plaintiff there was denied recovery because in consideration of a payment of a sum of money she had in formal writing accepted it in full of any and all claims and demands growing out of the death of her husband. In so deciding, however, the court was careful to say that—

"Without doubt, there may be technical releases or covenants not to sue, which, however effectual in favor of the person thus relieved from liability, are not conclusive as to another charged with the same wrong; it appearing that the person thus released was in no way liable. * * * It is also true that a mere gratuity paid by one as to whom no claim is asserted and no liability contemplated will not be a satisfaction of a claim against the one liable for an injury."

If there be any difficulty in reconciling all the precedents bearing on this point—and it must be admitted there is—this court has definitely announced its own stand thereon. In *Ryan v. Becker*, 136 Iowa, 273, 111 N. W. 426, 14 L. R. A. (N. S.) 329, *Becker* sued *Ryan* for damages on account of an alleged tort, and recovered judgment. Later *Becker* sued one *McGeough* for the same wrong. In this action *Becker* recovered judgment upon stipulation of the parties that a recovery should be had of \$50 in "full satisfaction and settlement" of *Becker's* claim. This judgment was paid and discharged, and thereupon *Ryan* brought suit to cancel the judgment against him on the theory that the release and satisfaction in favor of *McGeough* was in law a release of *Ryan*, a joint tort-feasor. Yielding to the liberalizing tendency of modern decisions, we there held that, notwithstanding

standing the entry of judgment and the stipulated release and discharge of McGeough, it was competent for Becker to show: (1) That the McGeough judgment was not rendered on the theory of damages for the injury done to Becker; (2) that McGeough was not in fact liable for the tort; and (3) that there was no intent to satisfy Becker's claim against Ryan. In so ruling, we reaffirmed the holding already quoted from our early case of *Turner v. Hitchcock*, supra, and, speaking by Deemer, J., we said:

"Upon these propositions, the authorities are in seeming conflict. Some of the cases held that one securing a judgment upon a claim for damages is estopped from denying liability upon the part of the party sued. Of this class are *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107 [and other cited cases]. While on the other side are *Wilson v. Reed*, 3 Johns. (N. Y.) 175; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Bloss v. Plymale* [3 W. Va. 393]; *Pogel v. Meilke*, 60 Wis. 248, 18 N. W. 927; *Owen v. Brockschmidt*, 54 Mo. 285; *Railroad Co. v. McWherter*, 59 Kan. 345, 53 Pac. 135. We have adopted the latter rule for this state."

[4, 5] For the purposes of this case it may be admitted that a covenant not to sue may be shown to have been intended as an unqualified discharge or release, but the burden of proof is upon the party seeking to fasten that character or effect upon the instrument to produce evidence justifying such conclusion. See *Johnson v. Von Scholley*, 218 Mass. 454, 106 N. E. 17. There is no evidence to that effect in this record. There is no testimony having any tendency to show that the street railway company was legally liable for Bodine's injury, or that he charged it with liability, or made claim upon it for damages, or threatened or contemplated suit against it. Upon such a showing it must be said as a matter of law that the instrument is to be given effect according to its terms.

[6] V. It seems to us unnecessary to extend this opinion to discuss the legal character and efficacy of a covenant not to sue. That it is a legitimate subject of contract has been affirmed over and over again by practically all the courts of our country, and that such a covenant, unless shown to have been otherwise intended, does not operate to release or discharge from liability any person other than the covenantor is equally well settled. See *Matheson v. O'Kane*, 211 Mass. 91, 97 N. E. 638, 39 L. R. A. (N. S.) 475, Ann. Cas. 1913B, 267; *Railway Co. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053; *Musolf v. Electric Co.*, 103 Minn. 369, 122 N. W. 499, 24 L. R. A. (N. S.) 451; *Edens v. Fletcher*, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618; *Railroad Co. v. Averill*, 224 Ill. 516, 79 N. E. 654; *Miller v. Fenton*, 11 Paige (N. Y.) 20; *Gilbert v. Finch*, 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623; *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 844; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752.

[7-9] The covenant in this case being one the legal validity of which must be conceded, the courts are bound to construe and sustain it according to its terms, in the absence of evidence impeaching its good faith or showing that the money, receipt of which it acknowledges, was in fact accepted as damages instead of consideration for his agreement not to sue the railway company. As was well suggested by the court below in reversing the finding of the Industrial Commissioner, the covenant not to sue was a legitimate contract, and the making of the same a sufficient consideration, if so deemed by the parties, to support the payment made. The mere fact of such payment is not a concession of liability by the railway company, nor is its mere receipt by Bodine evidence that he was making or asserting any claim of liability on its part. Nor is it material that "private corporations are not charitable institutions," or to recall that they "exist wholly and solely for the single purpose of financial gain," for it is not impossible that corporations, not unlike many individual citizens, may believe it business wisdom to purchase immunity from the expense and trouble of a possible lawsuit, even where no liability in fact exists. The railway company in this instance was faced with the fact that Bodine had been injured in a collision with one of its cars, and even though it may have been wholly without fault and in no manner legally liable for such injury, and no claim or charge of such liability yet preferred, it is reasonably possible for it to have preferred taking the initiative and fending against possible trouble in that line by obtaining a covenant from the injured man not to sue. Money paid upon such consideration would be in no proper sense "damages," and its acceptance would be in no proper sense a "satisfaction" of the liability of his employer for the payment of compensation under the statute. If Bodine had been a member of some insurance organization which had paid benefits to its sick or injured members and had received a substantial sum of money from such source, no one would think of giving the appellants credit therefor upon the statutory compensation which had been awarded to him; and yet a claim for such credit would be scarcely less reasonable than their demand made in this case. Speaking of covenants not to sue, the Minnesota court has said:

"Competent parties are fully protected in their freedom to make lawful contracts. Agreements to avoid litigation are lawful contracts. Negotiations leading to them are protected. They are both encouraged and enforced. When competent parties have written out the terms upon which they have agreed, their contract must be reasonably construed so as to carry out their intentions."

The language of the covenant in this case is not open to doubt or uncertainty. It pro-

vides in express terms that the money is paid in consideration of Bodine's agreement not to sue the railway company, its officers, servants, or employes on account of his injury. To make the intent doubly clear, it declares in terms that it is not a release of the company, or of Bodine's employer or insurer, or of any other person, but is "simply a covenant not to sue."

We cannot take it for granted that this instrument is not what it professes to be, or assume without evidence that the money was paid or received upon any other consideration than is there expressed.

Counsel say, however, that covenants not to sue have no place except where there are two or more joint tort-feasors, and that as the appellants were not joint tort-feasors with the railway company, the only effect of the written instrument would be to release the railway company, and that, such being the case, the money paid, though nominally in consideration of the agreement not to sue, must be treated as a payment of damages. Neither the premise nor conclusion is entirely sound. It is true that as a general rule such agreements are made use of in cases where a joint tort is claimed, but courts have frequently extended the doctrine to matters of joint contracts and other more or less analogous cases. The statute here did vest Bodine with the right to proceed against his employer for compensation under the statute, and also at his option to sue any person "other than his employer" if the circumstances of his injury were such as to create legal liability in such other person. The employer and "the other person," if liable, were in no sense joint tort-feasors, yet both were in a sense liable to the employe for the same injury; the obligation of the one being measured by the terms of the Compensation Act and the other by the applicable rules of the common law.

The right of Bodine to sue any person other than his employer was a mere option. He could, if he chose, rest upon the allowance to him of the statutory compensation, and his refusal to seek satisfaction at common law would work no wrong to his employer. If he could refuse to sue without affecting his right to receive compensation, how can his mere agreement not to sue affect the relations of the parties, even though as between him and the railway company it may be said to operate as a release? Had he elected to sue and had recovered and collected judgment for damages then, as he could not be permitted to receive more than one satisfaction, the appellants could require him to account to them for their advancements upon his compensation. But he did not sue, and there is no showing that in covenanting not to do so he deprived the appellants of any right or advantage they would

have acquired or enjoyed had that covenant never been made. If Bodine had no right to recover damages from the railway company (and none has been shown), then the appellants could not obtain any better or higher right by subrogation, even though the covenant not to sue had never been made. And for appellants to be allowed credit or deduction upon the compensation payable to the claimant, it must affirmatively appear that the money received by him was in legal effect a recovery of damages, a showing which has not been made.

This conclusion might well have been reached with greater measure of brevity by confining our discussion to the single proposition that appellant's right, if any, to a reduction of the compensation to Bodine is purely statutory, and that there is an entire failure on their part to lay the statutory foundation for such relief. But counsel on either side have had recourse to the wide field of inquiry into the common law of releases and covenants not to sue, a subject by no means free from the confusion of conflicting authority, and one bearing visible marks of the influences of legal evolution, and we have thought it not unwise to indulge in some latitude of discussion along that line.

We are satisfied with the correctness of the judgment below, and it is affirmed.

EVANS, O. J., and PRESTON, and DE GRAFF, J.J., concur.

MEYER v. HERNETT.

(Supreme Court of North Dakota. Oct. 5, 1921.)

(Syllabus by the Court.)

Corporations $\S$ 625—In action by receiver against treasurer for accounting, evidence held to sustain judgment of dismissal.

In an action for accounting, the evidence is examined, and held to sustain a judgment in favor of the defendant for a dismissal of the action.

Appeal from District Court, Logan County; Graham, Judge.

Action by Theodore Meyer, receiver of the Farmers' Co-operative Creamery Company, against Charles Hernet. Judgment for defendant, and plaintiff appeals, demanding a trial anew in Supreme Court. Judgment affirmed.

S. E. Ellsworth, of Jamestown, for appellant.

Cameron & Wattam, of Bismarck, for respondent.

CHRISTIANSON, J. This is an action for an accounting. The complaint alleges:

"That at all times since September 8, 1911, the Farmers' Co-operative Creamery Company was a corporation organized and existing under and by virtue of the general laws of the state of North Dakota relating to corporations, having its principal place of business at Burnstad, Logan county, N. D., where it was engaged in the operation of a creamery belonging to it, and in the purchase of cream and the manufacture and sale of butter.

"That on or about the date of the organization of said corporation, the defendant, Charles Hernett, was appointed treasurer by its board of directors, and from that date until about October, 1915, continued to act as treasurer for said corporation, to collect, receive, and hold all funds and moneys belonging to said corporation, including subscriptions to the capital stock of the same and the income resulting from the operation of said creamery and the sale of its products."

The complaint further alleges:

"That on or about March 9, 1918, an action was commenced by the Attorney General for the dissolution of the said Farmers' Co-operative Company, on the ground, among others, that it was insolvent; that in said action an order was made on May 14, 1918, appointing the above-named plaintiff as receiver of said corporation; that he qualified and entered upon the discharge of his duties as such receiver, and now is acting as such.

"That during the period from his appointment as treasurer of said Farmers' Co-operative Creamery Company about the 8th day of September, A. D. 1911, as aforesaid, until and after October, 1915, said defendant, Charles Hernett, in his capacity as treasurer of said corporation, received into his hands all moneys and funds belonging to said organization, in sums aggregating \$10,000 or more; that during said period said defendant paid out upon the operating expenses of said creamery, and upon other accounts of indebtedness against said corporation, sums of money, the exact amount of which has not been disclosed to and is not known to this plaintiff; that said defendant has not at any time rendered to the board of directors of said corporation a true and correct account of the sums of money so received from him, or the sums disbursed by him; that from the best information procurable by plaintiff, from the accounts, papers, letters, and files of said corporation, there has been received by said defendant, as treasurer of funds and moneys belonging to said corporation, over and above all expenditure, a sum aggregating more than \$3,500, which balance has not been by said defendant paid over to said corporation or to this plaintiff as receiver of the same, and of which defendant upon demand of this plaintiff has failed and refused to render an account."

The plaintiff prays judgment as follows:

"(1) That said defendant, Charles Hernett, be required to account to this plaintiff for all sums received by him as treasurer of said corporation, the items of disbursement, of any sums regularly paid out by him as such treasurer,

er, and the balance now remaining in his hands; (2) that upon said accounting judgment for the amount of any balance in the hands of said defendant of funds and moneys belonging to said corporation be entered in favor of this plaintiff as the receiver thereof; (3) and such other and further relief as to the court may seem just and proper in the premises, and for plaintiff's costs and disbursement herein."

The answer of the defendant admits that the Farmers' Co-operative Creamery Company is a corporation as alleged; that an action was brought for its dissolution, and that the plaintiff was appointed receiver of said corporation, and now is such receiver. The answer admits:

"That on or about the date of organization of said corporation defendant was appointed treasurer of said corporation and continued to act as treasurer for said corporation except for a certain period in which C. P. Holrup was appointed and acted as treasurer of said corporation."

The answer denies that the defendant has ever refused to render a correct and true account of the moneys received and disbursed by him as treasurer of said corporation, and avers that all moneys and funds received into his hands have been fully accounted for, and a report of the same rendered to the plaintiff, as receiver of said corporation. The answer further denies that the defendant has any moneys or funds belonging to said corporation in his possession, or that there is any balance whatsoever in his hands as treasurer of said corporation. The answer, also, avers:

"That during the time that the defendant acted as treasurer of said corporation, D. L. Anderson and H. A. Shepard each served as manager of said creamery, and in their capacity as manager paid salaries and other expenses, sold the product, and handled the receipts thereof, and the defendant, acting as mere custodian of funds, had no check on the actual business transactions of said creamery."

The case was tried upon the issues framed by these pleadings. The trial court made findings and conclusions in favor of the defendant. Judgment was entered accordingly, and the plaintiff has appealed from the judgment and demanded a trial anew in this court.

The evidence shows that on or about July 3, 1911, a certain written contract was entered into between the Hastings Industrial Company of Chicago, Ill., as party of the first part and certain persons, some 46 in number, denominated as the subscribers, as parties of the second part, wherein the said Hastings Industrial Company agreed with the subscribers to construct and equip a gathered cream power butter factory at or near the town of Burnstad, in Logan county, in this state, for the sum of \$4,000. Among

others, the contract contained the following provisions:

"The contract is not binding unless the amount of \$4,000 or more shall be subscribed, and it is understood that no subscriber is liable for a greater interest in said butter factory when same is completed than is represented by the amount of his or her individual subscription. Each subscriber agrees to pay the amount subscribed by him or her, to first party and no more.

"Payment as follows: 15 per cent. of the contract price when the foundation of the building is ready, and the material for building on ground; the balance 85 per cent. of the contract price, when the plant is completed.

"Subscriptions to this contract may be procured to any amount, and for this purpose one or more forms of this agreement may be circulated, and at any time after the subscriptions on all forms so circulated shall equal or exceed the said purchase price of said butter factory, it may be closed by the first party's special agent signing the same, and such forms shall be attached and taken together, and shall constitute the sole contract between the parties.

"First party shall have the right to first collect from said subscriptions or notes, as the entire amount due under this contract, but all money, notes, or subscriptions remaining after first party has been fully paid is the property of second parties.

"Second parties agree to appoint an executive committee of three when this contract is closed with full power and authority in a majority to represent them in all of their interests herein, and from time to time inspect the work of first party while it is building said butter factory and placing said machinery."

"For the purpose to form a corporation to own and operate said butter factory and fully carry out the intention of subscribers, it is hereby agreed that when this contract is closed, second parties are to incorporate in a limited corporation organized under the laws of the state, fixing the aggregate amount of capital at not less than the contract price, divided into shares of one hundred dollars each, according to the laws of the state. Each subscriber hereto shall receive a full paid certificate of the stock of such corporation to the amount of the par value of his subscription hereon, when paid in full and not until then, and the subscribers hereto shall not be liable for any further assessments or payments whatsoever."

It seems that the Hastings Industrial Company had serious doubts as to the financial responsibility of some of the signers, and, as a result of certain negotiations, six of the subscribers (of whom defendant was one) executed and delivered to the Hastings Industrial Company their three promissory notes, dated July 3, 1911, aggregating in all \$4,000, to wit, one note for \$1,500, payable October 1, 1912; one note for \$1,250, payable November 1, 1913; and one note for \$1,250, payable November 1, 1914. Thereafter the following assignment was executed and delivered to the six persons who signed the said three promissory notes, to wit:

"Chicago, Ill., Sept. 15, 1911.

"The Hastings Industrial Company of Chicago, Illinois, first party to a gathered cream power butter factory, to be erected at Burnstad, Logan county, North Dakota, hereby assign to Chas. Hernett, H. A. Shepard, Theodore Meyer, J. S. Reich, C. P. Burnstad, and D. L. Anderson all of their interests in said contract with full authority to make collections from all subscribers and use said collections as per contract.

"The Hastings Industrial Company,
"MFM. By John L. Peterson, Secy."

The evidence shows that when the creamery had been constructed and was put into operation, the company had no working capital. A small sum was borrowed from the bank for this purpose. It appears that the treasurer deposited all funds received, both from the sale of butter and from the payments received from any of the subscribers to the contract with the Hastings Industrial Company, to the account of the creamery company in the bank. Only one account or fund was kept, and as checks were drawn by the secretary or manager for operating expenses, such as the purchase of cream, salaries, or matters of that kind, he (the treasurer) paid them out of such fund. The evidence shows that prior to December 21, 1915, he received payments upon subscriptions aggregating \$1,557, which he so deposited. It also appears that of said sum only \$431.26 was utilized in paying the Hastings Industrial Company (for which that company allowed credit upon one of the said three notes), and that \$1,122.74 of said \$1,557 was disbursed in the payment of the operating expenses of the creamery. It also appears from the evidence that after the creamery ceased to operate, to wit, after December 21, 1915, various subscribers paid to Hernett sums aggregating \$1,739.36, as payment upon their subscriptions under the said contract with the Hastings Industrial Company. The undisputed evidence also shows that the six persons who signed the notes in favor of the Hastings Industrial Company were afterwards compelled to pay them, so that the Hastings Industrial Company has been paid in full.

After the defendant had interposed his answer, the plaintiff served a demand that defendant furnish an itemized statement or account of receipts and disbursements. The defendant furnished such account, showing the amount of moneys collected and expended by him up to and including December 21, 1915; that is, for the entire period that the creamery was being operated. As already stated, it appears, however, that after that date he collected or received from various subscribers to the contract with the Hastings Industrial Company sums aggregating in all \$1,739.36. The evidence adduced by the defendant shows that this latter sum

was all applied in payment of the indebtedness due the Hastings Industrial Company, and credit given therefor upon the notes given to that company by said six persons.

The contentions of the plaintiff are:

(1) That in so far as concerns the \$1,557 received by the defendant from subscribers, prior to December 21, 1915, he had no right to mingle such moneys with moneys received from other sources, such as the sale of butter; that "the stockholders and creditors of the corporation had a right to expect that the capital stock should be held as a trust fund, or applied in payment of the initial indebtedness or in improvements upon the creamery plant;" and that "the treasurer, having dissipated, misused, and misapplied this fund without the consent of the stockholders or creditors, is now liable upon an accounting to the receiver who represents both." (2) That in so far as concerns the \$1,739.36 received by the defendant from subscribers after December 21, 1915, the defendant was precluded from giving evidence as to the disbursements thereof made by him, for the reason that no mention was made of the collection and disbursements of such moneys in the itemized account rendered by the defendant to the plaintiff herein.

In our opinion neither of these contentions are tenable. It will be noted that by the terms of the contract between the Hastings Industrial Company and the subscribers it was expressly agreed that the industrial company was to be paid in all \$4,000, and that each one of the signers agreed to pay to the Hastings Industrial Company the amount subscribed, and no more. Each of the different subscribers subscribed \$100. By the express terms of the contract the Hastings Industrial Company had "the right to first collect from said subscriptions or notes the entire amount due under" the contract, namely, \$4,000; and it was only "money, notes or subscriptions remaining after" the Hastings Industrial Company had "been fully paid" that constituted "the property" of the subscribers.

The evidence shows that all moneys received by Hernet from so-called subscriptions, prior to December 21, 1915, amounted to \$1,557, and that subsequent to that date he received similar payments amounting to \$1,739.36, making an aggregate of \$3,296.36 collected on such subscriptions. The undisputed evidence, however, shows that the six persons who signed the notes in favor of the Hastings Industrial Company have paid such notes in full with interest. Manifestly, if the arrangement had not been made between the Hastings Industrial Company and the six persons who signed the three notes and later paid them, all the moneys paid on the so-called subscriptions would have belonged to the Hastings Industrial Company, and not to the Farmers' Co-operative Company. The

Hastings Industrial Company, however, has been paid in full, and has assigned its rights and interests under the contract to the six persons who executed and delivered their notes to it in full for its claim, and later paid such notes. These persons stand in the shoes of the industrial company. *Raich et al. v. Lindebak*, 36 N. D. 133, 140, 141, 161 N. W. 1026. In other words, the moneys collected upon the so-called subscriptions belonged to the assignees of the Hastings Industrial Company, and not to the Farmers' Co-operative Company. If any one has any complaint of the way in which these moneys have been disbursed, it is these men, and not the Farmers' Co-operative Company, which corporation confessedly received the benefit of some \$1,122.74, belonging to these men. There is no contention that the defendant did not account fully for other moneys received and disbursed by him. And, in our opinion, the trial court was entirely correct in finding that the defendant had fully accounted for all moneys received and disbursed as treasurer of the Farmers' Co-operative Company.

The plaintiff contends that the defendant is estopped from claiming that the moneys received by him on subscriptions belonged to the six persons who signed and paid the notes to the Hastings Industrial Company, for the reason that these persons have presented claims to the receiver, which claims, it is asserted, in part, are for moneys paid by such persons to the Hastings Industrial Company. In our opinion this contention is without merit. There is no contention that the claims presented are for anything except what these persons were required to pay to the Hastings Industrial Company in excess of what was received from the subscribers. There is nothing to indicate that any action has been taken thereon by the receiver whatsoever, and manifestly he has in no manner been prejudiced by the presentation of the claims. It appears from the evidence that the very moneys involved in this controversy had all been received by the defendant and disbursed long before the claims were presented to the receiver. And the claims were prepared on the theory that the moneys received by the defendant from the subscribers had all been received and disbursed by him, as the evidence in this case shows them to have been received and disbursed. As already indicated, it does not appear whether the claims have been allowed or disallowed. The presumption, of course, is that such action, and such action only, has been, or will be, taken, with respect thereto, as the law and facts warrant. The judgment appealed from is affirmed.

ROBINSON, O. J., and BIRDZELL and BRONSON, JJ., concur.

GRACE, J., concurs in the result.

STATE ex rel. TRUAX et al. v. SMART et al.
(Supreme Court of North Dakota. Sept. 22,
1921.)

(Syllabus by the Court.)

1. Statutes $\S$ 21—Initiated measure amended or repealed only by a two-thirds vote of all members elected to each house.

Article 26 of the Amendments to the State Constitution requires a two-thirds vote of all the members elected to each house of the legislative assembly to effect an amendment or repeal of any initiated measure adopted by the electors.

2. Newspapers $\S$ 1(1)—City special assessment notices must be published in elected official newspapers in such cities.

Section 5 of chapter 187 of the Laws of 1919, as amended by an initiated measure approved at the general election in 1920, requires the publication in the elected official newspaper of special assessment notices in cities in which such official newspapers are published.

Appeal from District Court, Ward County; J. C. Lowe, Judge.

Application by the State of North Dakota, on relation of O. F. Truax and another, as copartners, under the firm name and style of Truax & Colcord, for a writ of mandamus against W. M. Smart, as president, and C. D. Shaft and others, as members, of the Board of City Commissioners of the City of Minot, N. D., and Karl Dickinson, as City Auditor, H. E. Montgomery and others, as members of the Special Assessment Board, of said city. From a judgment awarding a peremptory writ, the respondents appeal. Affirmed.

John J. Coyle, of Minot, for appellants.
McGee & Goss, of Minot, for respondents.

BIRDZELL, J. This is an appeal from a judgment awarding a peremptory writ of mandamus. The facts upon which the judgment is based are as follows:

The relators, Truax & Colcord, are the owners of a paper published in the city of Minot and known as the Ward County Independent. This paper was a candidate upon the election ballot of 1920 for official newspaper, and, receiving a majority of the votes cast at the election, it was elected official newspaper and qualified as such. The defendants in this action are the members of the city commission, members of the special assessment board, and the city auditor of the city of Minot. Just prior to the beginning of the action the defendants had prepared for publication nine notices of special assessments which are required by law to be published, once each week for two successive weeks before being spread on the

tax lists. The defendants refuse to cause the publication of these notices in the Ward County Independent. They base their refusal on the ground that the city commissioners had previously designated the Minot Daily News, a paper of general circulation in Minot and northwestern North Dakota, as the official newspaper of the city; and it is the contention of the defendants that the notices of special assessments may properly and legally be published in the Minot Daily News as the official newspaper of the city.

The question presented is a narrow one, depending upon the construction of recent legislation. Chapter 187 of the Laws of 1919 is an act entitled "An act providing for the selection and designation of one state, county and municipal official newspaper in each county in the state, prescribing the manner of its selection and duties." Section 5 of this act provides that—

The official newspaper chosen in the manner prescribed by the preceding sections as the state, county, and municipal official newspaper, "shall publish all official proceedings of the board of county commissioners in said county and all other notices and publications that are now required by law to be published by county officers; all summons, citations, notices, orders and other process in actions or proceedings in the Supreme, district, county or justice courts, which are or may hereafter be required by law to be published in the respective counties of the state. All publications of every nature that now are or may hereafter be required to be published by state officers, elective or appointive; all notices of foreclosure of real estate or chattel mortgages or other liens on real estate or personal property foreclosed by advertisement in said county; and all legal notices of whatsoever kind and character required by law to be published or which may hereafter be required to be published in said county. Provided, however, that in organized cities, towns and villages where no official newspaper is published, said city, town or village, board, council or commission may designate an official newspaper for the publication of such notices; and legal publications as are now or hereafter may be required by law for said cities, towns and villages, including legal notices and official statements of the schools within such cities, towns and villages, and the statements of banks and other corporations therein; *but, in cities, towns or villages where the state, county and municipal official newspaper is published such notices and legal publications as are now or may hereafter be required by law to be published, shall be published in such official newspaper.*"

(The italicized portion is applicable to the case in hand by reason of the fact that the Ward County Independent is published in the city of Minot.)

The section quoted above was amended by an initiated measure submitted at the general election in November, 1920. This section, as embraced in the initiated measure, is as follows:

"No. 5. *Defining Duties of Such Official Newspaper.*—Such official newspaper as shall be chosen by the voters in said county as the state, county and municipal official newspaper therein, shall publish all official proceedings of the board of county commissioners in said county and all other notices and publications that are now required by law to be published by county officers; all publications of every nature that are now, or may hereafter be, required to be published by state officers, elective or appointive. Provided, however, that in organized cities, towns and villages where no official newspaper is published, said city, town, or village board, council or commission may designate an official newspaper for the publication of such notices and legal publications as are now or hereafter may be required by law for said cities, towns and villages, including legal notices and official statements of the schools within such cities, towns and villages, but in cities, towns or villages where the state, county and municipal official newspaper is published such official notices and legal publications as are now or may hereafter be required by law to be published, shall be published in such official newspaper."

The text of the original section was not changed in the initiated measure, except that in the latter certain matters such as summons, citations, orders, and other process in court proceedings, foreclosure notices, and corporation statements were omitted, so that their publication would not be required in the official newspaper. The initiated measure was carried in the general election.

In the legislative session of 1921 the following statute was enacted:

"An act to compel city councils to publish proceedings of all meetings in official paper to be designated by them.

"Be it enacted by the Legislative Assembly of the State of North Dakota:

"Section 1. *Publication of Proceedings.*—Hereafter it shall be the duty of city councils to cause to be published in an official paper, des-

ignated by them, a complete record of all proceedings of said councils.

"Sec. 2. *Repeal.*—All acts or parts of acts, in so far as they conflict with the provisions of this act are hereby repealed."

[1] This act was passed in the Legislature by the following vote: In the Senate, ayes 45, nays 0, in the House of Representatives, ayes 67, nays 22; absent and not voting, 24. Sixty-seven is less than two-thirds of the membership elected to the House of Representatives. Article 26 of the Amendments to the State Constitution provides that no measure enacted or approved by a vote of the electors shall be repealed or amended by the Legislature except upon a ye and nay vote upon roll call of two-thirds of all the members elected to each house. Conceding—though it is not decided—that chapter 35 of the Session Laws of 1921 would, if properly enacted, authorize the publication of special assessment notices in the official newspaper designated by a city commission, we have to determine whether or not it can be given that effect as against the requirements contained in section 5 of chapter 187 as amended by the initiated measure.

[2] We are clearly of the opinion that the initiated law requires the publication in the elected official newspaper of special assessment notices in cities in which such official newspapers are located; and there being no amendment or repeal of this law, enacted by the Legislature by the requisite two-thirds vote, it remains in full force and effect.

While counsel have argued the question of the constitutionality of chapter 35 of the Laws of 1921, and also whether it be partially or wholly unconstitutional, we find it unnecessary to consider these matters.

The judgment appealed from is affirmed.

ROBINSON, C. J., and GRACE, BRONSON, and CHRISTIANSON, JJ., concur.

McCORD v. PAGE COUNTY. (No. 33710.)

(Supreme Court of Iowa. Oct. 19, 1921.)

1. Courts $\S$ 99(2)—Overruling demurrer to petition did not preclude settling up answer of limitations.

Where defendant's demurrer to the petition, based on the statute of limitations, was overruled, he was not precluded from raising the same issue by answer on claim that the ruling on the demurrer became the law of the case.

2. Sheriffs and constables $\S$ 74—County held not estopped from pleading limitations to sheriff's claim for waiting on prisoners.

Code, $\S$ 508, requiring quarterly reports by sheriff as to care for prisoners, and Code Supp. 1913, $\S$ 511, par. 17, authorizing compensation "for waiting on and washing for prisoners," did not require the county board to furnish blanks for claims for waiting on prisoners nor fix a stated compensation therefor, and the board's failure to do so did not estop it from pleading that the sheriff's claim, not presented within five years, was barred.

3. Appeal and error $\S$ 1198—Court's ruling held not to exceed requirements of ruling on former appeal.

Where the Supreme Court on appeal held that a sheriff's claims for waiting on and washing for prisoners must have been presented to the board at the end of every three months, and if for any reason he did not do so he should so state, etc., the trial court's ruling on another trial that the sheriff's reasons for not presenting claims because no rate was fixed and no blanks furnished him was not legally sufficient, and that the claims were barred, was not beyond the requirements of the Supreme Court's ruling.

4. Limitation of actions $\S$ 53(3)—Sheriff's claims for care of prisoners not an open account.

Under Code, $\S$ 508, requiring sheriff to make quarterly claims for waiting on prisoners, the various items for services, etc., during the entire term of office, did not constitute one continuous, open, and current account within section 3449, but each quarter marked the accrual of the account for that quarter.

5. Prisons $\S$ 18(8)—Sheriff's claim for washing for prisoners precluded second claim for waiting on them.

Under Code Supp. 1913, $\S$ 511, par. 17, authorizing compensation for "waiting on and washing" for prisoners, the claims should be presented together, and presentation of a claim for washing precluded a later claim for waiting on, consisting in services in scrubbing, cleaning bedsteads and bedding, and cleaning and renovating the jail, etc.

Appeal from District Court, Page County; E. B. Woodruff, Judge.

Action brought to recover compensation for waiting on prisoners, as provided in section

511, Code Supplement 1913, par. 17. Trial to the court without a jury. Recovery was denied, and plaintiff appeals. Affirmed.

T. F. Willis, of Clarinda, for appellant.

L. H. Mattox, of Shenandoah, and Homer S. Stephens, of Clarinda, for appellee.

ARTHUR, J. Plaintiff alleges that as sheriff of Page county from January 1, 1904, to January 1, 1911, he was in charge of the county jail, and waited on the prisoners confined therein; that his services consisted in washing, scrubbing, and cleaning the bedsteads and bedding, cleaning and renovating the jail, heating and carrying water to the prisoners with tubs and other appliances for bathing, taking the prisoners to and from barber shops for shaves, or securing barbers to come to them, mailing their letters, and in divers other ways doing for them; that at divers times he made demands on the board of supervisors for compensation for services, and was refused payment; that on July 20, 1915, he filed with the county auditor and presented to the board of supervisors a claim for such services, claiming the sum of \$1,401.20, with interest thereon in the sum of \$336.80; that his claim was denied and payment refused. Plaintiff further alleges that he did not render quarterly itemized statements of claims for his services, as required by section 508 of the Code, for the reason that the county auditor of said county refused to furnish him blanks on which to make out such claims, and for the further reason that the board of supervisors refused to fix a stated amount per prisoner per day to be allowed for such services upon his oral demand that the board fix such amount, and alleges that by reason of such failure to furnish blanks to fix the amount for such services the defendant county waived the requirement that plaintiff file quarterly itemized reports, and that by the defendant county's conduct he was excused from filing such reports, and that defendant is estopped to say that such reports were not filed as required by statute, and demands judgment against defendant for \$1,401.20, with interest from July 1, 1911.

Defendant county admits that plaintiff did not make quarterly itemized reports for compensation claimed by him, as required by section 508, denies that it refused to furnish plaintiff blanks for making such claims, and denies that it has waived the requirements of section 508, and that it is estopped thereby to say that such reports were not filed as required by statute.

Defendant alleges that at frequent intervals plaintiff made claims against it for washing for prisoners, as provided in paragraph 17 of section 511 of the Supplement to the Code 1913, and that these claims were all paid and settled in full by defendant; that

plaintiff accepted such payment, and that by his acceptance of the amount so allowed his whole claim against the county, under section 511, was fully paid and satisfied, and pleads payment, accord, and satisfaction; that at the end of each quarter a cause of action accrued to plaintiff on his claim for such services for said quarter; that this action was commenced on the 4th day of September, 1915; and that plaintiff's cause of action for his services for each and every quarter of his incumbency of office, except the third and fourth quarters of the year 1910, did not accrue within five years before the commencement of this action.

Defendant further alleges that plaintiff made itemized reports, as required by section 508, for all claims he had against the county, except for waiting on prisoners; that such reports and claims were approved by the board of supervisors, and settlement was made with plaintiff, as required by section 508; that during the entire time of plaintiff's terms as sheriff, and up until January 20, 1915, he made no claim whatever for waiting on and washing for prisoners, and that no claim was presented to the board so that the same could be acted upon, except that during all of the time plaintiff was an incumbent of the office he made claims at stated intervals for washing for prisoners, as provided in paragraph 17 of section 511, and that full settlement was made with him on such claims for washing for prisoners, and he was paid in full for such services; that plaintiff did not make the claim in suit until July 20, 1915, which was more than 4½ years after his last term of office had expired, and more than 11 years after his right to compensation for such services for the first quarter of his first term had accrued, and that because of the lapse of so many years after such services were rendered, and by reason of laches of plaintiff in presenting his claim, by reason of his long acquiescence in the settlements made with him, and by reason of plaintiff's negligence in failing to make claims against defendant for such services, as provided by law, plaintiff waived all claim against the defendant for services, and plaintiff is estopped from claiming and recovering anything for such services.

Replying, plaintiff admits that he made claims against the county at various times for washing for prisoners, which claims were paid, but denies that the payment thereof constituted in any way a settlement of the claims now urged for waiting on prisoners, and denies that the same constituted full settlement. Plaintiff states that whatever delay there was on his part in making claim for waiting on prisoners was due to the fault of the defendant in failing to furnish him with blanks on which he could make his claims, and in failing and refusing to fix a reasonable compensation for such services to

be included in his claims, and pleads that defendant is estopped to rely upon and plead the statute of limitation.

Plaintiff further says that he could bring no action on his account until claim therefor was filed with the defendant county and payment refused, and that 5 years have not elapsed since the filing of said claim and refusal to pay the same; that the claim he is now urging against the defendant county is a running account, and constitutes but one sole cause of action, and that 5 years have not elapsed from the last item of the account to the time of the bringing of this action; that waiver is of a contractual nature and would be against public policy; and that the waiver and estoppel claimed by defendant are not matters which could be waived.

A jury was waived, and the case tried to the court. The court dismissed plaintiff's action, and rendered judgment against him for costs.

There is no dispute as to material facts.

Plaintiff served as sheriff of Page county from January 1, 1904, to January 1, 1911. During this time he had charge of the jail of Page county, and was custodian of the prisoners committed during that time. He washed the prisoners' personal clothing and bedclothing, scrubbed and cleaned the jail, and performed the usual and ordinary services necessary in waiting on and caring for the prisoners. Plaintiff kept a book entitled "Prisoners' Expense Account." This book was ruled in columns, giving the names, ages, sex of the prisoners, the date when received, the charge made for boarding each prisoner, charges for washing for each prisoner, fees for receiving and releasing each prisoner, a column for the total expense account for each prisoner, and the date of discharge. This book also had a column for miscellaneous charges. In the column "Washing" appears a charge after the name of every prisoner commencing with the first entry, dated January 2, 1904, and ending December 28, 1910. The total amount collected for washing was \$246.35. Final settlement was made on January 11, 1911, with plaintiff by the board for all the charges and claims set out in the book, "Prisoners' Expense Accounts." These claims included the claim for washing. Plaintiff says that his claim for washing for prisoners did not include anything for "waiting" on prisoners, and that the reason he included washing in his statement and did not include services for "waiting" on prisoners, was that the blanks the county furnished and the "Prisoners' Expense Account" book furnished by the county had columns for washing, but no columns for waiting on prisoners.

Plaintiff offered testimony that reasonable compensation for his services in waiting on prisoners was 15 to 35 cents per prisoner per day. Plaintiff himself testified that such

service was worth 20 cents, and 20 cents per day per prisoner is the compensation he demands.

Defendant demurred to plaintiff's petition as amended, based on the statute of limitation, and the demurrer was overruled. Defendant then answered, setting up, among other defenses, that plaintiff's action was barred. Plaintiff moved to strike defendant's amended and substituted answer, which motion was by the court overruled.

[1] II. Plaintiff assigns as error the overruling of the motion to strike, urging that the overruling of defendant's demurrer to his petition precluded defendant from raising the same issue by answer, thus claiming that the ruling on demurrer becomes the law of the case, and the same question cannot be raised at subsequent stages of the proceeding by answer, or objections to testimony offered. This assignment is without merit. *Back v. Back*, 148 Iowa, 223, 125 N. W. 1009, L. R. A. 1918C, 752, Ann. Cas. 1912B, 1025; *Buchanan v. Black Hawk Coal Works*, 119 Iowa, 118, 93 N. W. 51; *Frum v. Keeney*, 109 Iowa, 393, 80 N. W. 507.

The decided weight of authority is to the effect that the statute of limitations may be pleaded, unless waived by agreement, express or clearly to be implied, that this will not be done. *McKay v. McCarthy*, 146 Iowa, 546, 123 N. W. 755, 34 L. R. A. (N. S.) 911; *Howe v. Sioux City*, 180 Iowa, 580, 163 N. W. 411.

[2] III. Plaintiff assigns as error the finding of the court that there was no sufficient legal excuse for plaintiff's failure to file his claim with the county auditor for waiting on prisoners at the end of each quarter, as provided by section 508 of the Code, and that the court erred in his conclusion of law that the defendant county was not estopped from pleading the statute of limitations. The plaintiff pleads that he did not render the quarterly itemized reports for the matters covered by his claim, as provided in section 508, and gives as his principal reasons that he was not furnished blanks for so doing, and that the board did not fix a stated amount per person per day for waiting on prisoners. He pleads these reasons as estoppel against the defendant to say that his reports were not filed as required by statute, and says the defendant waived such requirement. The court found, as a matter of law, that the facts proved by plaintiff in reference to these matters did not constitute an estoppel against the county to plead the statute of limitations. The statute does not require the board to fix the compensation per day per prisoner for washing and waiting on prisoners in advance of the sheriff's filing claim for such service. Paragraph 17 of section 511 of the Code Supplement is as follows:

"For waiting on and washing for prisoners, the sheriff shall have such reasonable com-

pensation as shall be allowed by the board of supervisors."

We think this provision cannot be construed as requiring the board to fix the amount of this compensation in advance of any claim being filed. It is evident that what would be reasonable compensation for waiting on and washing for one prisoner might be very different from the reasonable compensation for rendering such service to another person. Some prisoners, on account of sickness or physical disability, might require very much more attention than others. It was the sheriff's duty to file his claim for such compensation. It was then the duty of the board to pass upon the claim. The plaintiff did not file any claim for his services, unless it was near the close of his last term of office; but simply talked it over with members of the board. It was evident that the board could not act on plaintiff's claim for waiting on prisoners, when he presented no claim. Appellant offered no sufficient excuse for not complying with the statute in filing his claim for waiting on prisoners.

[3] IV. This case was before this court once before and is reported in 179 Iowa, 1032, 162 N. W. 242. Appellant claims that the court's ruling goes beyond the requirements laid down by this court. We think not. We said:

"We are of opinion that claims for 'waiting on and washing for prisoners' must have been presented to the board of supervisors by plaintiff at the end of every three months during his several terms of office; and, if for any reason he did not do so, he should so state, and, if he did, he should state how much was allowed, to the end that only precisely what he then claimed, the amount allowed, and the balance, if any, remaining unpaid, shall be litigated; or, if his claim is for an additional amount, the basis thereof may be ascertained."

We think the court was correct in holding that the excuses offered by the plaintiff for not filing his claims quarterly, as provided by statute, were not sufficient, and did not stay the running of the statute of limitations, and that the claims in this case are barred, except for the last two quarters of the year 1910. Code, § 508; *McCord v. Page County*, 179 Iowa, 1032, 162 N. W. 242.

[4] V. Appellant contends that the court was wrong in his conclusion of law that appellant's entire claim, except for his services for the last two quarters of the year 1910, was barred by the statute of limitations. He urges that the various items of services he rendered for the prisoners constituted a continuous, open, current account, under section 3449 of the Code, and for that reason no part of it would be barred by the statute of limitations. In *Griffin v. Clay County*, 63 Iowa, 413, 19 N. W. 327, we held that each term of

office of a county treasurer was a separate source of employment, and that the balance of salary due the county treasurer for each year he performed the duties of his office was not an open account; that his salary was due at the end of each year, or at least at the end of each separate term, and should have been collected at that time. In the instant case it made no difference in regard to the running of the statute whether the claim was presented and disallowed by the board, or whether the appellant, sheriff, failed to present his claim. To hold that plaintiff's claim covering a period of seven years was a continuous, open, current account would defeat the purpose of section 508 of the Code, requiring the officer to make settlement at the end of each quarter. Of course, during each quarter the account for that quarter is open and current. But the entire account covering seven years, giving effect to section 508 of the Code, has none of the elements of a continuous, open current account.

[5] VI. We now come to consider whether plaintiff is entitled to recover on his claim for the last two quarters. It is urged by defendant county that in law the claims filed by plaintiff under paragraph 17, § 511, included all demands due plaintiff under said paragraph 17. The plaintiff insisted in his testimony on the trial that his claims which he filed under paragraph 17, and which were allowed and paid, were for washing of the personal clothing only of the prisoners, and that his claim in this case is for "waiting" on prisoners, such as "working, scrubbing, cleaning bedsteads and bedding, and cleaning and renovating the jail," etc. The trial court was of the opinion, and so held, that the clause in paragraph 17 of section 511 "washing for prisoners" means more than washing the prisoners' garments, and necessarily includes the items of plaintiff's claim of "scrubbing and cleaning the bedsteads and bedding, and cleaning and renovating the jail," which plaintiff construed to be "waiting on prisoners." It was the thought of the court that for plaintiff to now claim for the items of scrubbing and cleaning the bedsteads and bedding and cleaning and renovating the jail is seeking to increase his claims heretofore made for "washing for prisoners," and that, having once been paid for "washing for prisoners," he cannot now recover for the same service, even if he failed to claim for that part of "washing for prisoners" the items he now claims for.

Harding v. County of Montgomery, 55 Iowa, 41, 7 N. W. 396, is cited in support of the holding. Accordingly the court held that he could not determine, under the evidence, how much of plaintiff's present claims are for such washing, and how much for the other items mentioned in his petition, and therefore

the court could not render judgment in plaintiff's favor for anything. The trial court held, in effect, that the item of "waiting on and washing for prisoners" mentioned in paragraph 17 of section 511, Supplement to the Code 1913, is indivisible, and should be, and a claim therefor should be presented together at the same time, so that the board would not be misled, and for that reason plaintiff was not entitled to recover.

The majority accept the view of the trial court, and hold that appellant is precluded from recovery also for services claimed for in waiting on prisoners during the last two quarters of the year 1910.

The judgment of the trial court is affirmed. Affirmed.

EVANS, C. J., and WEAVER, PRESTON, STEVENS, De GRAFF, and FAVILLE, JJ., concur.

ELSON et al. v. SULLIVAN. (No. 34150.)

(Supreme Court of Iowa. Oct. 18, 1921.)

Homestead § 167—Sale destroys exemption.

Where the owners of land impressed with a homestead exemption convey it, its character as a homestead is lost.

Appeal from District Court, Adams County; P. C. Winter, Judge.

"Not to be officially reported."

Suit in equity to partition real estate by sale and distribution of the proceeds according to ownership, and to fix and apportion in the distribution, indebtedness against the property consisting of claims against estates of persons through whom title came. Defendant Jennie Paul Sullivan appeals. Affirmed.

J. H. Ritchey, of Corning, for appellant.

A. Ray Maxwell and D. H. Meyerhoff, both of Corning, for appellees.

ARTHUR, J. No complaint is made of the interests which parties to the action were adjudged to have in the real estate partitioned. Appellant insists in argument that the real estate should not have been impressed with liens of the claims because the real estate was a homestead, and further that, if the claims should be charged against the real estate, such charges were not properly apportioned against the shares of the parties in the real estate, and that her share in the proceeds of sale of the real estate was charged with too great an amount of the indebtedness.

Appellant's position that the property in-

volved was a homestead is without foundation in the record. The record shows that the property was not a homestead at the time of the inheritance by plaintiffs and purchase by defendant. Plaintiffs derived their title and interest through Rachel Paul, deceased wife of Jacob Paul, Sr. Appellant received her interest in the property, a two-thirds interest, by purchase of the interest in the property which Jacob Paul, Sr., inherited from Jacob, Jr., and his deceased wife Rachel.

It is true, and this is what probably confused appellant, that the property was for many years owned and occupied by Jacob Paul, Sr., and his wife, Rachel, as a homestead. But in 1914 Jacob Paul, Sr., and Rachel, his wife, conveyed the property to their son, Jacob Paul, Jr., and after that time the record does not disclose that the property was a homestead. Jacob Paul, Jr., died December 22, 1914, without having married. At the death of Jacob Paul, Jr., the property went back to Jacob Paul, Sr., and Rachel Paul, one-half to each. At the time of the death of Rachel Paul, February 20, 1915, Jacob Paul, Sr., became the owner of one-third of her one-half interest, which, added to the one-half interest which he inherited from Jacob Paul, Jr., made him the owner of two-thirds of the property. Shortly after the death of Rachel Paul, Jacob Paul, Sr., married one Sarah Evelyn Roach, to whom he soon conveyed his interest in the property, and Sarah Evelyn Roach Paul conveyed to appellant.

Appellant filed no pleadings in the cause. The petition was the only pleading. Appellant offered no evidence on the trial, and interposed no objections to the testimony offered by plaintiffs. She appeared for herself without the assistance of an attorney. However, her rights were properly protected by counsel for plaintiffs and the court. She is not represented by counsel in this court, but has been permitted to argue her own case orally, and present a printed argument prepared for her by one J. H. Ritchey. It appears from the record on submission of a motion to dismiss appeal that J. H. Ritchey is not authorized to practice law, although he assumes to be and signs himself as attorney for appellant in the abstract and printed argument. No injustice was visited upon appellant in the court below. Her rights were protected. The unwarranted assumption of J. H. Ritchey to serve her as a lawyer in this appeal has burdened her with the costs of the appeal.

The decree of the court below is affirmed. Affirmed.

EVANS, C. J., and STEVENS and FA-VILLE, JJ., concur.

STATE v. SCHWENDERMAN. (No. 34367.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Criminal law $\S$ 737(2) — Venue for jury where evidence thereof, or where evidence disputed.

If the evidence is in dispute, or evidence has been introduced tending to show venue, the question then becomes one of fact for the jury.

2. Criminal law $\S$ 564(1) — Evidence insufficient to prove venue.

In a prosecution for the forgery of an indorsement on a check, evidence as to the county wherein the offense was committed held not sufficient to prove venue.

Appeal from District Court, Wapello County; Seneca Cornell, Judge.

The defendant was convicted in the court below of the crime of forgery, and sentenced to an indeterminate sentence in the penitentiary, and he appeals. Reversed.

W. W. Epps, of Ottumwa, for appellant.

Ben J. Gibson, Atty. Gen., B. J. Flick, Asst. Atty. Gen., and Newton W. Roberts, Co. Atty., of Ottumwa, for the State.

STEVENS, J. The indictment in this case charged the defendant with having feloniously indorsed the name of "Mike Lemon," payee named in a check for \$37.20, bearing date February 26, 1921, and signed by the Ottumwa Supply & Construction Company, by Geo. A. Zika. The indictment lays the venue in Wapello county. At the close of the state's evidence, and again at the close of all the evidence, the defendant moved the court for a directed verdict, upon the ground that the state had failed to prove the venue or to introduce sufficient testimony to justify a conviction. Both motions were overruled, and these rulings are assigned as error, and relied upon by the defendant for reversal.

The facts upon which the state bases its case are substantially as follows: The defendant, Mike Lemon, and Hubert Lemon were employed by the Ottumwa Supply & Construction Company, or George A. Zika, in the construction of a road between Bloomfield and Ottumwa. Mike Lemon quit work shortly prior to February 26th. When he quit, his employer owed him \$37.20. The check in question was drawn by the bookkeeper of the Ottumwa Supply & Construction Company and signed by George A. Zika, at Ottumwa, on or about February 26th, and some time later, the date not shown, delivered to Hubert Lemon to give, or forward to, his brother, who lived at Sigourney. The defendant and other workmen employed in the construction of the road lived at a camp in Davis county. The defendant assisted in

the work about the camp from 7 until 9 o'clock a. m. One of the duties assigned to him was to gather up the mail each morning and take it either to a post office or a mail box about 50 yards distant—the evidence does not disclose which. Hubert Lemon testified that he wrote a letter to his brother on the evening he received the check from the paymaster of the Ottumwa Supply & Construction Company, and inclosed the check therewith in an envelope addressed to his brother, and on the following morning handed the envelope containing the check to the defendant, to mail with other letters lying on the table. He further testified that the defendant and two other workmen were sitting at the table when he wrote the letter and inclosed the check in the envelope. When the check was returned to the drawer, it bore the indorsement of "Mike Lemon" and "J. Redman," together with the paid stamp of the Ottumwa Savings Bank, on which it was drawn. The paid stamp of the bank bears date March 4, 1921.

The defendant worked for the Ottumwa Supply & Construction Company and lived at the camp until March 19th. The camp was located in Davis county. The various witnesses by their testimony located the camp "over in the edge of Davis county"; "on what is known as Big Soap creek, in Davis county, about 300 feet east of the present road"; "at a camp on Big Soap creek, Davis county"; "in the edge of Davis county." Harry Riseman testified that he indorsed the name "J. Redman" on the back of the check and obtained the money thereon. J. Redman was the proprietor of a department store in Ottumwa, where Riseman was employed. Riseman had no recollection as to who gave him the check, nor does the evidence show that the defendant purchased anything at the store prior to March 4, 1921. No one identified him as the person from whom the check was received. The only direct evidence connecting the defendant with the commission of the offense charged is the testimony of Hubert Lemon that he gave the envelope containing the check to him to mail, and the testimony of the vice president of one, and the cashiers of four other, local banks. These witnesses, after making comparison of the writing of the name "Mike Lemon" on the back of the check with the same name admittedly written by the defendant, testified that in their opinion they were written by the same person. The original exhibits have been certified to this court. A careful examination thereof reveals a similarity in the handwriting. The defendant denied that Hubert Lemon gave him the letter to mail, that he indorsed the name

of Mike Lemon on the back thereof, or that he delivered the check to Riseman, or any other person at the Redman department store, but admitted that he had been previously convicted of a felony.

[1] If the evidence is in dispute, or evidence has been introduced tending to show venue, the question then becomes one of fact for the jury. *State v. Spayde*, 110 Iowa, 728, 80 N. W. 1058. Does the record tend to show that the offense was committed in Wapello county, or in Davis county, within 500 yards of the Wapello county line? It is true that there was sufficient evidence to justify the jury in concluding that an envelope containing the check was delivered to the defendant at some place in Davis county near the Wapello county line. Whether the camp where he received the check, or the place where the letters from the camp were mailed, was within 500 yards of the Wapello county line or not, the evidence is very uncertain. Assuming, however, that the jury might have so found, what facts does the record reveal upon which the jury could have based a finding that the offense was committed in Davis county, within 500 yards of the line, or in Wapello county? No one saw him have the check in his possession after he received it from Hubert Lemon, if he did so receive it. No one testified that it was received from the defendant at the Redman department store. Forgery and uttering a forged instrument are, under our statute, separate and distinct offenses (*State v. Blodgett*, 143 Iowa, 578, 121 N. W. 685, 21 Ann. Cas. 231), and an indictment charging both offenses is bad for duplicity (*State v. McCormack*, 56 Iowa, 585, 9 N. W. 916).

[2] The difficulties of the county attorney are quite apparent. The state was without evidence that the defendant uttered the forged check. It seems to us that the record wholly fails to show where the offense was committed. It is true the defendant testified that he worked on the bridge or road until March 19th; but there is no evidence that he did not leave the camp or the road on which he was employed, or that he was not outside of both Davis and Wapello counties after it is claimed he received the check, and before March 4th, when it was probably received at the department store.

It is our conclusion that, for the reason stated, the verdict of the jury cannot be sustained. No sufficient evidence to prove the venue was introduced by the state. It follows that the judgment of the court below must be, and is, reversed.

EVANS, C. J., and ARTHUR and FAVILLE, JJ., concur.

SHEFFIELD MILLING CO. v. HEITZMAN
et al. (No. 34187.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Husband and wife $\S$ 121—Property paid for by wife cannot be subjected to satisfaction of judgments against husband.

Property paid for by a wife from her own resources, though purchased in the name of her husband, cannot be subjected to the satisfaction of prior judgments against him.

2. Fraudulent conveyances $\S$ 104(2) — No fraud in husband's quitclaim to wife of property paid for by her.

Where property sought to be subjected to the satisfaction of two judgments against a husband was purchased by his wife, who did not know of the judgments until the commencement of the action, no fraud was committed when the husband transferred the contract of purchase which, by inadvertence or mistake, ran to him, and executed a quitclaim deed to wife prior to the commencement of such action.

3. Trusts $\S$ 88—Parol testimony admissible to prove wife paid for property deeded to her husband and quitclaimed to her by him.

Where a husband, prior to the commencement of an action to subject property purchased in his name to the satisfaction of prior judgments against him, quitclaimed it to his wife, parol testimony was admissible to prove that she was the real purchaser, as against the objection that it was an attempt to set up by parol an express trust, whether he acted as her agent or held in trust for her, there being a resulting trust, which was discharged on his assigning the contract and quitclaiming to her.

4. Trusts $\S$ 17, 18(8)—Conveyance by trustee of parol trust based on sufficient consideration as against strangers.

A trust required by statute to be in writing is not void, but merely unenforceable, when resting in parol, and a conveyance by the trustee in discharge of the trust is based on sufficient consideration as against strangers.

Appeal from District Court, Lee County; John E. Craig, Judge.

Suit in equity to subject certain property occupied as a homestead by J. G. Heitzman and Mabel Heitzman, husband and wife, to the satisfaction of two judgments against J. G. Heitzman. Relief was denied plaintiff, and it appeals. Facts appear in the opinion. Affirmed.

John L. Benbow, of Ft. Madison, for appellant.

Herminghausen & Herminghausen, of Ft. Madison, for appellees.

ARTHUR, J. On the 17th day of February, 1903, appellant recovered judgment in the district court of Lee county against appellee J. G. Heitzman for \$210.21 and costs of suit. On the 9th day of January, 1906, appellant recovered another judgment

against J. G. Heitzman, appellee, in the sum of \$388.19 and costs. At the time these judgments were entered J. G. Heitzman was a single man, and remained single until 1908, when he married Mabel Heitzman, appellee, and they now have four children ranging in age from 2½ years to 11 years. J. G. Heitzman was formerly a real estate agent, now a clerk in a store. In the spring of 1916, the Heitzmans were living in a rented house. Mabel Heitzman had some money, and expected soon to inherit some money from her mother, who was suffering from cancer and could live but a short time, and who did pass away in a few months. Her mother carried a policy of life insurance, and owned two houses in Ft. Madison. She also expected some money from her grandmother which she received. On the death of her mother she did receive \$500 of the life insurance. She received \$180 and \$650 from the sale of some property of her mother's estate, and she also received rental from property of which her mother died seized of from \$12 to \$15 a month, and she continues to receive it. She also received \$100 from her grandmother. She also received \$25 per month for rental of the homestead property for some three months after it was purchased, and before they took possession.

J. G. Heitzman had no money—was insolvent. Upon the expectation of Mabel Heitzman to receive money from her mother's estate and from her grandmother, which she did afterwards receive, negotiations were begun with H. J. Kennedy, appellee, for the purchase of the property to be occupied by them as a homestead, which they did purchase for \$2,500. A contract of purchase of the property was made, and sounded from Kennedy to J. G. Heitzman, or Jerome Heitzman, the same person. The contract was prepared by Kennedy's lawyer. It was signed by both Jerome and Mabel Heitzman at a bank where Kennedy was cashier. When they were returning home from signing the contract, Mabel said to Jerome, "Why is that contract not made in my name?" Jerome said, "It is only a contract, and as soon as we get a deed to it it will be made out correctly in your name," and afterwards she spoke to him in the same way, and Jerome made the same answer. The contract of purchase was made on the 20th day of May, 1916, and a down payment was made of \$500. The balance was to be paid in installments of \$20 on the 20th day of each month, and thereafter until fully paid, commencing on June 20, 1916, and a promissory note of J. G. Heitzman and Mabel Heitzman was given for the balance of the purchase price. All installments due were paid up to the time of this trial. On March 19, 1918, "for value received," J. G. Heitzman assigned the contract to Mabel

Heitzman in writing, and at the same time she assumed in writing all obligations of J. G. Heitzman under and by virtue of the contract, and on the same day J. G. Heitzman, in consideration of "one dollar, love and affection and other good and valuable considerations," executed and delivered to Mabel Heitzman a quitclaim deed to the premises.

This action was begun May 29, 1918, about two months before the assignment of the contract and the quitclaim deed were made by J. G. Heitzman to Mabel Heitzman. In the original petition appellant alleged that appellee, J. G. Heitzman, had purchased from H. J. Kennedy, who held the legal title, the premises in controversy, and was the owner of an equity and interest in the property; that Kennedy held the property subject to the payment by J. G. Heitzman of the remainder of the purchase price; that the interest of J. G. Heitzman in and to the property had been acquired subsequent to the recovery of the judgment of the plaintiff; and that the equity and interest in the realty of J. G. Heitzman was liable in equity for the payment and satisfaction of the judgments. Appellant prayed for judgment and decree establishing the judgments as liens against the interest of J. G. Heitzman in and to the property; that the balance due Kennedy, holder of the legal title, be ascertained; that the property be sold, and out of the proceeds of the sale the balance of the purchase price due Kennedy be first paid; and that the remainder of the proceeds be applied in satisfaction of plaintiff's judgments.

In an amended petition plaintiff alleged, on information, not having access to the contract, that the contract provided that the title to the premises would be held by Kennedy until the whole or a large part of the consideration was paid, and that then the title was to be conveyed by Kennedy to Mabel Heitzman; that appellee, J. G. Heitzman, had in fact paid a large part of the purchase price; that J. G. Heitzman had made the contract and the payments therein in part performance for the purpose of hindering, delaying, and preventing the satisfaction of plaintiff's judgments out of the realty; and that J. G. Heitzman was insolvent.

Appellees answered separately, but their answers were substantially alike. They admitted rendition of the judgments, but denied that J. G. Heitzman, appellee, was the owner of an equitable or any other interest in the property in controversy; denied that he ever had any interest in the property, equitable or otherwise. Appellees averred that about May 20, 1916, J. G. Heitzman negotiated for and on behalf of Mabel Heitzman, his wife, to purchase the real estate in controversy as a homestead for said Mabel Heitzman and himself and their family; that a contract was made and enter-

ed into on May 20, 1916, between Kennedy, appellee, and Mabel Heitzman, appellee; that by inadvertence or mistake the contract was written in form only as though J. G. Heitzman, appellee, was the party in interest, but in fact and in deed the said Mabel Heitzman was to furnish the consideration for the purchase of said real estate, and did furnish the consideration thus far paid towards the purchase of said real estate, and that Mabel Heitzman was at the time the real purchaser; that J. G. Heitzman, in effect, had and has no interest in the property other than as the husband of Mabel Heitzman; that in pursuance of the purchase of the property as a homestead J. G. Heitzman and Mabel Heitzman, with their family, constituted of four children ranging from 2½ to 11 years of age, began to occupy the premises as a homestead in October, 1916, and have ever since so occupied it; that under the law the property was exempt from execution; that Mabel Heitzman had paid from her personal resources, all the money which had been paid on the contract; that on March 19, 1918, J. G. Heitzman, appellee, assigned, conveyed and transferred to Mabel Heitzman, appellee, his apparent right, title and interest in the contract, and made a quitclaim deed on the same day to her of all his apparent interest in and to the property, and that Mabel Heitzman, appellee, accepted said transfer, and assumed all the obligations of the contract, and the same was indorsed on the contract; that the assignment of the contract and the execution and delivery of the deed was one and in consummation of one transaction; that part of the consideration from Mabel Heitzman to J. G. Heitzman and the execution of the deed was the assuming and agreeing to pay a debt due to J. B. Heitzman, father of J. G. Heitzman, appellee, in the amount of \$900, incurred and used in the expense of remodeling and repairing the homestead; that Mabel Heitzman, appellee, was a bona fide holder for value of her interest in the property; that the transfer of the contract and of the rights thereunder, and the execution and delivery of the deed were made long prior to the commencement of the instant action.

Copies of the contract, with indorsement of payments thereon, and of the quitclaim deed, were annexed to the answers.

Appellees further allege that the judgments against J. G. Heitzman, appellee, had been recovered more than 10 years prior to May 16, 1916, the date of the contract, and that the judgments were not and never were liens on the real estate in controversy, and that the property was not subject to the satisfaction of the judgments.

After appellees' answers were filed, plaintiff amended his petition, alleging that the assignment of the contract and the execution of the deed from J. G. Heitzman to Mabel

Heitzman, appellee, were for the purpose of hindering, delaying, and defrauding the creditors of appellee J. G. Heitzman, and to prevent the satisfaction of the realty in controversy to the judgments due the plaintiff, and that appellee J. G. Heitzman was insolvent at the time of the execution and delivery of the contract and deed, and that they were executed without sufficient consideration, and were of no effect in equity, and prayed that the assignment of the contract and the deed be set aside.

In reply to the separate answers of appellees, plaintiff averred that appellees J. G. Heitzman and Mabel Heitzman were estopped by the terms of the contract from claiming and asserting any rights, title, or interest under the quitclaim deed made by J. G. Heitzman, appellee, to his wife, Mabel Heitzman, appellee, because such deed was voluntarily executed without a good, valuable, and sufficient consideration, and was fraudulent as to appellant, a judgment creditor of J. G. Heitzman, appellee, who was insolvent, and that no change of possession or indication of change of title was made of record, nor other notice, actual or constructive, by recording of the deed before the commencement of this action and the incurring of the expenses of this litigation prior to the filing of the separate answers of appellees; that all of the appellees were estopped as against the appellant in this action who relied on the original contract and a part performance thereof by J. G. Heitzman, appellee; that appellee Kennedy's rights, by reason of his making common cause in the fraudulent transfer, were postponed and rendered inferior in equity to the paramount lien and rights of plaintiff sought to be enforced in this action.

There was no dispute in the evidence. The only testimony offered by appellant was formal entries of the judgments which had been admitted by defendant, and the original contract, with payments indorsed thereon, which was furnished by defendant. Appellant offered no oral testimony. The only witnesses were the appellees.

[1] If Mabel Heitzman, appellee wife of J. G. Heitzman, appellee, in fact furnished from her own resources all of the money paid on the contract, all of the purchase money which had been paid for the property in controversy, that would seem to be determinative of this case in favor of appellees and against appellant. The evidence without dispute shows that she did furnish the money to pay every cent that was paid on the purchase price of the property. True, J. G. Heitzman, appellee, paid the installments, most of them, on the contract to Kennedy, but it is not shown that he used one cent of his own money in making such payments. But, on the contrary, it is clearly and conclusively proven that all of the payments were made with the individual

money of Mabel Heitzman. J. G. Heitzman was insolvent, was a clerk in a store, and it is not shown that he ever had any money of his own to make payments with. It does appear without contradiction that Mabel Heitzman received money from her mother's life insurance and from her mother's estate, and also from her grandmother, and that such moneys were used in making payments on the contract. The down payment was made from a loan of \$500 which was taken up with the insurance money received by Mabel. They borrowed \$900 from J. B. Heitzman, father of J. G. Heitzman, appellee, part of which was paid by Mabel Heitzman, and the balance assumed by her, which was not paid at the time of the trial. She was on the note given to the father for the loan.

[2-4] Appellant claims that fraud was intended and committed by transferring the contract and executing the quitclaim deed. Appellant asserts that J. G. Heitzman transferred the property to Mabel Heitzman for the purpose of defrauding his creditors. The evidence does not prove these claims, but positively disproves them. It is not shown that any money of J. G. Heitzman's went into the purchase of the premises, but it conclusively appears from the evidence that Mabel Heitzman furnished all the money which was paid on the property from her own individual means. J. G. Heitzman did not pay anything towards the purchase price nor the improvements on the homestead. There could be no fraud on the part of Mabel Heitzman, for she did not know of the existence of plaintiff's judgments until the commencement of this action. All of the appellees, who were all the persons having personal knowledge of the transaction, say that the property was purchased by Mabel Heitzman, but, by inadvertence or mistake, the contracts of purchase ran to J. G. Heitzman. Appellant contends that the evidence offered to prove that Mabel Heitzman was the purchaser and the real party in interest was incompetent, being an attempt to vary by parol evidence the terms of the written contract, that appellees by so doing attempted to set up an express agreement to establish a trust, and that an express trust cannot be established by parol, and that there can be no resulting trust for the reason that appellees relied on an express agreement. Unquestionably J. G. Heitzman, appellee, while he held the contract, held in trust for Mabel Heitzman, who had furnished all the money paid on the contract, which would constitute a resulting trust. Whether it be considered that J. G. Heitzman was acting as the agent of Mabel Heitzman or was her trustee and she the cestui que trust it matters little. Long before this action was commenced J. G. Heitzman and Mabel Heitzman and also Kennedy, recognized that the apparent interest of J. G. Heitzman in

the contract in fact belonged to Mabel Heltzman, and that J. G. Heltzman had no interest in property except as husband. If it was a resulting trust, as we think it was, it was discharged by J. G. Heltzman's assigning the contract and quitclaiming to Mabel. After a trust has become fully discharged, it ceases to be vulnerable to the objection that it may not have been established, in the first instance, by parol testimony. A trust required by statute to be in writing is not void, but merely unenforceable, when resting in parol, and the conveyance by the trustee in discharge of the trust is based on sufficient consideration as against strangers. *McCormick v. Griffin*, 116 Iowa, 397, 90 N. W. 84.

The record shows that the transaction was free from fraud, and, although not done in as strictly a businesslike manner as usual with strangers, was carried out more strictly than usual between husband and wife. The court was correct in finding the equities with appellees and dismissing the petition.

Decree and judgment must be and are affirmed.

Affirmed.

EVANS, C. J., and STEVENS and FAVILLE, JJ., concur.

CITY OF BLOOMFIELD v. BLAKELY. (No. 34299.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Municipal corporations $\S$ 106(3) — Three separate readings of proposed ordinance unnecessary where rule suspended.

Where a city council under Code, $\S$ 682, has, by a three-fourths vote, dispensed with the rule requiring the reading of a proposed ordinance on three different days, the ordinance may be placed on its final passage at a single meeting, and three different readings at such meeting are not required.

2. Municipal corporations $\S$ 109 — Record of separate readings of proposed ordinance unnecessary under suspension of rule.

Code, $\S$ 682, relating to the reading of proposed ordinances, does not require that the fact of three separate readings shall be made a matter of record in the proceedings of the city council, where the rule requiring reading on three different days has been dispensed with.

3. Municipal corporations $\S$ 109 — Council's record held sufficiently to show yeas and nays vote on ordinance.

Code Supp. 1913, $\S$ 683, requiring yeas and nays to be called and recorded on passage of ordinances, held sufficiently complied with by the records of the proceedings of a city council, showing affirmatively which members were present, that the roll was called, and how each member voted.

4. Municipal corporations $\S$ 106(3) — Motion for vote on final passage of ordinance held sufficient.

A motion before a city council that "said bill for ordinance be placed of record for its final passage" held sufficient by its terms to bring before the council the question of a vote upon the passage of the ordinance, and not merely its recording for passage at some future time.

Appeal from District Court, Davis County; D. M. Anderson, Judge.

Defendant was convicted in mayor's court of violation of an ordinance of the City of Bloomfield regulating the speed of automobiles upon the public streets. He appealed to the district court, where the action of the mayor's court was sustained, and he now prosecutes his appeal to this court. Affirmed.

Buell McCash, of Bloomfield, for appellant.
John F. Scarborough, of Bloomfield, for appellee.

FAVILLE, J. An information was filed in the mayor's court of the appellee city charging the appellant with violation of Ordinance No. 226 of said city. The said ordinance fixes the speed limit of automobiles upon the streets of said city.

The question for our determination is whether or not the ordinance in question was legally adopted by the city council. The record of the proceedings of the city council respecting the adoption of said ordinance has been certified to us. Said record is as follows:

"Council Chamber, Bloomfield, Iowa,

"October 19, 1915.

"Council met in adjourned session, as per adjournment taken October 12, 1915, with following members and officers present:

"E. N. Bezenberger, Mayor; J. H. Leon, J. L. Spurgeon, J. M. Owsley, J. L. Barrickman, Councilmen. (John Hutchings, absent.) J. F. Scarborough, City Attorney. R. C. Bristow, City Treasurer and Manager. E. Z. Morrow, City Clerk.

"J. L. Spurgeon offers resolution, sec. by Owsley, that the bill for Ordinance 226 be read. On roll call vote was as follows: Yeas: Leon, Spurgeon, Owsley, and Barrickman. Nays: None. Resolution carried.

"Bill for Ordinance 226 then read carefully by City Atty. Scarborough, after which the matter was open for discussion.

"Motion by Owsley, sec. by Leon, that rule requiring reading of bill for ordinance on three separate days be dispensed with, and that the reading just made be the first reading. On roll call vote was as follows: Yeas: Leon, Spurgeon, Owsley, and Barrickman. Yeas, 4. Nays: None. Motion carried.

"The above-named bill for ordinance then read by Atty. Scarborough the second time.

"Motion by Spurgeon, sec. by Leon, that bill for Ordinance 226 be placed on its third reading. On roll call vote was as follows: Yeas:

Leon, Spurgeon, Owsley, Barrickman. Yeas, 4. Nays: None. Motion carried.

"Motion by Owsley, sec. by Barrickman, that said bill for ordinance be placed of record for its final passage. On roll call vote was as follows: Yeas: Leon, Spurgeon, Owsley, and Barrickman. Yeas, 4. Nays: None."

Upon this record it is the contention of the appellant that the said ordinance was never legally adopted.

Section 682 of the Code provides as follows:

"Ordinances of a general or permanent nature, and those for the appropriation of money, shall be fully and distinctly read on three different days, unless three-fourths of the council shall dispense with the rule."

It appears from the record that a motion was properly made and seconded that the rule requiring reading of the ordinance on three separate days be dispensed with, and no question is raised that three-fourths of the council voted to dispense with the rule.

It is contended, however, that the record fails to affirmatively show that the ordinance was read a third time after the rule had been dispensed with. It must be conceded that the record makes no specific recital in regard to the reading of the ordinance a third time. It does appear from the record that the ordinance was read by the city attorney a first and second time. After the second reading, it appears that a motion was made that the ordinance be placed on its third reading, and that this motion was carried. The record does not disclose the fact that the ordinance was then read the third time in pursuance of this motion.

So far as the record shows, after the motion to place the ordinance on its third reading was carried, the next step, as shown by the record, was the motion that the ordinance "be placed of record for its final passage."

The statute above quoted provides that ordinances shall be read "on three different days, unless three-fourths of the council shall dispense with the rule."

In *Collins v. Iowa Falls*, 146 Iowa, 305, 125 N. W. 226, we said, referring to this statute:

"It will be noted that the quoted section of the statute refers to this requirement of formality as a 'rule,' and provides that it may be dispensed with by three-fourths of the council."

The "rule" that may be dispensed with is the rule requiring ordinances to be fully and distinctly read "on three different days." The record in this case clearly shows that the rule was dispensed with. When the rule is legally dispensed with by a vote of three-fourths of the council, there is no provision left that requires three separate and distinct readings. The requirement of the statute is that the ordinance shall be read on three different days. This provision may be entirely dispensed with by the council, and the ordinance passed at a meeting on one day in-

stead of at meetings on three different days. Where the rule is dispensed with by the council, as was done in this instance, the ordinance may be passed at a single meeting or on one day, and there is no provision left in this statute or elsewhere that requires that the ordinance shall be then read in full three different times. There is a clear distinction between "three different readings" of the ordinance and a reading of the ordinance on "three different days." If the rule requiring the ordinance to be read on three different days is entirely dispensed with, as provided by the statute, there is no provision remaining that requires that the ordinance shall be read three different times at the one meeting where it is up for consideration.

Furthermore, the statute does not require in terms that the fact of the reading of the ordinance shall be made a matter of record in the proceedings of the city council. It is the vote upon the passage of the ordinance that must be recorded, but not necessarily the fact of the reading of the ordinance.

[1, 2] The city council having, by a three-fourths vote, dispensed with the rule requiring the reading of the ordinance on three different days, the ordinance can be placed upon its final passage at a single meeting of the council, and in such event three different readings of the ordinance at such meeting was not required by the statute. Furthermore, the fact of such separate readings is not required by statute to be made of record in the proceedings of the council where the rule is dispensed with.

In any event in the instant case it is fairly to be presumed from the entire record that the ordinance was in fact read in full the third time before it was placed upon final passage. There is no merit in appellant's contention at this point.

II. It is contended that the ordinance was never legally enacted, because there is a failure to show of record that the yeas and nays were properly called and recorded upon the question of the adoption of the ordinance. The particular point stressed is that the motion upon which the final roll call was taken was not sufficiently specific in its language to place the ordinance itself upon passage. The language of the record above quoted shows that it was moved and seconded that "said bill for ordinance be placed of record for its final passage." The contention of the appellant is that the effect of this motion was merely to have the ordinance recorded in some record of the city council, and that it did not place the ordinance "on its passage" before the council; or, in other words, that the motion had merely to do with the recording of the ordinance for "final passage" at some future time when the ordinance might be taken up for such passage.

The statute (Code Supplement 1913, § 683) provides:

"On the passage or adoption of every by-law, ordinance, and every such resolution or order, the yeas and nays shall be called and recorded."

We have held that this requirement of the statute is mandatory, and that, unless the yeas and nays are called and recorded upon the final passage or adoption of an ordinance, the same is not legally enacted.

This was our direct holding in the Town of Olin v. Myers, 55 Iowa, 209, 7 N. W. 509, and has been followed in Markham v. City of Anamosa, 122 Iowa, 689, 98 N. W. 493, Cook v. City of Independence, 133 Iowa, 582, 110 N. W. 1029, and Farmers' Telephone Co. v. Town of Washta, 157 Iowa, 447, 133 N. W. 361.

[3] The record in this case affirmatively shows which members of the city council were present at the time. It affirmatively shows that the roll was called and affirmatively shows of record how each member of the council voted. There is a sufficient compliance with the requirements of the statute in these several particulars.

[4] The precise question for our determination at this point is whether or not the motion that "said bill for ordinance be placed of record for final passage" was sufficient by its terms to bring before the city council the question of a vote upon the passage of the ordinance, and that the vote thereon was in fact a vote to adopt and pass said ordinance. The language of this motion must be construed in the light of the circumstances under which it was made. The city council had the ordinance in question before it for consideration at that time. The council had voted to dispense with the rule requiring the reading of the ordinance on three different days. The ordinance had been read and considered by the council at the time this motion was made. The language used in the motion was not technically accurate, nor was it by any means the most apt and expressive that could have been chosen, but we do not think there was such verbal inaccuracy as to render obscure and uncertain the plain purpose and intent to place the ordinance upon final passage. The members of the council could not well have been in any way misled in the matter, and must have clearly understood that they were voting upon the final passage of the ordinance.

A fair and reasonable construction of the language of the motion, in the light of the circumstances under which it was made, leads us to the conclusion that the effect of the language of the motion was to place the ordinance upon its final passage. This being true, it follows that the ordinance was duly adopted.

We hold that the record sufficiently shows that the ordinance in question was duly and legally adopted and enacted as provided by

the statute, and that the same was not invalid for any of the reasons urged upon this appeal.

It follows that the judgment of the district court must be, and the same is, affirmed.

EVANS, C. J., and STEVENS and ARTHUR, JJ., concur.

WHITMORE v. GAMBLE et al. (No. 34253.)

(Supreme Court of Iowa. Oct. 18, 1921.)

Schools and school districts $\Leftrightarrow$ 38—Irregularities in election favoring consolidation of districts held immaterial.

Where in an election to form a consolidated district of a village and territory outside one or two country ballots were placed in the town box and one of the judges to equalize ballots placed town ballots in the country box, and results showed two less country ballots than country voters and two more town ballots than voters, but there was a very substantial majority for the consolidation, the irregularity was immaterial.

Appeal from District Court, Page County; Earl Peters, Judge.

Action in equity to determine the validity of an election establishing a consolidated school district and to enjoin the treasurer and director from issuing bonds. By stipulation of the parties it was agreed that the court might treat the action as an appropriate one, whether technically so brought or not. There was a decree dismissing plaintiff's petition, and he appeals. Affirmed.

Ferguson, Barnes & Ferguson, of Shenandoah, for appellant.

L. H. Mattox and Wilson & Keenan, all of Shenandoah, for appellees.

STEVENS, J. At an election held on the 28th day of February, 1920, at the town hall in Coin, Page county, Iowa, to vote upon the question of the organization of a consolidated independent school district to be known as the consolidated independent school district of Coin, two ballot boxes were used, one for the voters residing within the incorporated town of Coin, and one for the voters residing within the territory of the proposed district outside of the town of Coin. The count of the judges of election showed that 87 votes were cast for consolidation and 7 against in the town of Coin, and 67 votes for and 50 against consolidation in the territory outside thereof, thereby showing a majority in favor of consolidation both in the town and in the territory outside thereof.

The contention of counsel for appellant is that ballots which should have been placed in the ballot box used for the territory out-

side of Coin were erroneously put in the town box, and that ballots that should have been put in the town box were placed in the country box. The testimony sustains this contention to the extent of showing that one or two country ballots were placed in the town box, and that the judges, for the purpose of equalizing the number of ballots, placed one or two town ballots in the country box. Of course, the judges did not know whether these ballots were cast for or against consolidation, and the error could not be corrected in this way. When the ballot boxes were opened and the votes counted by the judges, it was discovered that the ballots in the country box were two less than the number of votes cast, as shown by the pollbook, whereas the town box contained two more than the total number cast in Coin, as shown by the pollbooks. This irregularity did not, however, affect the result. Giving to appellant the most favorable interpretation of the testimony, there was still a substantial majority, both in the town and country boxes. The error of the judge who deposited the ballot in the wrong box was discovered immediately and a correction sought as above suggested. Manifestly the election was not invalidated by the errors shown. The result was the same as it would have been if the claimed errors had not been made. The citation of authorities on this point is unnecessary, but, as bearing upon the question, see *State v. Lockwood*, 181 Iowa, 1233, 165 N. W. 330, and *Powers v. Harten*, 183 Iowa, 764, 167 N. W. 693. The record contains nothing to indicate fraud or design upon the part of the judges to improperly mingle the ballots.

It is further contended by counsel for appellant that electioneering was permitted and carried on at the town hall during the day of the election. This point is not insisted upon in argument, and a careful reading of the record satisfies us that the contention is without merit.

We therefore hold that the decree of the court below sustaining the consolidation of the district should be, and is, affirmed.

EVANS, C. J., and FAVILLE and ARTHUR, JJ., concur.

CRONK v. DUNLAP. (No. 34172.)

(Supreme Court of Iowa. Oct. 18, 1921.)

Boundaries §52(2)—Plaintiff held to have waived allowance of time to file exceptions to commissioner's report.

Where plaintiff's petition for establishment of lost corners under Code, §§ 4228-4230, was filed February, 1919, and issue made forthwith

on plea of acquiescence and adverse possession, and at February term, 1920, on trial notice by defendant, the court fixed trial for March 15th, when plaintiff requested appointment of engineer to make plat stating that, if the line found was as claimed by defendant, plaintiff would dismiss, and, if it was not the same, he would proceed immediately, and the commissioner so appointed filed plat on March 17th, and the court fixed March 19th for trial, plaintiff had waived right under section 4235 to demand postponement to the next term to file exceptions to the commissioner's report, and, especially in view of court's right to proceed on issue of acquiescence, plaintiff could not refuse to appear on the date assigned.

Appeal from District Court, Davis County; Seneca Cornell, Judge.

A proceeding to establish alleged lost corners of a residence lot. The plaintiff moved for a continuance and for time to file exceptions to a commissioner's report. His motion being overruled, he refused to appear at the trial, and his petition was dismissed for want of prosecution. He has appealed. Affirmed.

Roberts & Webber, of Ottumwa, for appellant.

Payne & Goodson, of Bloomfield, for appellee.

EVANS, C. J. The plaintiff alleged in his petition that he was the owner of the east two-thirds of a certain lot 3 in the city of Bloomfield, and that the defendant was the owner of the west one-third thereof, and that the boundary line between the two properties had become lost or destroyed. He prayed for an establishment of same under the provisions of chapter 5, tit. 21, of the Code, being sections 4228-4239. Plaintiff's petition was filed in February, 1919. Issue was made by the defendant forthwith. The defendant pleaded acquiescence in the recognized line and also adverse possession. At the February, 1920, term of court the case was regularly assigned for trial upon a fixed date. On such date the parties appeared. Upon the application of plaintiff the court appointed a commissioner to make measurements of the lot in question and to make and present a plat which would show the true line separating the east two-thirds from the west one-third of said lot and which would also show the alleged line acquiesced in by the parties as contended by the defendant. This appointment of the commissioner contemplated immediate action and report by the commissioner, and the trial was postponed until such report should be made. Such report was presented on the second day following, and consisted of a mere plat of a rectangular lot which indicated the correct mathematical line and the line contended for by defendant as having been acquiesced

in. Thereupon the court ordered the trial to proceed on the second day following the filing of such report. Thereupon the plaintiff filed a motion for postponement of the trial until the next term so that he might have opportunity to file exceptions to the report on or before the second day of such term as provided by section 4235 of the Code. Such motion of plaintiff gave to the court advance notice that the plaintiff would not appear at the trial on the date set by the court. On such date the case was called for trial in due course. No one appeared for the plaintiff, and his petition was dismissed.

Plaintiff's exceptions are predicated wholly upon the provisions of section 4235, whereby the parties are allowed until the second day of the following term to file exceptions to the commissioner's report. For the purpose of this appeal we will assume that the plaintiff had a mandatory right to such time unless he had already waived it.

An examination of the record satisfies us that the disclosures therein are sufficient evidence of a waiver to justify the court in the ruling complained of.

For more than one year after the issue had been made the case had apparently slept upon the docket. At the February, 1920, term, pursuant to trial notice by the defendant, the court fixed a date of trial as of March 15th following. On that date plaintiff appeared by his attorney and orally applied for the appointment of a commissioner for a limited purpose. The record recites that at that time the plaintiff—

"orally requested the court to appoint an engineer to inspect and survey the lines in dispute, and stated orally that it would better enable the court to understand and apply the evidence if the commissioner would make a plat showing both lines as claimed by the parties, and stated to the court, in substance, that if the commissioner found the west line of plaintiff's lot as platted to be on the same line as the fence claimed by defendant as a line by adverse possession or acquiescence, he would dismiss plaintiff's action at the cost of plaintiff, but that, if the commissioner did not so find, they would proceed immediately upon the report of the commissioner, with the introduction of the evidence and the final determination of said cause; that thereupon the court sustained the motion of plaintiff and appointed a commissioner for the express purpose of making a survey to locate the lines claimed by the plaintiff and the defendant and to draw a plat showing the line claimed by the plaintiff and also the line claimed by the defendant, and to file said plat at once, and the trial of said cause was suspended until the said report of the commissioner could be filed."

Pursuant to his appointment, the commissioner made the measurements and filed his plat on March 17th. Thereupon the court fixed March 19th as the date for resuming

the trial. The defendant had appeared with his witnesses on the 15th and pursuant to the temporary postponement of the trial he held his witnesses in court until the 19th and until the case was reached for trial. We think that upon this record the waiver by plaintiff is shown, and that he was in no position to demand, as a matter of mandatory right, a postponement until the following term. He made no showing whatever that would have justified the court in exercising a discretion in his favor in the interest of a fair trial.

Furthermore, under section 4230 the issue of acquiescence was one which the court was not required to submit to the commissioner. Such issue was not in fact submitted to the commissioner. The trial court could therefore have proceeded with the trial of that issue either before or after the filing of the commissioner's report and without reference thereto. Clearly therefore the plaintiff was in no position to make a peremptory demand upon the court, or to say in advance, "I will not appear before you on the date assigned." The case was duly called for trial upon the date fixed. The plaintiff refused to offer any evidence or to appear in any manner. The court did not err in dismissing his petition.

The judgment below is therefore affirmed.

ARTHUR, STEVENS, and FAVILLE, JJ., concur.

STATE v. VAN GORDER. (No. 33642.)

(Supreme Court of Iowa. Oct. 18, 1921.)

Criminal law §1077—Accused held entitled to transcript of evidence at county's expense.

Under Code, § 254, as to ordering transcript of evidence at the county's expense, where accused is unable to pay therefor, *held*, that neither the fact that accused was able to furnish an appeal bond, nor that his wife had property, nor that accused had relatives who had previously aided him, nor that he was permitted to subpoena witnesses at county's expense, nor that his case had been an expensive one for the county, nor that he was capable of earning money, constituted reason why his application for such transcript should be denied; accused having been imprisoned on another charge, and therefore unable to work and pay for a transcript.

Appeal from District Court, Monroe County; D. M. Anderson, Judge.

The defendant was convicted of manslaughter and prosecuted an appeal. He made application to the district court under the statute for an order that a transcript of the evidence in said cause be ordered at the expense of the county. The application was refused, and defendant appeals from the order denying said application. Reversed and remanded.

Wm. S. Hart, of Waukon, and D. W. Bates, of Albia, for appellant.

Ben J. Gibson, Atty. Gen., and B. J. Flick, Asst. Atty. Gen., for the State.

FAVILLE, J. The appellant was indicted in the district court of Monroe County, Iowa, charged with the crime of murder in the first degree. Upon the trial, he was convicted of manslaughter. From judgment on said conviction he has prosecuted an appeal to this court.

In proper form the appellant presented his application for an order that the transcript of the evidence in the cause in which he had been convicted should be ordered by the court at the expense of Monroe county, Iowa. The appellant's application was supported by his own affidavit and that of others respecting his financial condition. Affidavits in resistance thereto were filed. The order of the lower court was as follows:

" * * * Upon showing made by the defendant and counter showing made by the state, the court is not satisfied that the defendant is not able to pay for a transcript of the evidence taken upon the trial. The defendant apparently had no difficulty in giving an appeal bond of \$7,500, upon which he is now and has been since May at liberty upon the charge herein made. He is an able-bodied man, and with the present demand for labor ought to have no difficulty in making \$5 or more per day. He and his wife were interested in a property at Poplar Bluff, Mo., in which they certainly had considerable equity. His wife had an interest in her father's estate of \$3,000 or \$4,000, and he has brothers and sisters and other relatives in Allamakee county, Iowa, who have heretofore come to his aid. In his trial in this court he was permitted to subpoena all the witnesses he asked for, and many of them residing at a great distance. The county has paid these fees. The case was an expensive one to Monroe county, and the added burden of a transcript at its expense should not be added, when the means are certainly at hand for the defendant to bear this expense himself. The defendant's motion for a transcript of the evidence in this case at the expense of Monroe county, Iowa, is overruled, to which ruling the defendant at the time duly excepts."

Code, § 254, provides as follows:

"If a defendant in a criminal cause has perfected an appeal from a judgment against him, and shall satisfy a judge of the court from which the appeal is taken that he is unable to pay for a transcript of the evidence, such judge may order the same made at the expense of the county."

We have examined the record, and are satisfied therefrom that the appellant has clearly established his inability to pay for the transcript in said cause. The fact that he was able to furnish an appeal bond, or that his wife has an interest in her father's

estate, or that the appellant has brothers and sisters and other relatives in Allamakee county, Iowa, who had previously come to his aid, is not a sufficient reason why he should be denied a transcript at the expense of the county, as he has no legal way of securing any funds from these sources with which to pay for a transcript. Nor should the fact that he was permitted to subpoena witnesses in his trial at the expense of the county, or that the case has been an expensive one, be considered as any just reason why his application for an order for transcript should be denied.

The fact that the appellant is an able-bodied man and should be earning good wages, as suggested in the order of the court, is not sufficient to justify the refusal of his application for a transcript at the expense of the county, in view of the affidavits filed in the case. It sufficiently appears that the appellant has been arrested and was imprisoned for another offense, and therefore has not been in a position to earn money for the payment of a transcript. The apparent interest of the appellant in a property at Poplar Bluff, Mo., in which his wife is also interested, appears to be so negligible that we do not think it could be fairly said that the appellant had any resources therein which would be available to him to secure the necessary money for a transcript in this cause.

The theory of our law is to guarantee, in so far as possible, not only a fair and impartial trial to every person charged with crime, but also a right to have his cause reviewed by the highest tribunal in the state, so that it may be determined that his conviction has not been erroneously or illegally procured. We have had occasion to review this statute and to discuss it in *State v. Robbins*, 106 Iowa, 688, 77 N. W. 463, *State v. Wright*, 111 Iowa, 621, 82 N. W. 1013, *State v. Goodsell*, 136 Iowa, 445, 113 N. W. 826, and *State v. Harris*, 151 Iowa, 234, 130 N. W. 1082, and it is unnecessary for us to review what we have said therein respecting this statute and its proper construction and application. Upon the record in this case we are satisfied that the trial court was in error in denying the appellant's application for a transcript at the expense of Monroe county, Iowa, but that the same should have been ordered by the court.

It therefore follows that the action of the lower court is reversed, and said cause is remanded, with instructions to the lower court to proceed in accordance with this opinion.

Reversed and remanded.

EVANS, C. J., and STEVENS and ARTHUR, JJ., concur.

**BILBO et al. v. DISTRICT COURT OF
RINGGOLD COUNTY et al.**
(No. 34063.)

(Supreme Court of Iowa. Oct 18, 1921.)

1. Venue ⇐37—Change for fraud in inception of note sued on cannot be granted after continuance.

An application for a change of venue under Code Supp. 1913, § 3505, subd. 6, on ground that note sued on was fraudulent in its inception, and without consideration, was subject to the provision of section 3506 that application for change shall not be allowed after a continuance.

2. Venue ⇐37—Reply to answer not necessary to make up issues to bring case within rule against change of venue after continuance granted.

In a suit on a note, a reply to the answer was not necessary to make up the issues, denial of the allegations in the answer furnished by statute being sufficient, so that the contention that the provision of Code, § 3506, forbidding granting application for change of venue after continuance could not apply because, no reply being filed, issues were not made up, was without merit.

Certiorari to District Court, Ringgold County; Homer A. Fuller, Judge.

Proceedings in certiorari to test the legality of the action of the District Court of Ringgold County in refusing a change of venue to plaintiffs under section 3505, subsec. 6 thereof, of the 1913 Supplement, in an action brought against plaintiffs, George W. Bilbo and Mary S. Bilbo, by Bert Teale, in Ringgold county, upon a promissory note. Petitioners filed answer therein alleging fraud in the inception of the note and alleging their residence to have been at all times in Union county, and asking a change of venue from Ringgold county to Union county, the county of their residence. The order of the District Court is sustained and affirmed. Affirmed.

Spence & Beard, of Mt. Ayr, and D. W. Higbee and R. Brown, both of Creston, for petitioners.

F. F. Fuller and Lewis & Lewis, both of Mt. Ayr, for respondents.

ARTHUR, J. On August 5, 1920, Bert Teale filed a petition in the district court of Ringgold county demanding judgment on a promissory note which by its express terms was payable at Mt. Ayr, the county seat of Ringgold county. The suit was brought for the August, 1920, term, which began August 16, 1920, and an original notice was duly served on defendants notifying them to appear before noon of the second day of the term.

On August 17th defendants appeared by Thomas L. Maxwell and Spence & Beard, attorneys, and at the request of their attorneys were given 30 days' time to file answer.

On August 17, 1920, the answer of defendants, which was afterwards filed, was prepared, signed, and verified by appellants.

On September 18, 1920, defendants filed the answer, admitting execution and delivery of the note sued on, but alleged fraud in its inception.

Subsequent to filing the answer the cause was continued over to the November term by the final adjournment of the August term.

The November term, 1920, convened on the 1st day of November. At the November term, some time in November, the case was continued over to the January term, 1921.

On the 23d day of December plaintiff filed a trial notice that the case would be brought to trial at the regular January term, 1921, to commence on January 3, 1921.

[1] On December 28, 1920, defendants in the case below, petitioners in this case, filed their motion or application for change of place of trial from Ringgold county to Union county, under subdivision 6 of section 3505 of 1913 Supplement, on the ground that the note sued on was fraudulent in its inception, without consideration, and that their signatures were procured thereto by false and fraudulent representations. Resistance was made to the motion, and the motion, with resistance thereto, was submitted to the court, and on December 30th the court ruled, refusing to grant change of place of trial, basing the ruling upon the fact that the case had been continued over the August term and over the November term before the application for a change of place of trial was filed. The ground of the application for a change of place of trial is found in subdivision 6 of the Code, § 3505, which was made a part of such section by the Acts of the Thirty-Third General Assembly. Prior to the enactment of this amendment to Code, § 3505, we have on numerous occasions been called upon to construe its provisions in connection with Code, § 3506. Section 3506 limits the time within which application should be filed. In every case where provisions of Code, § 3506, have been urged against the granting of the change, we have held that, if the case had been continued after the grounds of change were known to the party asking the change, the change would be refused. The provisions of Code, § 3506, are plain, and provide that no change shall be granted after a continuance, the wording being: "Nor shall such application be allowed after a continuance."

In *Dean v. White*, 5 Iowa, 266, a change was refused because the motion was not filed until after a continuance had been granted. The holding in that case was based on the

language in the case of *Wright v. Stevens*, 3 G. Greene, 63, in which we said:

"If the facts upon which his application was based existed at the first term, and were known to him, his application should have been made at that term. If they had come to his knowledge since the first term, or did not exist at that time, that should have been stated as an excuse for not having previously made the application."

These cases have been followed in many cases since. *Finch v. Billings*, 22 Iowa, 228; *McCracken v. Webb*, 36 Iowa, 551; *Petty v. Hayden Bros.*, 115 Iowa, 212, 88 N. W. 339; *Hamill v. Brewing Co.*, 165 Iowa, 266, 143 N. W. 99, 145 N. W. 511.

The answer of defendants below filed on September 18, 1920, and which was prepared and sworn to on August 17, 1920, shows that defendants then knew of the fraud pleaded as a ground of change of venue. If the application for a change of venue had been made at the time of filing answer in the case, and before a continuance had been granted, the court would have had no discretion in the matter, and the change would have been granted on the filing of the bonds as required by statute (Code, § 3505). *State ex rel. Ehrdal v. District Court of O'Brien County*, 179 N. W. 442.

Hamill v. Brewing Co., *supra*, was decided after subdivision 6 was added to section 3505. If there was any intention that Code, § 3506, should not apply when the ground of the change was based on subdivision 6, the Legislature has not so said by enactment, and we have not so construed the same. There is no reason that we see why the provisions of Code, § 3506, do not apply to subdivision 6 of that section.

In the instant case the knowledge of the fraud relied upon was known by petitioners on the second day of the first term to which they were required to appear, as shown by their answer signed and verified by them on that date, and later filed in the case. Two continuances having thereafter been had in the case before the motion was filed for a change, we are of the opinion that the court had no discretion whatever in the matter, and that petitioners, defendants below, waived their right to a change. They had an absolute right to the change if application had been made in time, but the plain provisions of section 3506 apply and could not be ignored.

[2] Petitioners urge that, if section 3506 should be held to apply, which they contend does not apply, then that the plaintiff Bert Teale had failed to file a reply to respondents' answer, thereby making up the issues which were necessary to secure a change under section 3506; that until a reply was filed it could not be known whether the case would ever come to trial, or that petitioners

would then desire a change; and that the continuances had in such case were not such as contemplated by section 3506, but one after the issues had been made up. This position is not well taken. The plaintiff might have filed a reply, but it was not necessary to make up the issues. Denial of the allegations in the answer furnished by statute made up the issues. The change of place of trial applied for by petitioners was rightfully refused.

The proceedings of the district court must be and are affirmed.

Affirmed.

EVANS, C. J., and STEVENS and FAVILLE, JJ., concur.

BOLATTI v. WABASH RY. CO. et al. (No. 34123.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Railroads $\Leftrightarrow$ 5½, New, vol. 6A Key-No. Series.—Notice of damage to shipment held sufficient, though not directed to Director General.

Where notice of damage to shipment of grapes was in all respects sufficient to apprise defendant Director General of Railroads of the loss, the notice is not insufficient because captioned to the railroad company, since General Order 50, which was passed after the notice was given, relating to actions against the Director General, had no application.

2. Carriers $\Leftrightarrow$ 187.—Under evidence as to negligent handling of shipment of grapes direction of verdict for defendant held error.

In an action for damages to a shipment of grapes, *held*, under the evidence relating to the negligent handling by terminal carrier, that court's action in directing a verdict for defendant was error.

Appeal from District Court, Monroe County; Seneca Cornell, Judge.

Action for damages to a shipment of grapes. Directed verdict for defendants, and judgment against plaintiff for costs. Plaintiff appeals. The material facts are recited in the opinion. Reversed.

Price & Hickenlooper, of Albia, for appellant.

D. W. Bates, of Albia, for appellees.

STEVENS, J. The shipment in controversy, which is a carload of grapes, originated with the Southern Pacific Railway Company at Burbank, Cal., on September 29, 1918, and was tendered to the plaintiff at Albia, Iowa, the designated point of destination by the Wabash Railway Company on October 10th.

The action, as originally brought, was against both the Wabash Railroad Company and the Director General of Railroads. Lat-

er, however, the action against the railroad company, on motion of the defendant, was dismissed. The negligence charged in plaintiff's petition is the alleged failure of the employees and agents of the defendant in charge of the instrumentalities of the Wabash Railroad Company to promptly transport the car to its destination and its failure to sufficiently and timely ice the same.

At the conclusion of plaintiff's testimony, the defendant moved the court for a directed verdict upon two principal grounds, as follows: (a) That no notice or claim for damages was served upon the Director General of Railroads by plaintiff, as required by the bill of lading; and (b) that the testimony of plaintiff failed to show negligence on the part of the Wabash Railway Company, but that it, in fact, disclosed that the negligence, if any, causing the damages complained of occurred while the car was in charge of the initial or intermediate carrier. As stated, the motion was sustained, and a verdict returned for the defendant.

[1] I. The bill of lading contained a provision that claims for damages on account of loss or injury to property in transit by the carelessness or negligence of the railroad company must be made in writing to the originating or delivering carrier within six months after delivery of the property. Plaintiff attempted to comply with this provision of the contract by causing a notice and verified claim bearing the caption "Claim for Goods destroyed to the Wabash Railway Company" to be served upon James Wallace, the agent of the Director General and in charge of the station of the Wabash Railway Company at Albia, Iowa. The notice in substance and form in all other respects complied with the requirements of the contract. *Georgia, F. & A. R. Co. v. Blush Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948. It was certain, definite and specific, and its purport, purpose, and intention to claim damages on account of the negligence of those in charge of the shipment could not have been mistaken or misinterpreted.

It is not claimed by counsel for appellee that the notice could have been conveniently or promptly served upon any other officer or agent of the Director General than the one upon whom service was made. If the notice and claim for damages was insufficient, it is solely because it was not directed to the Director General instead of to the Wabash Railway Company. No particular form of notice is required. The notice served to apprise the agents and officers of the Director General that plaintiff claimed damages on account of the negligent transportation of the grapes. The bill of lading, by its specific terms, required notice to be given either to the originating or terminal carrier. No one was prejudiced by

the failure of the plaintiff to include in the caption the name of the Director General or to make the notice run directly to him. The notice itself clearly indicated what shipment was referred to and the amount of damages claimed. General Order No. 50, requiring all actions for damages to property in transit occurring after December 1, 1917, to be brought against the Director General directly, was promulgated by the Director General October 28, 1918, which was after the grapes were tendered to the plaintiff and after the notice was served upon the agent.

So far as we are advised, the Federal Supreme Court has not held that written notice of the consignee's intention to file a claim for damages, or the claim itself must be addressed to the Director General. Order No. 50, which is relied upon by counsel for appellee, does not purport to cover this point. Its purpose was to require that all actions at law and suits in equity for loss or damage to property arising after December 31, 1917, based on contract binding upon the Director General be brought directly against the Director General. The court in *Missouri Pacific R. Co. v. Ault*, 256 U. S. —, 41 Sup. Ct. 593, 65 L. Ed. 647, held that—

"The President took over the physical properties, the transportation systems, and placed them under a single directing head; but he took them over as entities, and they were always dealt with as such. Bull. No. 4, p. 113. Each system was required to file its own tariffs. General Order No. 7, Bull. 4, p. 151. Each was required to take an inventory of its materials and supplies. General Order No. 10, Id. p. 170. Each federal treasurer was to deal with the finances of a single system; his bank account was to be designated, '(Name of Railroad), Federal Account.'"

It seems to us that the notice in question fully met the requirements of the contract, and that no prejudice resulted to any one on account of its being directed to the railway company instead of the Director General. Wallace testified that he was the agent of the Director General, and that he forwarded the claim to the freight agent of the railroad company, whom he supposed also to be under the Director General.

[2] II. The condition of the grapes when they arrived at destination is described by the witnesses as "full of worms," "dried up," "very nearly all rotten," and that they "looked like they were burned." The witnesses further testified concerning the condition of the car when opened that "it looked like the car was on fire"; that "for about 15 or 20 minutes we could not get into the car on account of the smoke"; that, "when the door of the car was opened, it was hot"; and that, "when we opened the door at first, we could see nothing, and we opened another door so the air could go

through, the smoke go off, and we tried to go to the back of the car to take out some grapes. It was warm in the car up near the door. I saw something that looked like smoke coming out of the car."

Robert A. Albertus, one of the consignors, testified that the grapes were ripe, but in good condition, when delivered to the Southern Pacific, and that, if the car had been sufficiently and properly iced, they should have been in good condition at destination. One witness testified that there were about 2½ feet of ice in the bottom of the ice compartment, and another witness that it contained only about a foot and a half. The evidence does not show when the car was received at Kansas City by the Wabash Railway Company nor the time actually consumed in the transportation from that point.

Clearly, there was sufficient evidence of negligence to carry the case to the jury. But it is vigorously argued by counsel for appellee that plaintiff's evidence fully exonerated the terminal carrier from negligence. Toney Trevisol, who paid the draft attached to the original bill of lading to the bank for the plaintiff, testified that the defendant's agent told him that, according to the bill, the car was not iced after it left Los Angeles until it reached Kansas City. On cross-examination the witness was asked to state whether, if the car was not iced after it left Los Angeles and before it arrived at Kansas City the grapes would not have been completely spoiled before the car arrived at that point. The competency of the witness to answer the question was challenged and overruled by the court. The answer, however, was that he did not know. No other evidence as to when or where the car was iced, or what quantity was placed in the compartment, was offered. While the evidence may not have been strong on some features of the case, yet, under familiar rules of law, it was sufficient to require submission of the case to the jury. We therefore hold that the motion to direct a verdict should have been overruled, and that the judgment of the court below cannot be allowed to stand.

Reversed.

EVANS, C. J., and FAVILLE and ARTHUR, JJ., concur.

GOLDEN v. BILBO. (No. 34147.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Deeds §32—Title under deed blank as to grantee passes by delivery.

A deed blank as to the grantee confers the equitable title on the purchaser, and such title passes by delivery.

2. Vendor and purchaser §232(9)—Rule referring possession to known right of possession inapplicable to short-term lessees.

The rule that, where one is in possession under a known right of possession, such possession is referable to such right, and a purchaser need not inquire further, is inapplicable to lessees who rent for short periods and often renew their leases.

3. Exchange of property §8(4)—Contract for exchange held competent to show time for delivery of possession.

Where plaintiff and defendant had contracted for exchange of lands, but the property to be received by plaintiff was burdened by a lease so that possession could not be given, the contract for the exchange was competent in action for damages to show the time that plaintiff was to have actual possession.

4. Appeal and error §719(1)—Errors not listed as relied on cannot be considered.

A complaint on appeal, made in argument only, that the measure of damages in an instruction given was incorrect, cannot be considered where the giving of the instruction was not listed among errors relied on for reversal.

5. Evidence §213(1)—Offers of compromise inadmissible to show liability.

Offers by way of compromise are not admissible to show liability.

6. Evidence §213(2)—Offers of compromise held inadmissible to show liability for breach of contract.

In an action for damages for breach of a contract for the exchange of lands, evidence that defendant had offered to make certain payments and had offered a certain sum in settlement of the claim held incompetent as being offers of compromise.

7. Appeal and error §1052(5)—Admission of offers of compromise held harmless error.

In an action for breach of contract for the exchange of lands, admission of incompetent evidence consisting of offers of compromise held harmless; the question of liability having been decided by the court, and not the jury.

8. Exchange of property §8(4)—Evidence of foreclosure held properly excluded in suit for breach of contract.

In a suit for the breach of a contract for the exchange of lands, evidence of the record in a foreclosure action with receiver clause in the mortgage, subsequent to the date of the contract, held properly excluded; the action not being one for the recovery of rent.

Appeal from District Court, Union County; P. C. Winter, Judge.

Appellee brought this action to recover damages for the breach of a contract between himself and appellant which provided for exchange of properties. Appellee alleged that he suffered damages because the premises received by him were subject to a lease extending from March 1, 1919, to

March 1, 1920, whereby he was denied possession of the premises on March 1, 1919, on which date, under the contract, he was to receive possession. Trial to a jury, resulting in a verdict for appellee. Judgment was rendered thereon, from which this appeal is prosecuted. Affirmed.

R. Brown, of Creston, for appellant.

Kenneth H. Davenport and E. F. McEniry, both of Creston, for appellee.

ARTHUR, J. In his petition appellee claims he was denied possession of the land he was to receive on March 1, 1919, because of a lease previously given whereby possession was retained by the lessee from and after March 1, 1919, to March 1, 1920, and that such lease prevented a sale or trade of the land by him, and resulted in damage to him; that under the terms of the contract for the exchange of properties defendant was to give possession to plaintiff on March 1, 1919.

Appellant admits executing the contract and the terms of the same, but alleges that he performed all the terms of the contract; that in pursuance of the terms of the contract he executed and delivered a deed for the premises to appellee on or about October 30, 1918, and made full performance of the terms of the contract; that the lease complained of was void, and that appellee failed in his possession because of his own neglect and omissions; that the title received and held by appellee by virtue of the deed of October 30, 1918, was paramount to the lease of the premises; and that appellee lost the possession of the premises and the rental by his own fault, omissions, and failures.

II. Error is assigned to instruction No. 3, wherein the court instructed the jury that the contract had been established beyond dispute under which by its terms, appellee was to be given possession March 1, 1919, and that it was further established without contradiction that appellant did not so give appellee possession, and that the only remaining issue was to fix the amount of appellee's damages.

Appellee, by contract in writing, traded certain town property to appellant for a farm. The contract is dated October 24, 1918, and contains the following provision:

"Each party hereto agrees to pay the interest due on the mortgages on the property he is trading and the taxes thereon up to October 23, 1918, and possession of the farm is to be given on March 1, 1919, and possession of the town property is to be given as soon as the title papers are exchanged, and this trade completed."

It appears without dispute in the record that one Frank Pierce owned the land in September, 1918, and in that month convey-

ed the same to Elsie Seligman by deed in which the name of the grantee was not inserted. While Elsie Seligman was the owner of the deed, on October 1, 1918, she leased it to John Sink for the year commencing March 1, 1919, and ending March 1, 1920. On October 16, 1918, Sink subleased a part of the land to William Cunningham, and the remainder to W. J. Hammons, for the term of his lease. Cunningham and Hammons were already in possession of the premises under lease for the year ending March 1, 1919. Elsie Seligman sold the land to appellant, and delivered the deed, still blank as to grantee. It was discovered that the description in the deed was erroneous, and a new deed was executed by Pierce October 30, 1918, to correct the error, and appellee's name was inserted as grantee in this new deed. Some time in January, 1919, appellee discovered the existence of the lease from Elsie Seligman to Sink, and the subleases from Sink to Hammons and Cunningham, and appellee and appellant then had a conference about the possession of the premises by Hammons and Cunningham with Hammons and Cunningham, lessees, at which the lessees insisted on the validity of their leases and their right to possession under them until March 1, 1920, and refused to surrender possession of the premises. Appellant never did put appellee in possession of the premises.

Counsel for appellant take the position that the deed from appellant to appellee, delivered in October, 1918, and accepted by appellee, invested the appellee with title and the right to possession of the premises paramount to the right of possession of the lessees, that the lease from Seligman to Sink was void, and that the subsequent leases to Hammons and Cunningham were void, and that both appellant and appellee took title without notice of the leases, and that the title of appellee was paramount to the leases, and that he failed to enforce his right of possession at his own peril. Counsel for appellant further contend that, when the deed to appellee was executed, the contract of exchange which preceded the deed and which provided for possession on March 1, 1919, was merged in the deed, and that the contract was not competent evidence to show plaintiff's right to possession on March 1, 1919. The record is clear that the tenants had valid leases for the year beginning March 1, 1919, and ending March 1, 1920, and could not be dispossessed. Title to this land was for a time dependent on the ownership of a certain deed, blank as to grantee.

[1] It is settled in this state that such deed confers the equitable title on the purchaser, and that such title passes by deliv-

ery. *Liljedahl v. Glasgow*, 180 N. W. 870. While Elsie Seligman held the land by the deed, blank as to grantee, it is undisputed that she leased the land to John L. Sink, who sublet to Hammons and Cunningham. Hammons and Cunningham were in possession as tenants when the contract between appellee and appellant was made, and when the deed was delivered, and when appellant acquired the blank deed from the identical persons who leased the land to Sink. At the time the contract was entered into neither party knew that Hammons and Cunningham were in possession under leases. They both disclaimed such knowledge. Appellee did not know of any possession by tenants. Appellant was informed of occupancy of the premises by Cunningham and Hammons, but did not know, as he testified, that they were in possession under leases. Appellant testified:

"I knew that Hammons and Cunningham were in possession. I did not talk to either of them to find out when their leases expired."

[2] Under such situation, the rule contended for by appellant that, where one is in possession under a known right of possession, such possession is referable to such right, and the purchaser can rightfully assume that the possession is bottomed on such right and need not inquire further, can scarcely be applied to lessees who rent for short periods and often renew their leases. Reasonable inquiry of the lessees in possession would have disclosed their claim.

[3] Appellant's position that it was not competent to show by the contract when plaintiff was to have actual possession of the land is not tenable.

It was not error under the facts shown in the evidence to instruct the jury, as the court did, that the contract, by the terms of which appellant agreed to give appellee possession of the farm described in the contract on March 1, 1918, was established by the evidence without dispute, and that the evidence established the fact without contradiction that the appellant did not give the appellee possession of the farm on March 1, 1919, and that the only issue for the consideration of the jury was the amount of appellee's damage.

[4] Complaint is also made, in argument only, as to the measure of damages adopted by the instruction. Giving of the instruction defining the measure of damages is not listed among errors relied upon for reversal, and cannot be given attention.

[5] IV. We now come to consider error assigned in permitting appellee to testify to offers of a compromise and settlement. Counsel agree, and well they may, that it is the settled law of this and every other state that offers by way of compromise are not admissible to show liability. Appellee in-

sists that no such evidence was admitted, and therefore no error committed. Appellant says the evidence received was of such a character. Appellee insists that no statements of appellant, either by way of compromise or otherwise, were received over the objection of appellant; that the statements testified to by appellee were not objected to by appellant, nor was any motion to strike the same made.

To ascertain what evidence was received and the nature of it, and what objections, if any, were made, we must go to the record.

Appellee testified that in January or February, 1919, he learned from Hammons of the leases which Hammons and Cunningham had, and took the matter up with appellant as to whether he (appellee) could obtain possession of the land; that a little later, in February, appellee, appellant, Hammons, and Cunningham met to consider the leases, and whether appellee could get possession of the land; that Hammons and Cunningham said they had the land leased, and appellant said if they had he did not know it; that he and appellant then agreed to lay the facts before appellant's attorney and abide by his decision.

"Q. Whom did you see? A. Mr. Higbee, his attorney. (Defendant objects to the question for the reason that it is incompetent, immaterial, and irrelevant, and improper to relate the proceedings in an attempt to compromise.) The Court: Defendant may answer for the present. (Defendant excepts to the ruling.) A. We went to Mr. Higbee's office, and Mr. Bilbo [appellant] himself related the circumstances, and presented a copy of the contract, and told the facts in the case, and when he was through Mr. Higbee said, 'There is nothing to this, George [Bilbo].' (Defendant renews objection before made that the testimony was incompetent, immaterial, and irrelevant and improper to relate the proceedings in an attempt to compromise.) The Court: I think the decision of Mr. Higbee is not competent. It is an offer to compromise, and the motion to strike will be sustained. He can relate what led up to this. The Witness: Can I relate Mr. Bilbo's conversation afterwards? The Court: Yes. A. After the matter had been submitted to Mr. Higbee, Mr. Bilbo agreed to pay me for the rent of 1919, and I told him if he would do that I would be satisfied with that, and at that time he agreed to do that, and the next day he submitted two notes for the rent, but they were simply his personal notes. I did not accept those notes. He wanted to know then if I would accept them if he had Dr. Orlo Coakley on there as security for himself, and I said 'Yes,' and he left and never came back. I saw Mr. Bilbo with reference to this transaction in the spring of 1920 again. Q. State that conversation to the jury. A. He had tendered a settlement of \$800, I believe, to dismiss any suit. (Defendant objects to any testimony being given in regard to any compromise as being incompetent.) The Court:

I will overrule the objection at this time. (Defendant objects to the ruling of the court.)"

[6, 7] Unquestionably the testimony was of offers of compromise. The testimony of appellee shows that appellant agreed to pay the rent for 1919, and at another time offered to pay \$600 in settlement of his claim against appellant. This testimony was incompetent for any purpose. When the first question was asked by counsel for appellee to bring out what occurred in Mr. Higbee's office, apt objection was made, but the court permitted the witness (appellee) to answer and state that they went to Mr. Higbee's office, and appellant stated their controversy to Mr. Higbee, and that Higbee said, "There is nothing to this George [Bilbo]." This answer was stricken by the court, but the court then permitted appellee to relate further statements of appellant. This the court did without a question being propounded to the witness, and we think the former objection would apply. The witness stated that he had another conversation with appellant in the spring of 1920, and was asked to state such conversation to the jury. No objection was interposed to this question before the witness started to answer, and the witness stated that appellant had tendered a settlement of \$600, and before the witness had proceeded further appellant objected, and the objection was overruled. Appellee's answer that he had tendered a settlement of \$600 could scarcely have been anticipated by the question, and was really a volunteer statement, and it seems that the court considered the objection made in time, for he overruled it. It was error to admit the testimony. But was it prejudicial error under the issues and facts? Unquestionably it would have been prejudicial error if the question of liability of appellant had been a question for the jury. But the liability of appellant was decided by the court on the record, as a matter of law.

The jury found damages in the amount of \$700. The damages allowed were less than the rental paid by the sublessees to Sink, and therefore less than the minimum to which appellee was entitled. We think the jury could not have been influenced, in assessing the damages, by the testimony received of offer of compromise, and that error in admitting such testimony was without prejudice to appellant.

[8] Appellant complains of the exclusion from evidence, on his offer, of a record of foreclosure proceedings of a mortgage on the land, with receiver clause in the mortgage, which proceedings were subsequent to the date of the contract of exchange of properties. It was not error to exclude such offer. This action was not brought to re-

cover rent. It was an action to recover the difference in the value of the farm, with possession delivered on March 1, 1919, and the value of the farm with possession delivered on March 1, 1920.

We find no reason to disturb the verdict and judgment, and the case is affirmed. Affirmed.

EVANS, C. J., and STEVENS and FAVILLE, JJ., concur.

VAN v. DEAN et al. (No. 34120.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Sunday $\S$ 30(3)—Service of original notice on Sunday valid unless prohibited.

The service of an original notice is a ministerial act, and, unless prohibited by statute, is valid if made on Sunday.

2. Sunday $\S$ 30(3)—Statute authorizing necessary service of notice on Sunday construed.

The requirement of Code, $\S$ 3522, that notice shall not be served on Sunday unless on oath that personal service is impossible if not then made, and that such affidavit be indorsed on the original notice, is not for defendant's benefit, but makes it obligatory on the officer to serve the notice on Sunday, and relieves him from the penalty for violating the Sunday law.

3. Sunday $\S$ 30(3)—Statutory affidavit need not be indorsed on copy of original notice served on Sunday.

Service on Sunday of an original notice having properly indorsed thereon the affidavit provided for by Code, $\S$ 3522, allowing such service when necessary to get personal service, is valid, although the copy left with defendant did not have such affidavit indorsed thereon; the statute not making the affidavit a part of the notice nor modifying section 3514 or 3518.

Appeal from District Court, Lee County; W. S. Hamilton, Judge.

Plaintiff appeals from the order and judgment of the court quashing the service of an original notice. Reversed.

Hollingsworth & Blood and Hughes & Dolan, all of Keokuk, for appellant.

W. H. Hartzell, of Carthage, Ill., and Boyd & McKinley, of Keokuk, for appellees.

STEVENS, J. The sole question in this case is whether an original notice having indorsed thereon the oath of the plaintiff, his agent or attorney, stating that personal service thereof cannot be had upon the defendants unless made on Sunday, is valid if the officer does not read the affidavit to the defendants or indorse the same upon the copies delivered to them at the time of the service. The notice served and returned by the sheriff had the required affidavits in-

dorsed thereon. The return recited that "this service is made by reason of the attached affidavit." The affidavit indorsed on the notice is dated June 27, 1920, and the return of the sheriff recites that service was made on Sunday, June 27th.

The court below sustained the motion of defendants to quash the service upon the ground that the same did not comply with section 3522 of the Code, authorizing same to be made on Sunday. There is no doubt that a proper affidavit was indorsed on the notice. It is, however, conceded that the sheriff did not, at the time of the service, read the affidavit to the defendants, nor was the same indorsed upon the copies delivered to them.

[1] The service of an original notice is a ministerial act, and, unless prohibited by statute, is valid if made on Sunday. *State v. Ryan*, 113 Iowa, 536, 85 N. W. 812; *Nixon v. City of Burlington*, 141 Iowa, 316, 115 N. W. 239, 18 Ann. Cas. 1037; *Puckett v. Guenther*, 142 Iowa, 35, 120 N. W. 128, 134 Am. St. Rep. 402.

Section 3522 of the Code is as follows:

"Notice shall not be served on Sunday unless the plaintiff, his agent or attorney makes oath thereon that personal service will not be possible unless then made, and a notice so indorsed shall be served by the sheriff, or may be served by another, as on a secular day."

[2, 3] The indorsement of the required affidavit on the original notice subscribed to by the plaintiff, his agent or attorney, removes the inhibition of the statute and authorized the officer to serve the same on Sunday. The affidavit is, however, no part of the notice. The contents of an original notice, service of which is authorized on Sunday, is governed by section 3514 of the Code, and must be the same as a notice served on a secular day. The requirement of the statute that the affidavit of the plaintiff, his agent or attorney, reciting that unless made on Sunday service cannot be had upon the defendants, be indorsed upon the original notice, is in no sense for the benefit of the defendant. It makes it obligatory upon the officer to serve the notice on Sunday, and relieves him from the penalty imposed for the violation of the Sunday statute. It is true that defendants were compelled to inspect the notice, having the affidavit and return of the sheriff indorsed thereon, to ascertain whether the service was authorized, but this did not affect the validity of the service. The statute authorizing service of an original notice to be made on Sunday does not make the affidavit a part of the notice, nor does it in any way modify either section 3514 or 3518 of the Code. None of the authorities cited by appellee are to the contrary. The service was

entirely proper and valid, and the motion to quash should have been overruled.

It follows that the judgment of the court below is reversed.

EVANS, C. J., and FAVILLE and ARTHUR, JJ., concur.

IN RE DANIELS' ESTATE.

ELY et al. v. NYE et al.

(No. 34011.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Wills $\S$ 184(4)—Fourth codicil held to revoke third codicil, although using words in addition to legacies already made; "said."

The fourth codicil to a will provided, "I hereby revoke and cancel item 3 of my said will and in lieu thereof 'now' give * * * to M. R. E. and L. B. E. * * * the 'said' sum of \$5,000, share and share alike 'in addition to what I may have devised to them in my said will or codicils thereto,'" and such codicil also revoked item 5 of the will and gave \$5,000 to same legatees. The third codicil to the will also revoked the same items of the will and gave \$5,000 legacies to same legatees. Held that, construing whole will, testatrix' intention was to revoke the third codicil entirely, notwithstanding use of words "in addition to," and not to give an additional sum to the two named legatees, the testatrix having evidently forgotten codicil 3, and the word "said" referring to something previously pointed out or designated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Said.]

2. Wills $\S$ 750—Distinction between "specific" and "general" legacy stated.

The distinction between a "specific" and "general" legacy is that the former refers to a particular thing capable of precise identification, while the latter is one which does not refer to any certain or definite property capable of precise identification and which must be paid and satisfied out of the general assets of the estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Legacy; Specific Legacy.]

Appeal from District Court, Linn County; F. F. Dawley, Judge.

Action brought by the executors of her estate for the construction of the will of Harriette S. Daniels, who died October 24, 1919. A full statement appears in the opinion. Affirmed.

Trewin, Simmons & Trewin, of Cedar Rapids, for appellant.

Luberger & Lenihan, of Cedar Rapids, for appellee.

STEVENS, J. This appeal involves the construction of the will and several codicils of Harriette S. Daniels, deceased, the material paragraphs of which are as follows:

Items 3, 4, 5, and 7 of the will:

"Item 3. I give, devise and bequeath unto my executors, in trust, for my sister, Lydia B. Ely, of Brookline, Mass., in token of my love and affection, and in recognition of her kindness to me in times past, the sum of five thousand dollars (\$5,000.00), to be invested as my executors shall see fit, the income of which investment I direct them to pay to my said sister during her lifetime, and upon her decease, it is my will and I so direct, that my said executors shall pay the principal of this bequest, five thousand dollars (\$5,000) to Mary E. Page, daughter of Caroline A. Page, and Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.

"Item 4. I give, devise and bequeath unto my niece, Mrs. Caroline A. Page, daughter of my sister, Lydia B. Ely, of Brookline, Mass., aforesaid, the sum of five thousand dollars (\$5,000.00).

"Item 5. I give, devise and bequeath unto Miss Mary E. Page, daughter of said Mrs. Caroline A. Page, of Brookline, Mass., the sum of five thousand dollars (\$5,000.00).

"Item 7. I give, devise and bequeath unto Mary Reynolds Ely and Lydia B. Ely, daughters of my said nephew, Elisha D. Ely, of Canton, Ohio, the sum of five thousand dollars (\$5,000.00) each."

Paragraphs 2 and 8 of the third codicil:

"Second. I hereby cancel and revoke item 3 of my said last will and testament, and in lieu thereof I hereby give, devise and bequeath unto my executors in trust for my sister, Lydia B. Ely, of Brookline, Massachusetts, in token of my love and affection, and in recognition of her kindness to me in time past, the sum of five thousand (\$5,000.00) dollars, to be invested as my executors shall see fit, the income of which investment I direct them to pay to my said sister during her lifetime, and upon her decease it is my will, and I so direct that my said executors in trust shall pay the principal of this bequest, five thousand (\$5,000.00) dollars to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike.

"Third. I hereby cancel and revoke item 5 of my said last will and testament, and in lieu thereof I hereby give, devise and bequeath unto my executors in trust, for Caroline A. Page, daughter of my sister, Lydia B. Ely, of Brookline, Massachusetts, the sum of five thousand, (\$5,000.00) dollars to be invested as my executors shall see fit, the income of which investment I direct them to pay to the said Caroline A. Page during her lifetime, and upon her decease it is my will, and I so direct, that my executors shall pay the principal of this bequest, five thousand (\$5,000.00) dollars to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, share and share alike."

Items 2, 3, and 4 of the fourth codicil:

"Item II. I hereby revoke and cancel 'item 3' of my said will and in lieu thereof, I now

give, devise and bequeath to Mary Reynolds Ely and Lydia B. Ely, daughters of Elisha D. Ely, the said sum of five thousand (\$5,000.00) dollars, share and share alike in addition to what I may have devised to them in my said will or codicils thereto.

"Item III. I hereby revoke and cancel 'Item 4' of my said will and in lieu thereof, I now give, devise and bequeath the five thousand (\$5,000.00) dollars therein devised to my niece, Mrs. Caroline A. Page, to the above named Mary Reynolds Ely and Lydia B. Ely, share and share alike, in addition to what I may have devised to them in my said will or codicils thereto.

"Item IV. I hereby revoke and cancel 'item 5' of my said will wherein I devised unto Mary E. Page five thousand (\$5,000) dollars and now devise and bequeath the sum of five thousand (\$5,000) dollars to the said Mary Reynolds Ely and Lydia B. Ely, share and share alike, in addition to what I may have devised to them in my said will or the codicils thereto."

Item 14 of the fifth codicil:

"Item 14. I hereby revoke and cancel item 2 of my second codicil to my will of date June 30, 1906, which said codicil bears date of July 21, 1914, and which codicil revokes and cancels item 3 of my said will, and in lieu thereof I now give, devise and bequeath to Mary Reynolds Ely, daughter of Elisha D. Ely, the said sum of five thousand dollars (\$5,000.00) this bequest being in addition to what I may have heretofore devised to her in my said will, or any codicil thereto."

Perhaps a brief restatement of the material provisions of the several instruments requiring our consideration, or throwing light upon the intention of testatrix, will enable us to make somewhat clearer the points at issue. First, as already shown, the will among others makes three bequests of \$5,000 each as follows: \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, share and share alike, subject to the payment of the incomes therefrom during her life to Lydia B. Ely, of Brookline, Mass., a sister of testatrix; \$5,000 to Mrs. Caroline A. Page, also of Brookline, Mass., and a daughter of Lydia B. Ely; and \$5,000 to Miss Mary E. Page, daughter of Mrs. Caroline A. Page; that by paragraph 2 of the third codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, and bequeathed \$5,000, share and share alike, to Mary Reynolds Ely and Lydia B. Ely, nieces, subject to the payment of the income therefrom, during her life, to her sister, Lydia B. Ely, as before, that by paragraph 3 of the third codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, daughter of Caroline A. Page and bequeathed \$5,000 to Mary Reynolds Ely and Lydia B. Ely, subject to the payment of the income therefrom to Caroline A. Page, daughter of Lydia B. Ely, sister of testatrix, during her life; that by paragraph 3 of the fourth codicil, testatrix again in terms revoked the bequest of \$5,000 to

Mary E. Page, Mary Reynolds Ely, and Lydia B. Ely, and bequeathed \$5,000 absolutely, share and share alike, to Mary Reynolds Ely and Lydia B. Ely; that by paragraph 3 of the fourth codicil, testatrix revoked the bequest of \$5,000 to Mrs. Caroline A. Page, and bequeathed \$5,000 absolutely to Mary Reynolds Ely and Lydia B. Ely, share and share alike; that by paragraph 4 of the fourth codicil, testatrix revoked the bequest of \$5,000 to Mary E. Page, daughter of Mrs. Caroline A. Page, and bequeathed \$5,000 to Mary Reynolds Ely and Lydia B. Ely, share and share alike; that by paragraph 14 of the fifth codicil, testatrix revoked paragraph 2 of the fourth codicil and gave \$5,000 absolutely to Mary Reynolds Ely. Thus, it appears that paragraphs 3 and 5 of the original will were, in terms, revoked both by the third and fourth codicils, each of which gave Mary Reynolds Ely and Lydia B. Ely two sums of \$2,500 each, or, in the aggregate, \$5,000.

[1] The only controversy between the parties is as to what effect, if any, shall be given to paragraphs 2 and 8 of the third codicil. The court below found that neither of appellants—that is, Mary Reynolds Ely or Lydia B. Ely (now Horner)—took anything by paragraphs 2 or 3 of the third codicil; that by the fourteenth paragraph of the fifth codicil Mary Reynolds is entitled to \$5,000; that by paragraph 3 of the fourth codicil each of appellants is entitled to \$2,500, and also by paragraph 2 of the fourth codicil \$2,500 each; that is, that Lydia B. Ely Horner is entitled in the aggregate to \$5,000, in addition to the bequest made to her in paragraph 7 of the will, and Mary Reynolds Ely to \$10,000, in addition to the bequest made to her in the same paragraph thereof.

Looking further to the provisions of the third and fourth codicils, it will be observed that paragraph 2 of the third codicil is identical with paragraph 3 of the original, except the former eliminates Mary E. Page from participation in the \$5,000 bequeathed thereby; that by paragraph 3 of the third codicil, which revoked paragraph 5 of the will, testatrix gave the income from \$5,000 to Caroline A. Page during her life, and the principal to Mary Reynolds Ely and Lydia B. Ely, who are not mentioned in paragraph 4 of the will.

The language of paragraphs 2, 3, and 4 of the fourth codicil is materially different from that used in the third, but quite as definite and specific. The language of paragraph 2 is that—

"I hereby revoke and cancel item 3 of my said will, and in lieu thereof I now give, devise, and bequeath to Mary Reynolds Ely and Lydia B. Ely * * * the said sum of \$5,000, share and share alike."

And then follow the words:

"In addition to what I may have devised to them in my said will or codicils thereto."

Paragraph 8 of the fourth codicil, which revoked paragraph 4 of the original will, is not in controversy, but attention is called to the fact that the \$5,000 which paragraph 4 of the will gave to Caroline A. Page, testatrix now gives to appellants, share and share alike. The language of paragraph 4 of the fourth codicil, which revoked item 5 of the will is similar to that of paragraph 2, but the word "said" is omitted therefrom. Much emphasis is given by appellants to the words in both the second and fourth paragraphs of the fourth codicil, "in addition to what I may have devised to them in my said will, or codicils thereto." It must be conceded that this language is significant, and is entitled to serious consideration in the interpretation of the several instruments involved. The words "said sum of five thousand (\$5,000.00) dollars" clearly and definitely refer to the sum referred to in paragraph 3 of the will. The meaning of testatrix at this point is not certain. That \$5,000 she "now" gives, share and share alike, to appellants, but the question at once arises: Was this bequest intended to be additional to that contained in paragraph 7 of the will, and paragraph 2 of the third codicil? We think clearly not.

As before stated, testatrix, in her original will, bequeathed three sums of \$5,000 each to certain relatives—two nieces, appellants, and a grandniece—which by the later provisions of her will she gave to appellants—\$10,000 to Mary Reynolds Ely and \$5,000 to Lydia B. Ely Horner. The \$5,000 bequeathed to appellants by the second and third paragraphs of the third codicil is manifestly, although not specifically, so designated, the same \$5,000 that is referred to in paragraphs 3 and 5 of the original will. When in paragraph 2 of the fourth codicil testatrix again in terms revoked paragraph 3 of the will, and bequeathed \$5,000, share and share alike, to appellants, she used the word "said," she clearly indicated that she had the \$5,000 referred to in paragraph 3 of her original will in mind. The word "said" refers to something previously pointed out or designated. *State v. Skeggs*, 154 Ala. 249, 46 South. 268; *Hinrichsen v. Hinrichsen*, 172 Ill. 462, 50 N. E. 135. Though the language of paragraph 4 of the fourth codicil is not quite so specific, we think the same intention is clearly inferrable therefrom. Manifestly, testatrix did not intend in terms to twice revoke paragraphs 3 and 5 of her will. She must have either forgotten or overlooked the terms of the third codicil when she executed the fourth. This conclusion is emphasized by the language of paragraph 3 of the fourth codicil, wherein she refers specifically to the \$5,000 bequeathed to Caroline A. Page in item 4 of her will. The words "In addition to what I may have devised to them by my will or codicils thereto" is evidently a saving clause, intended to protect appellants against the possible revo-

cation of some provision previously made for them, and is given effect in connection with the seventh paragraph of her will, in which she gave each of appellants \$5,000. In other words, the plain purpose evinced by the testatrix is that she intended these particular designated sums to go to appellants, and the words "in addition" are of secondary, and not controlling, importance. The effect of these bequests would have been the same if these words had been omitted, and yet by the interpretation adopted full effect is given thereto. By no other construction, however, can effect be given to all the language of paragraph 2 of the fourth codicil. While, as stated, the language of the fourth paragraph thereof is not quite so specific, nevertheless, by construing the several instruments together, we have no doubt that testatrix referred to the same sum of \$5,000 in the third paragraph of the third codicil as in the fourth paragraph of the fourth codicil. Her intention to give two sums of \$5,000 each to appellants is clearly indicated by the provisions of both the third and fourth codicils. When she revoked paragraph 4 of her will she gave the \$5,000 therein bequeathed to Mary E. Page to appellants, thereby finally disposing of the three \$5,000 items specifically disposed of by the original will.

[2] It is urged by counsel for appellants that none of the bequests are of specific property, and that a legacy is specific only "when it is the intention of the testator that the legatee should have the very thing bequeathed to him, and not merely a corresponding amount in value." This language is quoted from *Bales v. Murray*, 186 Iowa, 649, 171 N. W. 747. The distinction between a specific and general legacy is that the former refers to a particular thing capable of precise identification, while the latter is one which does not refer to any certain or definite property capable of precise identification, and which must be paid and satisfied out of the general assets of the estate.

The question at this point is not whether the will refers to particular sums of money that have been segregated and so set apart as to be capable of precise identification, but is: What was the intention of the testatrix? Had she formed the desire and intention of disposing of three sums of \$5,000 each to certain of her relatives repeatedly named in a particular way? Had these separate sums assumed in her mind the form of specific items of property, and, if so, is it not the duty of the court, in the construction of her will and the several codicils thereto, to so treat these bequests?

The words "said sum of five thousand dollars" can only be understood as referring to a prior bequest of a like sum, which she had forgotten, or overlooked. Corroboration is given to this thought by the fact that, in the

opening paragraph of the fourth codicil, she erroneously refers to it as "this second codicil," and again, in paragraph 14 of the fifth codicil, she makes the same error. That testatrix in fact referred to the second paragraph of the fourth codicil, not to the second codicil, is conclusively established by the fact that she also designated it by the correct date of the fourth codicil. Each bequest in the several codicils follows a revocation of a prior bequest of a like sum.

It is our conclusion that testatrix at all times had in mind three separate sums of \$5,000 each, which, although not specifically segregated from her estate and set apart as in the form of notes, bonds, or certificates of deposit, these separate sums nevertheless had assumed the same character or classification in her mind as though they were so set aside and designated, and that it was her intention, when she executed the fourth codicil, to revoke all prior bequests of these sums. She at no time intended same to be additional to the items mentioned in paragraphs 2 and 3 of the third codicil. The effect of the execution of the fourth codicil was to revoke these bequests.

It follows that, as found by the court below, Mary Reynolds Ely takes \$5,000 under item 14 of the will, and \$2,500 under the third and fourth paragraphs of the fourth codicil, and Lydia B. Ely Horner \$2,500 under each the third and fourth paragraphs thereof, and nothing under paragraph 2, which, as stated, was revoked by item 14 of the fifth codicil.

It follows that the finding and judgment of the court below must be and is affirmed.

EVANS, C. J., and ARTHUR and FA-VILLE, JJ., concur.

ARENDs v. FRERICHS et al. (No. 33740.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Trusts §103(1)—Evidence held insufficient to establish fraud of plaintiff's mother in acquiring title to lands of deceased father and husband.

In an action by a daughter to establish a claim in a parcel of land left by her deceased father in 1878, evidence as to the foreclosure of a mechanic's lien, assignment of the sheriff's certificate of sale to widow's relative, and final acquirement of title to the land by purchase by the widow, held not to show a fraudulent intent to defeat daughter out of her share of the estate, so as to charge the mother as trustee.

2. Trusts §103(1)—Parent may purchase property in which minor child has an interest without becoming trustee.

A parent is not ipso facto a trustee of the property of a minor child, and may acquire an

interest in property belonging to a child, if the purchase is in good faith and for a valuable and adequate consideration, and the parent does not become a trustee of the property so purchased from the mere fact of relationship.

3. Tenancy in common §15(2)—Ouster of cotenant or claim of hostile title necessary to start operation of statute of limitations.

As between tenants in common one cannot start the operation of the statute of limitations against the other until there has been an ouster or assertion of a hostile title.

4. Tenancy in common §15(10)—Evidence held to show adverse possession under deed from purchaser at judicial sale; "redeemed."

In an action by a daughter to establish an interest in estate left by her father, on the theory that plaintiff and her mother were tenants in common, and that the mother, by acquiring title by purchase from a purchaser in foreclosure proceeding, thereby redeemed for the benefit of both, evidence held to show that the mother claimed title adversely to plaintiff, notwithstanding testimony that she referred to the farm as having been "redeemed" by her; it being apparent the word "redeemed" was not used in its technical or strictly legal sense, but meant to refer to the fact that she had repurchased or reacquired the premises.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Redeem.]

5. Tenancy in common §15(2)—Tenant in possession may acquire title by adverse possession.

A tenant in possession may oust his cotenant, and start the operation of the statute of limitations, and acquire title to the whole by adverse possession; but actual notice of the hostile claim must be brought to the cotenant before the statute begins to operate.

6. Tenancy in common §15(10)—Notice of ouster by one cotenant may be proven by circumstantial evidence.

As between tenants in common, actual notice of ouster may be proven by circumstantial evidence.

7. Tenancy in common §15(7, 8)—Undisputed possession by one tenant in common bars action of cotenant to recover possession, if not brought within statutory period.

An action by a daughter to establish a claim in an estate of her father, who died in 1878, the theory being that she and her mother were tenants in common, where she knew for many years after attaining her majority that the estate had been the property of her father, and that the widow exercised rights of ownership to the exclusion and denial of daughter's rights, is barred by laches, and the statute of limitations barred her action.

8. Tenancy in common §15(10)—Evidence held sufficient to establish title by adverse possession.

Where a daughter, claiming a share in her father's estate on the theory that she and her mother were tenants in common, had

known for more than 20 years after attaining majority that the estate descended from the father, and that the mother had title to the property under deed from a purchaser at foreclosure sale, and had occupied the land, made improvements, executed mortgages, and sold part, an absolute estate vested in the mother by adverse possession.

Appeal from District Court, Grundy County; Thos. J. Guthrie, Judge.

Action in equity to recover an interest in real estate. A decree was entered for plaintiff, and the defendants appeal. The facts appear in the opinion. Reversed.

Edwards, Longley, Ransier & Harris, of Waterloo, and F. A. Ontjes, of Mason City, for appellants.

Deacon, Good, Sargent & Spangler, of Cedar Rapids, for appellee.

FAVILLE, J. Conrad Pickleman was a farmer residing in Grundy county, Iowa. He owned 280 acres of land, and had some personal property and an equitable interest in other real estate. Pickleman died in 1878, leaving surviving him a daughter, at that time about 2 years of age, and his widow, Folka Pickleman about 20 years of age. The child grew to womanhood and married. The widow married a man by the name of John Frerichs. This action was originally brought by the daughter against her mother to recover in interest in the remaining portion of the said 280 acres of which Conrad Pickleman died seized. During the pendency of the litigation the mother died, and the appellants herein are her surviving husband and children and the executor of her will, who were substituted as defendants.

Pickleman was heavily indebted at the time of his death. He left no will, and his father-in-law was appointed administrator of the estate. In due time the estate was closed and the general creditors of Pickleman received less than 40 cents on the dollar on their various claims. At the time of Pickleman's death, the real estate in controversy was encumbered by a mortgage of \$2,600 and interest, and there was also outstanding thereon a mechanic's lien for about \$400, which was held by one Turner. In May, 1878, action was commenced by Turner to foreclose his mechanic's lien. The foreclosure proceedings went to decree, and execution was issued, and the land was sold to satisfy said decree. The sheriff's certificate of sale was issued to Turner, the plaintiff in said action, who subsequently assigned the same to one Aikin. Shortly before the period of redemption expired, Aikin assigned the certificate of sale to Hinderk Frerichs, an uncle of the widow, Folka Pickleman, for a consideration of \$400, and on September 1, 1880, Hinderk obtained and recorded a

sheriff's deed to said land. On the same day he executed a special warranty deed to the widow, Folka, which deed he retained as security for the purchase price to be paid by her. About two years thereafter said deed was delivered to the said Folka, and was placed on record March 1, 1888. On December 8, 1880, the district court of Grundy county set off to the said widow, Folka, 65 acres out of said farm as her distributive share.

Immediately following the death of Conrad Pickleman, the widow and her daughter made their home with the widow's father, one Harm Kramer. In the spring of 1883, the widow married John Frerichs, a son of said Hinderk Frerichs, and shortly after their marriage these parties moved upon the farm in question and continued to live there for several years. Buildings, fences, and tiling were placed upon the farm, and it was mortgaged and one 40 was sold. Some 30 years before this case was tried, Folka rented the farm to one Myer, who occupied it as tenant thereafter, and until after this suit was commenced. The daughter lived on the farm with her mother and stepfather for several years. She was married in 1896, and thereafter lived in the village of Holland, about 3 miles distant from the farm, where her husband was engaged in business as a general merchant. After the mother rented the farm to Myer, she also lived in the village of Holland, and continued to reside there until her death. The mother collected all the rents, paid the taxes, and exercised full ownership of the farm.

This action was begun in 1914, and by it the appellee seeks to establish an interest in the said land as an heir of her deceased father, Conrad Pickleman, and she also seeks an accounting for the rents derived from the land by the mother since the father's death. It is the contention of the appellants that the mother, Folka, obtained the full legal title to the premises by deed from Hinderk Frerichs to her, and that in any event her title has ripened by adverse possession, and that the appellee is now estopped from asserting any interest in said premises. The statute of limitations is also relied upon as a defense.

The testimony in the case is exceedingly voluminous. It is impossible for us to set it out in detail. The administration of the estate of Conrad Pickleman involved many transactions. There were numerous contests between his creditors and the administrator of his estate. Many hearings were had before a referee. Objections were filed to the reports of the administrator, and hearings had thereon. The record of these somewhat complicated and voluminous proceedings in the administration of the estate of Conrad Pickleman has been transported en masse into the record in this case, including depositions and the transcripts of testimony taken

during the various stages of the administration of the estate of said decedent. A considerable amount of this evidence is incompetent, and cannot be considered in determining the issues in this case. The storm center of this controversy is in regard to the deed which Folka obtained from Hinderk to the land in controversy.

[1] II. It is contended by appellee that the whole proceedings which resulted in the execution and delivery of the deed to the premises from Hinderk Frerichs to Folka were in fulfillment of a scheme on the part of Folka to cheat and defraud her daughter, the appellee, of her interest in this land. Practically every incident and circumstance connected with this transaction, from the filing of the mechanic's lien by Turner until the delivery of the deed from Hinderk Frerichs to the widow, is exhibited as evidential of a fraudulent scheme. It is contended that this woman, left a widow at about 20 years of age and beset by the numerous creditors of her husband, started out to deliberately plan to cheat and defraud her child, then about 2 years of age, out of her interest in her father's estate. It is suggested that she conspired with the party who held the mechanic's lien to have the same foreclosed, and that she fraudulently failed to interpose a defense in said action. The fact that one of her attorneys was appointed guardian ad litem for the minor child in certain proceedings is noted as a suspicious circumstance. The fact that she testified as a witness upon the trial of the mechanic's lien case, and that by her it was established that the material furnished her husband went upon the premises in controversy, is also claimed to be a badge of fraud. It is likewise urged that the action to foreclose the mechanic's lien was barred by the statute of limitations, and that the widow did not interpose such defense, and that this is evidence of a fraudulent purpose on her part. The fact that she married a son of Hinderk Frerichs, who acquired the title and conveyed the same to her, is also claimed as indicative of the fraudulent character of the transaction.

We have not attempted to review all the evidence on this question, but merely to outline some of its general characteristics. We have examined the record with care, and find that the appellee has failed to establish her claim of actual fraud on the part of the widow in regard to the foreclosure proceedings in the mechanic's lien case. We are satisfied from the record that the lienholder, one Turner, brought the foreclosure action in good faith, without any collusion, or conspiracy with the widow, Folka, that the decree of the court was obtained without fraud, and that the proceedings which culminated in the issuance of the sheriff's certificate of sale to the lienholder, Turner, and his assignment thereof to Aikin, were all done in good faith.

It is contended that after the sale of the premises under the foreclosure proceedings the widow, Folka, arranged for the procurement of the sheriff's deed and a subsequent conveyance of the title to her in pursuance of a fraudulent scheme on her part to cheat appellee. As to this feature of the transaction, which we shall discuss somewhat later, we also fail to find from the evidence that the widow was guilty of fraud. Our conclusion is that the contention of the appellee, that in these various transactions the mother was actuated by a purpose to cheat and defraud the appellee, and did so cheat and defraud her, is not sustained by the proof. A further recital of the evidence upon which we base this conclusion would serve no useful purpose, but none of it has been overlooked.

[2] III. It is one of the contentions of the appellee that, by virtue of the fiduciary relation existing between the mother and her minor daughter, the procurement of the title to the land by the mother was a fraud upon appellee, and that in any event the mother held the premises in trust for the appellee as heir of her deceased father. As before stated, we fail to find evidence of any intent on the part of the mother to cheat and defraud the appellee. Is she chargeable as a trustee? The mother, as natural guardian of her child, was undoubtedly required, both by good morals and by law, to exercise the utmost good faith in dealing with the property rights of the infant child. But a parent is not ipso facto a "trustee" of the property of a child, nor is a parent absolutely prevented from acquiring an interest in property belonging to a child. The relationship does not, in and of itself, create a trusteeship. The relation between the parties is fiduciary and confidential. Scrupulous good faith is required at all times, but a parent is not prevented from purchasing in good faith, and for a valuable and adequate consideration, property in which a minor child may have an interest. By such a purchase, if fairly and honestly made, in good faith and for a valuable and adequate consideration, the parent does not become a trustee of the property so purchased from the fact of the relationship between the parties alone.

As before stated, the land involved herein consisted of a tract of 280 acres. There was an outstanding mortgage of approximately \$2,600 against it. The mechanic's lien had been foreclosed, and the entire premises sold thereunder for \$100, on August 30, 1879. Numerous creditors had filed their claims against the estate of the decedent. During the year of redemption from the mechanic's lien foreclosure, the administrator of the estate had made application to the court for an order to sell the real estate of the decedent to pay debts of the estate. A referee appointed by the court to consider this matter reported to the court that the

premises were encumbered to the full amount of their value. This report was approved by the court and an order for a sale of the premises was refused by the court. The creditors of the estate received less than 40 cents on the dollar of their claims on final settlement. The widow was entitled to her share in the premises, under the statute, free from debts.

Various witnesses testified that in their opinion the land was worth from \$25 to \$30 an acre in 1880. The record of sales of land in that locality during that year (1880) indicated the recited consideration in transfers was on an average considerably less than \$20 an acre. It is obvious that testimony of this character respecting a particular tract of land at a remote time, with the fluctuation in values from year to year, must of necessity be somewhat uncertain. While the dower interest of the widow had not been formally set off to her by order of court at this time, she was entitled as a matter of law to the admeasurement of her dower in the land and the setting apart to her of one-third in value of the estate free from the debts. So that the value of the appellee's interest in the land of the decedent must be determined by taking into consideration the value of the dower interest of the widow in said land. The outstanding mortgage, with its accumulated interest, the amount due on the mechanic's lien, and the sum owing to general creditors approximately equaled, if it did not exceed, the estimated value of the appellee's interest in the lands of the decedent at the time. The finding of the court, upon the application of the administrator for authority to sell the land to satisfy the indebtedness, that the premises were incumbered to the full amount of their value, is of significance, and the conclusion seems to be supported by the evidence offered in this case. We are satisfied from the record that, practically speaking, there was no monetary value to appellee's interest in the land at that time. It was at least negligible. We do not find that, under the facts disclosed by the record, the widow acted in bad faith in the acquisition of the title to the land, or that by reason of the circumstances and the relationship of the parties she should be charged as a trustee because of the relationship of parent and child. As bearing on the question herein discussed, see *Welch v. McGrath*, 59 Iowa, 519, 10 N. W. 810, 13 N. W. 638; *Otto v. Schlappkahl*, 57 Iowa, 226, 10 N. W. 651.

IV. It is contended, however, that by reason of the facts and circumstances disclosed in the record the acquisition of the deed to the premises by Folka should be held in equity to be a redemption by her as a co-tenant of property belonging to her and her daughter, as tenants in common, and that

such equitable redemption inures to the benefit of the appellee as such cotenant. It is assumed by both parties to the case that the appellee and her mother were tenants in common of the premises, and we are not called upon to determine that question.

It will be noticed that at the time the land was sold at the sheriff's sale under the foreclosure of the mechanic's lien, to wit, on August 30, 1879, the widow's dower had not yet been definitely set off to her by order of court. The application to admeasure her dower had, however, been filed June 9, 1879, the day before the decree was entered in the foreclosure case. The court had recognized her right to dower in the premises and had appointed referees to admeasure it. The report of said referees admeasuring her dower was filed June 19, 1880. The report was not approved by the court until December 8, 1880. The widow had been made a party defendant in the foreclosure proceedings, and so far as the record discloses there was no reference to, or recognition of, her dower rights in the premises in the foreclosure action. There is no doubt that she knew of the foreclosure of the mechanic's lien, and that the entire farm had been sold thereunder. It also appears from the evidence that, before the year of redemption expired, her attorneys interviewed the holder of the certificate of sale respecting an assignment of the same; but nothing came of this, and there is no evidence to show that Hinderk Frerichs, who did procure an assignment of the certificate from Aikin ever knew of this action of the attorneys. The period of redemption from the sale under foreclosure of the mechanic's lien expired August 30, 1880. The widow, Folka, prior to the expiration of the year of redemption, interviewed her uncle, Hinderk Frerichs, in regard to the outstanding sheriff's certificate. Just exactly what was said and done between the parties, and the deductions to be drawn therefrom, is the subject of extensive discussion by counsel for both parties. Hinderk Frerichs was not a witness in regard to this transaction. The widow, Folka, testified in regard thereto on two different occasions, and it must be conceded that her testimony is not altogether consistent. It is evident that she was solicitous to save something, if possible, out of the wreckage of her husband's estate.

It is strenuously contended by the appellee that the conduct of the widow in connection with this matter was in pursuance of a fraudulent scheme and design on her part to secure the entire farm for herself, and to cheat and defraud the appellee of her interest therein. The widow admitted on cross-examination that she made "an arrangement" with Hinderk Frerichs for him to advance the money for the purpose of

securing the certificate of sale, and that this "arrangement" with him was made before he took the assignment. At one time she testified that the talk was with regard to the farm, and at another time she testified that it was only with regard to the 65 acres. The testimony in regard to the so-called "arrangement" was to the effect that, when she interviewed her uncle in regard to the matter, he told her that he would see about it and would talk it over with his wife. She testifies that nothing further was said in regard to the matter between her and Hinderk until Hinderk secured the sheriff's deed. After this talk with the widow, however, Hinderk approached the holder of the sheriff's certificate of sale, and on August 25, 1880, secured an assignment of the same for a consideration of \$400. The widow testified that she contributed no part of this amount. The day after the period of redemption expired, Hinderk obtained a sheriff's deed to the premises. At the same time and place that he secured the sheriff's deed, Hinderk executed to the widow a special warranty deed for the premises, and orally agreed with the widow to convey the premises to her upon her payment to him of a consideration of \$800, which was twice the amount that he had paid for the assignment of the sheriff's certificate. The deed recited a consideration of \$3,000; but, as before stated, there was an outstanding mortgage on the farm of \$2,600 and accumulated interest. The widow's testimony was to the effect that the understanding was that Hinderk was to hold the deed as security for the payment to him of \$800, and when the same was so paid that the deed was to be delivered to her. She also testified that she was about 2 years in paying to Hinderk the \$800, and that when it was all paid he delivered to her the deed, which she placed of record March 1, 1883.

During this period of time, the widow did not have possession of the land. Thereafter she married John Frerichs, a son of Hinderk, and took actual possession of the farm, and built buildings and fences thereon, placed tiling on the same, executed mortgages thereon, sold one 40 of the tract, and continued thereafter to hold possession, either by herself or by a tenant, until this suit was commenced. Assuming that the parties were tenants in common, we have held that one cotenant cannot acquire an outstanding title to land held by tenants in common, and thus defeat the title of the other cotenant to his undivided interest, where each owes a duty to protect the title. In *Weare v. Van Meter*, 42 Iowa, 128, we said:

"A tenant in common holds a several interest in the lands, which is so far identical

with his cotenants' interests that, in all matters affecting the estate, he will be regarded as acting for them as well as himself. He cannot, therefore, purchase an outstanding adverse title and set it up against his cotenants, if they are willing to reimburse him, pro rata, for the money by him so expended. He will be regarded as holding the title he thus acquires in trust for his cotenants until the presumption is repelled by their refusal to contribute in payment of his outlays."

To like effect see *Flinn v. McKinley*, 44 Iowa, 68; *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164; *Tice v. Derby*, 59 Iowa, 312, 13 N. W. 301; *Sorenson v. Davis*, 83 Iowa, 405, 49 N. W. 1004; *Moy v. Moy*, 89 Iowa, 511, 56 N. W. 668; *Patty v. Payne*, 178 Iowa, 593, 159 N. W. 1012; *Crawford v. Mels*, 123 Iowa, 610, 99 N. W. 186, 66 L. R. A. 154, 101 Am. St. Rep. 337.

The reason for the rule so announced is that the duty rests upon each cotenant to protect the estate held in common, said duty being reciprocal. The protection of the title to the property so held in common by one cotenant inures to the benefit of the other cotenant, who stands ready to make good his proportionate share of the debt for which both are liable. The rule announced is sound, and we reaffirm it.

It is contended, however, that this rule does not apply in the instant case, because it is claimed the duty to pay off the outstanding lien was not a duty resting upon each of the cotenants, assuming them to be such. It is contended that the widow was entitled to her dower in the real estate of the decedent free from all debts of the intestate, and that the share of the appellee alone was liable for the payment of debts, and hence there was no reciprocal duty to protect the property and pay off the lien. It is also contended that the appellee could not have paid off the debt and charged any portion thereof to the widow's share, as she was entitled to hold the same free from all debts of decedent.

It is also urged as significant that the appellee's interest in the premises, in view of the indebtedness of the estate, for which her share was liable, was of little value, and that appellee could lose nothing by foreclosure and sale because she had nothing to lose. As between the appellee and her mother, if the appellee had redeemed from the foreclosure of the mechanic's lien, she could not have enforced contribution from her mother, because the latter was entitled to her dower in the real estate free from the debts of the decedent, and the share of the appellee was alone liable for the debt.

It is strenuously insisted that the rights of both the appellee and the widow were entirely lost by the issuance of the sheriff's deed, that the fee title vested in Hinderk Frerichs, and that the acquiring of the title by the widow some two years later, upon the payment

of twice the amount that Frerichs had paid to procure the assignment of the title, was not in equity a redemption of the premises, but was an absolute purchase of the full fee title and a vesting of the same in the widow, and that the appellee had been completely divested of any and all interest she had in said premises. We are not agreed on the proposition as to whether or not the acquiring of the title by the widow, Folka, under the circumstances disclosed, should be held to be an equitable redemption of the premises, that inured to the benefit of the appellee as a tenant in common with the widow. Some of the members of the court are of the opinion that the transaction constituted an equitable redemption by one cotenant. Other members of the court are of the opinion that there was no equitable redemption whatever, and that the title to the premises vested absolutely in Hinderk Frerichs, and that the conveyance to the widow by Frerichs was, under the circumstances, not a redemption of the premises, but the acquisition of the absolute fee title in the widow, free from any claim or interest of the appellee therein. In view of our conclusion, as announced in the next following division of this opinion, and because of the divergent views of the court on this question, we make no pronouncement thereon.

V. If the deed from Hinderk Frerichs to the widow, Folka, vested in her the full fee title to the premises in question, then the appellee's rights in said real estate terminated at said time. It is contended, however, that if the acquiring of the title by the widow was in equity a redemption of the premises by one cotenant, the appellee is entitled to recover, and that her action is not barred by the statute of limitations. If it be assumed that the acquisition of the title by the widow was an equitable redemption of the premises by one cotenant, it does not of necessity follow that the appellee's right of recovery is not barred by the statute of limitations, or that the same will not be enforced because of the appellee's laches.

[3] Between tenants in common, one cotenant cannot start the operation of the statute of limitations until there has been an ouster or the assertion of a title not consistent with the cotenancy and hostile to the rights of the other cotenant. The widow in this case acquired title to the premises by a special warranty deed. The consideration paid therefor was not inadequate, and was twice the amount that her grantor, Hinderk, had paid two years previous in acquiring the same from the holder of the sheriff's certificate. She placed the deed of record in 1883, and thereafter took possession of the premises. From that time on she at all times exercised the rights of ownership. She collected the rents, paid all the taxes, sold off and conveyed one 40-acre tract, mortgaged and remortgaged the premises, and consist-

ently and continuously exercised the rights of an owner in fee simple.

[4] It is true that there is evidence in the record that the widow referred to the farm as having been "redeemed" by her; but, under all the circumstances disclosed in connection with the transaction, we fail to find sufficient in the record to establish conduct inconsistent with her claim of ownership from and after the date that she acquired title by delivery of the deed from Hinderk. It is apparent from the evidence that she did not use the word "redeemed" in a technical or strictly legal sense, but meant to refer to the fact that she had repurchased or reacquired the premises. The situation is somewhat similar to that disclosed in *Cold v. Beh*, 152 Iowa, 368, 132 N. W. 73.

The appellee was born July 20, 1876. She was therefore past 6 years of age when the deed from Hinderk to her mother was delivered and placed of record. After the mother acquired title to the farm, she and the appellee lived thereon until the latter was about 12 years old, when the family moved to the village of Holland. The appellee was married when she was 18 years of age, and continued to reside in Holland, about 3 miles from the farm in question, until this suit was brought in 1914. The appellee, as a witness in her own behalf, testified that she did not know that she had any interest in this property, or that her father had ever owned the land until in the year 1913. This action was commenced in 1914. The evidence in contravention of this is so conclusive that we are forced to believe that the appellee is in error in this contention.

The record discloses conversations and transactions between the appellee and other parties respecting the farm long prior to 1913. From this it appears that, some 7 years before the commencement of this suit, she had been advised by a friend that she was entitled to two-thirds and the mother to one-third of the property that belonged to her father. Some significance should be attached to the fact that the husband of the appellee consulted an abstractor with reference to the recovery of his wife's interest in the lands that had been sold under the foreclosure of the mechanic's lien, and that he also had an attorney examine the record of the foreclosure of the mechanic's lien, and received from him a report of the record in said matter, and that this was some 8 years before the suit was commenced. There is also evidence in the record of various conversations with friends and relatives of appellee regarding the farm and her interest therein. The evidence tends to show that she stated to witnesses that she had been advised by attorneys that she had an interest in the farm and that her husband had persuaded her not to endeavor to secure it.

The tenant on the farm testified that, dur-

ing the period while he was on the farm, the appellee visited the farm repeatedly, and that she told the tenant that she thought she had a share in the farm. It also appears that, some 15 or 18 years before the trial, the appellee called upon an abstractor to inquire about her interest in the farm owned by her father, and stated that she thought she ought to have something out of her father's estate. The appellee denied all these various conversations and transactions.

We have not attempted to set out all of the conversations or incidents referred to in the evidence, but we are satisfied that the appellee, who resided on this farm until about 12 years of age and then continued to live within 3 miles of it thereafter, who frequently visited the farm during these years, and who conversed with her relatives and friends in regard to it, was fully aware of the fact that the farm had been the property of her father at the time of his decease, and that the mother was claiming ownership thereof, and was paying the taxes and otherwise handling the property as her own.

[5] We recently had occasion to review the authorities upon the question of the rights of one cotenant against another in the case of *Luney v. Rollins*, decided June 25, 1921, and reported in 183 N. W. 339. In that case we said:

"The law that the entry and possession of one tenant in common is presumed to be for the benefit of all, and that such possession is to be regarded as the possession of all, until rendered adverse by some unequivocal act, or series of acts, or declaration of the tenant in possession, indicating or proclaiming his intention to claim the entire estate, brought to the actual notice of his cotenants, is too familiar to call for discussion. It is equally well settled that a tenant in possession may oust his cotenant, and start the statute of limitations to running, and acquire title to the whole by adverse possession. Actual notice of the hostile claim of the tenant in possession must, however, be brought to the attention of his cotenant before the statute will run."

We quoted and approved the rule announced in *Burns v. Byrne*, 45 Iowa, 285. We also collected some of our previous decisions on the questions involved herein.

[6, 7] The rule is well established that as between tenants in common actual notice of ouster may be proved by either direct or circumstantial evidence. *Casey v. Casey*, 107 Iowa, 192, 77 N. W. 844, 70 Am. St. Rep. 190. If it should be conceded that the purchase of the premises by the widow, Folka, from Hinderk Frerichs, was in equity a redemption by one cotenant of property held in common, we are satisfied from the record in this case that the appellee is not entitled to recover any share in the estate at this time. The widow, after placing the deed on record, at all times exercised all of the

rights of ownership in the premises in question. We are also satisfied from the record that the appellee knew for many years after attaining her majority, and long before this action was begun, that the farm in question had been the property of her father, and that the widow had exercised all the rights of ownership thereof to the complete exclusion and denial of any rights on the part of the appellee. It follows that appellee's action was barred by the statute of limitations.

[8] VI. It is true that mere occupancy of the premises, even for a longer period than 10 years, is not of itself sufficient to establish a title against a cotenant by adverse possession. But we have much more than this in the instant case. The appellee has not been a stranger to this situation. Waiving all question of her knowledge of the public records of the county, or of the published maps and tax lists, we think it fairly appears from the evidence that the appellee knew for many years that her father had owned the farm, and that her mother was claiming it absolutely as her own. Both she and her husband had made inquiries regarding the title. She had stated to relatives and friends that she thought she had or should have an interest in the premises. She lived near the place, and visited it occasionally, and talked with the tenant about her having an interest in it. The greater weight of the testimony convinces us that she must have known, and did know, that her father had owned the farm, and that her mother was claiming and exercising full ownership thereof. The appellee's knowledge of the original ownership must be presumed, for it was not only a matter of record, but of notoriety. *Laraway v. Larue*, 63 Iowa, 407, 19 N. W. 242; *Knowles v. Brown*, 69 Iowa, 11, 28 N. W. 409; *Hanson v. Gallagher*, 154 Iowa, 192, 134 N. W. 421. For about 20 years since attaining her majority she has stood by under these circumstances, while the widow was openly exercising all the rights of an owner in fee simple, under a claim of right.

We think the record discloses all the essential elements to establish a title in the widow by adverse possession. The record title to real estate, followed by long-continued occupancy, accompanied by the usual acts of ownership, such as the erection of buildings, the execution of mortgages on the premises, the sale and conveyance of a portion thereof, the payment of taxes, and the collection of rents cannot be disturbed, except upon satisfactory and convincing proof. This is especially true where the party seeking to impeach such title has been in a position to know, and has known, the situation for a long period of years, and has stood by without any attempt to impeach such title. In this case we find that the appellee

has failed to establish her right to claim an interest in the real estate in controversy as an heir of her deceased father.

It follows that the decree of the trial court must be, and the same is, reversed.

EVANS, C. J., and STEVENS and ARTHUR, JJ., concur.

RICKMAN et al. v. HOUCK. (No. 33991.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Specific performance ⇨33—Insanity of defendant when contract made pertinent inquiry.

In a suit for specific performance, whether defendant was incapable of transacting business at the time the contract was made is a pertinent inquiry.

2. Specific performance ⇨121(8)—Evidence insufficient to show that defendant was insane at the making of the contract.

In a suit for specific performance, evidence held to sustain a finding that defendant when contracting was sane.

3. Insane persons ⇨2—Mere proof of mental defect does not establish incompetency.

Where it is sought to show that a party to a contract for the sale of land was insane at the time the contract was made, mere proof of mental defect does not necessarily establish incompetency.

4. Vendor and purchaser ⇨98 — Return of cash payment insufficient to place parties "in statu quo."

Where defendant had contracted to convey certain property to plaintiffs for use for a grain elevator, an offer to return the consideration paid down was insufficient to re-establish the status quo, acquisition of that particular property being necessary for plaintiffs' purposes, and they having purchased other property in reliance on the contract; placing in statu quo implying restoration of the party injured to as near the condition that existed prior to the making of the contract as possible.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Statu Quo.]

Appeal from District Court, Des Moines County; Oscar Hale, Judge.

Suit for specific performance of a contract to sell real estate. Decree for plaintiffs. Defendant appeals. Affirmed.

Hirsch & Riepe, of Burlington, for appellant.

Power & Power, of Burlington, for appellees.

ARTHUR, J. On the 4th day of August, 1919, Mrs. Susan Arm Priest entered into a written contract with appellees to sell and convey certain property located in the city

of Burlington, Iowa, for the agreed price of \$2,200, \$500 in cash and the balance of \$1,700 on or before September 1, 1919. On the 2d day of September, 1919, a deed was drawn up in accordance with the contract of sale of the premises, and signed by Susan Armpriest. This deed was not delivered, but was found by appellant, guardian, among the papers of her ward, and produced in the trial, and offered in evidence by plaintiffs. The deed is a warranty deed dated September, 2, 1919, signed by Susan Armpriest, and acknowledged September, 2, 1919, by her before La Monte Cowles, notary public, and conveys the property described in plaintiff's petition. On the refusal of appellant's guardian to carry out the contract of her ward, this action for specific performance of the contract was instituted on January 20, 1920.

The defense alleged was that on the 13th day of October, 1919, Susan Armpriest was adjudged insane and committed to the state hospital for the insane at Mt. Pleasant, Iowa, and was then confined in said hospital; that Susan Armpriest was declared to be a person of unsound mind by the district court on the 12th of November, 1919, and appellant, Estella, L. Houck, was appointed as her guardian; that Susan Armpriest was a person of unsound mind on the 4th day of August, 1919, the date when the contract was made; that the contract sued on was void by reason of the fact that Susan Armpriest was at that time incapable of making a contract, and appellant tendered the \$500 paid down on the contract back to the appellee.

Appellees were farmers who were desirous of acquiring a tract of real estate for the purpose of erecting an elevator thereon for storing and shipping grain, which, according to their plans, required ground contiguous to the railroad, a portion of which ground should be so elevated above the railroad track as to enable them to load the cars from the elevator by gravitation. The property owned by appellant's ward and certain property adjacent thereto, which appellees desired to acquire if possible, possessed all the qualifications necessary for the successful carrying out of appellees' plans. Appellees regarded the property owned by appellant's ward as the key to the entire situation, as its elevation above the railroad track was considerably greater than that of the other real estate which they contemplated buying, if they could purchase the Armpriest property. Appellees did not want any of the real estate unless they were able to buy the Armpriest property, and appellant's ward was advised of that fact at the time the contract involved was executed by Susan Armpriest and delivered to appellees. Appellees had secured options for all of the real estate they desired to acquire for carrying out their plans, and appellant's ward was advised of that fact. During the first days of

September, when the balance was to be paid to Susan Armpriest on the contract, appellees and Susan Armpriest and her daughter, Estella L. Houck, accompanied by La Monte Cowles, an attorney of Burlington, Iowa, who for many years had been counsel for appellant's ward, and who was with her for the purpose of assisting her in the transaction, met at the office of Mr. Power, who was attorney for appellees. Mrs. Armpriest had with her the deed that was to be executed in performance of the contract. It was stated by Mr. Cowles, attorney for Susan Armpriest, that the indebtedness secured by a mortgage resting on the real estate had not been paid, and appellees declined to pay the money until the mortgage was canceled. Appellees advised Mrs. Armpriest, however, that the balance due would be, and it was, left with the Farmers' & Merchants' Savings Bank of Burlington to be paid to her as soon as the existing incumbrance was canceled. Susan Armpriest was at the time a depositor in the Farmers' & Merchants' Savings Bank.

[1] Resistance to performing the contract is based on the alleged incapability of Susan Armpriest to make the contract on August 4, 1919. This leads us to the evidence to ascertain whether Susan Armpriest, on August 4, 1919, was incapable of transacting the particular business in question. That such is the pertinent inquiry see *Mitchell v. Mutch*, 180 Iowa, 1281, 164 N. W. 212; *Swartwood v. Chance*, 131 Iowa, 715, 109 N. W. 297.

A few months before making the contract involved in this case Mrs. Armpriest sold some property which she owned, transacting the business in a satisfactory manner. On August 26th appellant's ward purchased property in Burlington known as the Magel property, transacting such business properly. Appellant's ward had for some years conducted quite a large boarding house in property she owned, and was so engaged at the time she executed the contract in controversy, and continued to conduct the boarding house until in October, when she broke down physically and mentally, and was taken to the hospital. The testimony of appellant herself and her husband, and a brother and sister of her ward, was offered, showing certain actions and sayings of her ward which she claimed were peculiar and different from former conduct of her ward, and which she claims evidenced insanity.

It was correctly found by the lower court, and as we understand, conceded by counsel for appellant, that appellees had no knowledge of the facts and circumstances relied upon by appellees to sustain the allegations of want of mental capacity to enter into the contract. Counsel for appellant placed strong reliance upon the testimony of Dr. Thorner, who was introduced as an expert witness, and who said that Susan Armpriest was not of sound mind on the 4th day of August.

1919, when the contract was entered into. Dr. Thornber was her family physician for several years. He did not see her on or about the 4th day of August, 1919, at the time the contract was entered into. He had not treated her since March, 1918, until in October, 1919, when she was completely broken down. She had never said anything to Dr. Thornber about her property affairs. The doctor stated that in his opinion the condition she was in in October had been growing for some time; that he thought the last year or two she was more nervous than in former years. Basing his answer on his knowledge of the condition of Mrs. Armpriest and on assumed facts which appellant claims were established by the evidence, Dr. Thornber testified that Susan Armpriest was insane on August 4, 1919. The facts assumed were acts and sayings of Mrs. Armpriest testified to mostly by her daughter, appellee, and partly by her brother and sister and her daughter's husband. The question assumed that Mrs. Armpriest complained during the warm weather of dizziness, seemed to be more forgetful than usual, was abusive, and cursed two small grandchildren whom she was keeping, children of her son, when formerly she never did anything of that sort; that she begun to use profanity in her usual conversation when she had not done that before; that she whipped one of the small children for doing trivial things; that she reported that Mr. Toothacre, one of the officers of the bank, had laughed at her, and she said she made a face at him; that she told her sister that she had not paid her taxes, when in fact she had paid them; that on occasion of visiting her sister at Mt. Pleasant she told her sister that she (the sister) "had made changes in her house," when in fact she had made no changes whatever; that she took a child of her son to keep and look after, and at the same time was running a boarding house, and said she could not take care of the child, and yet she had her son send another child to her, and she looked after and cared for the two children at that time, when she frequently would complain that she could not take care of them, and yet she would continue to do so, and when her son visited her she would say nothing about his taking them away until after he had left, then would complain that he had no right to leave them there; that he ought not to do it; that she complained to the family that the death of her daughter—some 2 years before—was due to the medicine which the doctor gave her, and if she had taken care of her herself she would have lived; that she frequently spoke of having lots of money, and said that in 3 years she would be a millionaire; she was making bushels of money. Further included in the question were the assumed facts that Mrs. Armpriest had continually said she would not sell the property in controversy for less than \$3,000, and that

when the opportunity was presented to her she sold it for \$2,200, and said in justification that the purchasers told her if she did not sell it they would have it appraised and she would have to sell it. Only the daughter (appellant) testified to these matters.

We are constrained to doubt the reliability of appellant's testimony in some particulars at least. Appellant was at the bank with her mother when the contract was signed, and afterwards said as a witness that she (her mother) had several arguments before the contract was signed with Mr. Toothacre, cashier of the bank; that she got pretty well excited; that she put her hands over the middle of the table and pounded her fist to make them understand; that her mother was so excited in the argument about the taxes that she just pounded on the table with her fists. There were five or six men present, one of them Toothacre, cashier of the bank, and the others farmers and business men, and they all testified that there was no excitement on the part of Mrs. Armpriest; that she did not become excited or pound the table with her fist, nor was there anything unusual in her conduct. Appellant went with her mother and saw her sign the contract and receive the \$500 payment, and raised no objection, never suggested to the gentlemen present that there was anything wrong with her mother, and then came upon the witness stand and testified in her examination in chief that at the time her mother signed the contract she (the witness) knew her mother was insane. On cross-examination she said:

"If I said she [her mother] was insane, I did not mean to say she was insane on that day; I know she is insane now, and I knew afterwards that all these little things led up to her insanity. I knew she was extremely nervous. I did not know she was insane at that time. I didn't tell these men she was insane. I didn't intend to deceive them."

On redirect examination she testified:

"I didn't realize the condition she was in at the time, but I realized she was extremely nervous and had been all summer during the hot weather. Before going down there to sign the contract I told my mother not to get excited or nervous, just to keep her mind on the business, and not to think of anything only what she was doing."

The daughter's memory was a little faulty at least. It appears without controversy that she and her mother called at the office of Mr. Power about September 2d, at the time the purchase price was to be paid, for the purpose of receiving the balance due and delivering the deed. Concerning that transaction this witness testified:

"We were at Mr. Power's office one time and you [Mr. Power] called Mr. Cowles over. Some one told us to be at your office. I don't remember what we were there for."

All of the appellees testified that they did not say to Mrs. Armppriest that if she did not sell to them they would have the property appraised and take it away from her. If Mrs. Armppriest made such statements to her daughter, it probably did not flow from a delusion, but more likely from an erroneous understanding that the property could be condemned for the use that appellees were going to make of it. It is strange that appellee did not remember what she and her mother and their attorney were at Mr. Power's office for. Unquestionably they were there to carry out the contract. They were there to receive the balance of the purchase money and deliver the deed. Mrs. Armppriest wanted the balance of the purchase money so she could use it to make payment on the property she had purchased from Magel. Appellees refused to pay over the money to Mrs. Armppriest because they wanted the incumbrance on the property paid off and the taxes paid before they paid the balance of the purchase price. Appellees told her, or told her attorney in her presence, that they would leave the money with the Farmers' & Merchants' Bank, and as soon as she delivered to them merchantable title, Mr. Toothacre, who was cashier of the bank, would turn the money over, and the money was left in the bank. No objection whatever was made by Mrs. Armppriest or her attorney, or her daughter, to the carrying out of the contract.

Dr. McKittrick, who had been the doctor member of the commissioners of insanity for 10 or 12 years, and who was acting in that capacity when they examined Mrs. Armppriest in November, 1919, testified that the nature of her difficulty pointed toward paresis, or softening of the brain; that paresis comes on gradually, and there are certain times when there is quite an excitability, acutely so; that it was very acute the day he examined her in November, 1919; that apparently she had been in a normal stage until perhaps a few weeks prior to his examination; that he thought the stage she was in then was apparently recent; that in his judgment the period of excitement was of short duration; that paresis is a progressive disease. He testified:

"I would not say that a paretic was insane previous to the time it manifested itself in excitement and extreme nervousness. We have had paretics who conducted battles in the navy; that have settled questions of international import. I have had paretics under my own observation that have bought and sold large stocks of goods, not necessarily extraordinary cases, because paresis is of slow origin. It is my conclusion that this maniacal stage was recent. When it had not reached such a stage that there were outward manifestations; there would be no way for unskilled men to determine whether she was afflicted or not."

The adjudication finding Mrs. Armppriest a person of unsound mind was not until the

13th day of October, 1919, between two and three months after the date of the contract involved in this action. The evidence shows, beyond controversy, that during that interval Mrs. Armppriest had been transacting business as she ordinarily did, carrying on her boarding establishment, buying real estate and transacting business with the banks. In short, the record does not show a single act or fact upon the part of Mrs. Armppriest, until some time after making the contract, indicating incapability to make such a contract. No doubt disease, likely paresis, had been preying upon her for some time before she broke down in October. She had carried on her business just as she had done for years before. Just before her breakdown she had added to her burdens papering, painting, and cleaning of another house preparatory to moving out of the house she had sold.

La Monte Cowles, a prominent lawyer and responsible man, who for a number of years had been Mrs. Armppriest's attorney, and who assisted her in making the contract and purchase of the Magel property on August 26, 1919, 22 days after the contract here involved was made testified:

"At the time the contract with Magel was made, there was no thought on Mr. Magel's part, or on my part, or that of any one else, that Mrs. Armppriest was insane."

Mr. Cowles could properly only state his own opinion of Mrs. Armppriest's condition of mind. However, we think his opinion sound.

[2, 3] On the whole record we are constrained to find that it has not been shown that Susan Armppriest was incapable of transacting the particular business in question—the making of the contract involved in this cause. We think the delusions relied upon, those which were sustained by the evidence, did not influence Mrs. Armppriest to such an extent, if at all, that she was without reasonable conception or understanding of the true nature and terms of the contract. *Mathews v. Nash*, 151 Iowa, 127, 180 N. W. 796. Mrs. Armppriest was only 52 years old. Cooking for boarders and keeping and caring for two young grandchildren, with disease creeping on her, had, on August 4th, impaired her physically, and likely to some extent she was then impaired mentally. But mere proof of mental defect does not necessarily establish incompetency. *Evers v. Webb*, 186 Iowa, 1172, 173 N. W. 264; *Mitchell v. Mutch*, 180 Iowa, 1281, 164 N. W. 212, in which we said:

"Mere weak-mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance."

[4] Reaching the conclusion that it has not been shown that appellant's ward was incapable of making the contract involved in this case, it is not necessary that we proceed further in discussion of the case. However, we may consider whether or not appellees would be placed in statu quo by appellant's returning to them the \$500 received on the contract, which she offered to do. It is an elementary rule that placing in statu quo implies restoration of the party injured to as near the condition that existed prior to the making of the contract as possible. The evidence shows that appellees' agreement to purchase any of the several pieces of property was conditioned upon acquiring all of it, and appellant's ward was distinctly notified of that fact. After obtaining options for the purchase of the several pieces of property, appellant's ward was informed that contracts had been agreed upon with the owners of the pieces of property other than hers, and that they would buy her property. The contracts were all made on the same day. Mrs. Arm Priest's property was of such a character and so located, and its relation to the other pieces of property such, that if appellees were not able to acquire title to all of the pieces of property it would practically defeat the purpose for which they were buying, and they would not have purchased any of it had they not been able to make a contract with appellant's ward. They purchased real estate for which they had no use, unless they acquired Mrs. Arm Priest's property. The other real estate had improvements on it which were sold at auction and removed, and they received only a small consideration for the improvements. Ordinarily in a case of this kind, the returning of the cash payment would place the injured party in the condition that existed prior to the making of the contract. Not so in the instant case. It would not compensate them for their inability to carry out their enterprise in which they invested a large amount of money.

On the entire record we are satisfied that the decree of the trial court is correct, and it is therefore affirmed.

EVANS, C. J., and STEVENS and FAVILLE, JJ., concur.

BERRY v. GROSS. (No. 34246.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Bills and notes $\S$ 453—Parol agreement to vary blank indorser's liability held inadmissible.

Though an indorsement of a note by the payee is in blank, and though the note is non-negotiable, the payee's agreement with his immediate indorsee that the transfer was simply to pass title without any recourse on him is

not available against a remote indorsee without notice.

2. Evidence $\S$ 441(11)—Parol agreement to vary blank indorser's liability held inadmissible on theory that indorsement was not in blank.

Agreement in nonnegotiable note that on default in payment the makers and indorsers agree to pay attorney's fees and also agree that time of payment may be extended without notice becomes a part of the payee's indorsement, so that it, in legal effect, is not an indorsement in blank, though such in form, and therefore his oral agreement with his indorsee that the transfer was simply to pass title without any recourse on him may not be shown.

Appeal from District Court, Decatur County; H. K. Evans, Judge.

Action on a promissory note. The facts are stated in the opinion. Judgment for plaintiff, and the defendant Gross appeals. Affirmed.

Nesbitt & Johnston, of Des Moines, for appellant.

Frank Wisdom, of Bedford, for appellee. McGinnis & McGinnis, of Leon, for interveners Lames.

O. M. Slaymaker, of Osceola, for defendants Sutton and Zimmerman.

STEVENS, J. This is an action upon a promissory note against Andrew and Anna Lames, makers, and J. M. Gross, payee as indorser, and to foreclose a mortgage upon 287 acres of land in Decatur county, given to secure the payment of the note. Judgment was entered against the maker and the indorser, but refused to decree a foreclosure of the mortgage. Gross alone appeals. The parties agree that the instrument in suit is nonnegotiable. The note which is for \$4,000, with interest at 6 per cent. was executed May 1, 1915, and matured November 1, 1917. On November 15, 1915, Gross assigned the mortgage, executed to secure the payment thereof, to William Roberts, and transferred the note to him by a blank indorsement as collateral security for an existing indebtedness. On November 13, 1917, William Roberts, by written instrument, assigned the mortgage to M. E. Harris, and indorsed the note as follows:

"I hereby assign the within note to * * * without recourse on me"

—and returned the note and mortgage to Gross. Prior to the redelivery of the note to Gross by Roberts, the former and M. E. Harris entered into an agreement in writing for the exchange of real estate, by the terms of which Gross agreed to transfer the note and mortgage to Harris. On September 2, 1918, Harris assigned and delivered the note, without indorsement on the back thereof, to the Union Savings Bank of Redding, Iowa, and later the bank sold and delivered the

note to Asa Berry, plaintiff and appellee herein. All transfers were for a valid consideration, but only Gross and Roberts indorsed the note. Other necessary parties to the action to foreclose the mortgage were named in plaintiff's petition, and appeared and made defense in the court below, but, as the court held that the mortgage had ceased to be a lien upon the land described therein, and as the plaintiff has not appealed, their rights are not affected by this appeal.

Two principal defenses set up by the appellant in his answer and relied upon by him and urged in this court are as follows: (a) That it was orally agreed between Gross and Harris, at the time of the delivery of the note to the latter, that Gross was to be completely relieved from liability, that the transfer was to be without recourse upon him, and that the note was accepted as full payment and settlement of the obligation created by the contract for the exchange of properties; and (b) laches.

Appellant testified concerning the transaction with Harris as follows:

"Q. State what you told Mr. Harris. A. I told Mr. Harris that the \$4,000 note and mortgage was put up as collateral security with Mr. Roberts at the bank for money, and that this \$4,000, or rather the \$1,000 mortgage, had been started—foreclosure had been started on that by Mr. Annis, and the time of redemption was not yet out. Also that I would have Mr. Roberts indorse this note and mortgage over from him to Harris and not coming back through me at all. Also that I would not be responsible at all for the note and mortgage, would guarantee the value to be in the land, but I was not responsible in any way for the note, and in the talk with Mr. Roberts. Mr. Roberts asked me if I wanted to sign that without recourse. I told him to sign without recourse below his name, and that would cover it all. This is the way I turned it over to Mr. Harris. Q. Did Mr. Harris accept this note with the understanding that you have just related? A. Yes, sir. * * * The matter of the transfer between myself and Harris was simply to transfer title from me to Harris."

The court below in a written opinion held that this evidence was inadmissible, and that the alleged oral agreement between appellant and Harris was not available as a defense to plaintiff's cause of action.

[1] We will first inquire as to the admissibility of parol evidence to show that the agreement between appellant and Harris was different from that arising under section 3048 of the Code and implied by law. As already stated, appellant indorsed the note in blank, and delivered it, together with the mortgage executed to secure its payment, to Roberts as collateral security for the payment of an existing indebtedness, and that later the note and mortgage and a written assignment of the mortgage signed by Roberts

was returned by him to Gross, who delivered it to Harris.

Subject to the qualifications and exceptions hereafter noted, parol evidence of the actual contract or agreement between a blank indorser of either a negotiable or nonnegotiable note and his immediate indorsee, although it may tend to vary or modify the contract implied by law, has long been held to be admissible in this state. *Harrison v. McKim*, 18 Iowa, 485; *Huse v. Hamblin*, 29 Iowa, 501, 4 Am. Rep. 244; *James v. Smith*, 30 Iowa, 55; *Geneser v. Wissner*, 69 Iowa, 119, 28 N. W. 471; *Evans v. Burns*, 67 Iowa, 179, 25 N. W. 119; *Truman v. Bishop*, 83 Iowa, 697, 50 N. W. 278; *First National Bank v. Crabtree*, 86 Iowa, 731, 52 N. W. 559; *Lynch v. Mead*, 99 Iowa, 66, 68 N. W. 579; *Iowa Valley State Bank v. Sigstad*, 96 Iowa, 491, 65 N. W. 407; *Farmers' Savings Bank v. Wilka*, 102 Iowa, 315, 71 N. W. 200; *Farmers' Savings Bank v. Hansmann*, 114 Iowa, 49, 86 N. W. 31; *Savings Bank v. Hanna*, 124 Iowa, 374, 100 N. W. 57.

The exceptions referred to are as follows: Parol evidence is not admissible to show that no contract of any description was entered into or intended by a blank indorsement (*Geneser v. Wissner*, supra; *Evans v. Burns*, supra); and such evidence is admissible only in an action between the immediate parties to the agreement (*Skinner v. Church*, 36 Iowa, 91; *James v. Smith*, 30 Iowa, 55; *First National Bank v. Crabtree*, supra). A provision in a note by which the indorsers waived presentment of payment, notice of nonpayment, protest and notice of protest, and due diligence in bringing suit is the equivalent of an indorsement in full, and parol evidence to show a different agreement is not admissible. *Bank v. Sigstad*, supra; *Bank v. Wilka*, supra. The rule, so far at least as it was applicable to negotiable instruments, was abrogated by the enactment of the Uniform Negotiable Instrument Law. *Porter v. Moles*, 151 Iowa, 279, 131 N. W. 23. The instrument involved in each of the above cases was a negotiable promissory note.

Much emphasis is placed by appellant upon his contention that the Negotiable Instrument Law has no application to nonnegotiable instruments, and therefore that *Porter v. Moles*, supra, is not an authority in this case. To what extent this contention must be upheld is not very material to the present discussion. The Negotiable Instrument Law is a codification of common-law rules, and, whether applicable or not to nonnegotiable instruments, the rules in many instances must be the same. The most important distinction between the two kinds of instrument is that nonnegotiable instruments are subject to certain defenses in the hands of a holder without notice, whereas

a bona fide holder of a negotiable instrument without notice is protected against the same. While the point was not directly involved in *Park v. Best*, 176 Iowa, 7, 157 N. W. 233, which was an action against a blank indorser of six certificates of deposit, which were created by the parties, and the court without, however, so holding, as nonnegotiable, the rule was recognized. No reference was made therein to *Porter v. Moles*, supra.

As previously stated, the oral agreement relied upon by appellant was entered into between Gross and Harris, and, so far as the record discloses, was unknown to appellee at the time he acquired the note from the bank. Unless a distinction may be made in the rule announced in *Skinner v. Church*, supra, between negotiable and nonnegotiable instruments, the agreement between Gross and Harris was not admissible in an action brought by Berry against Gross as the original indorser. No distinction occurs to us. The liability of an indorser of a nonnegotiable instrument is direct and positive and equivalent to the execution of a new note. *Long v. Snyder & Hawthorne*, 3 Iowa, 266; *Wilson v. Ralph and Van Shaick*, 8 Iowa, 450; *Billingham v. Bryan*, 10 Iowa, 317; *Allison v. Hollembeck*, 138 Iowa, 479, 114 N. W. 1059. And the holder may maintain an action against each, or all, of the indorsers. *Lynch v. Mead*, supra; *Huse v. Hamblin*, supra. The liability of indorsers is definitely fixed by the Uniform Negotiable Instrument Law. Demand, notice of nonpayment, and protest are necessary to charge an indorser of negotiable paper, unless the same is waived upon the face of the instrument or by the indorsement, whereas notice and protest of a nonnegotiable instrument are not necessary. *Huse v. Hamblin*, supra; *Long v. Snyder & Hawthorne*, supra; *Billingham v. Bryan*, supra.

[2] The agreement relied upon by Gross, so far as it was binding at all, was restricted to himself and Harris, and could not be interposed as a defense to this action. Furthermore, parol evidence was not admissible to show that the transfer by Gross to Harris was for the purpose of transferring title only.

The note in suit contained the following provision:

"Upon default of payment of this note, the makers, indorsers, guarantors, and sureties, agree to pay all attorney's fees and expenses of collection and consent that any justice of the peace may have jurisdiction on this note to the amount of \$300.00 and I do hereby severally waive demand of payment, protest, and notice of protest of this note and consent that time of payment may be extended without notice."

We held in *Bank v. Sigstad*, supra, that—

"When the defendant put his name on the back of the note, without more, he became a party to the paper, and bound by all its provisions. These provisions of the note then formed a part of his contract of indorsement, and he was as fully bound by them as he could have been had they been placed upon the back of the note and his name * * * been written under them."

This is as true of a blank indorser of a nonnegotiable note as the blank indorser of one that is negotiable. It is true that the waiver of notice of nonpayment, protest, and notice of protest is without the same significance in an indorsement of a nonnegotiable note, but the defendant agreed by his indorsement to pay the attorney fees, and that time might be extended for the payment of the note without notice. The point is that the indorsement ceased in legal effect to be a mere indorsement in blank. All that appeared on the face of the note was as much a part thereof as though it had been written over his signature, and therefore the alleged oral agreement was not admissible. *Savings Bank v. Hanna*, 124 Iowa, 375, 100 N. W. 57, and cases cited supra.

We need not discuss the effect of the enactment of the Uniform Negotiable Instrument Law upon the question of the admissibility of parol evidence to vary or alter the implied obligations of a blank indorser of a simple nonnegotiable promissory note, as what is said above disposes of the appeal.

The claim of laches is without merit.

For the reasons already pointed out, the judgment of the court below must be and is affirmed.

EVANS, C. J., and ARTHUR and FAVILLE, JJ., concur.

**FARMERS' SECURITY BANK OF CONWAY
v. SPRINGEN et al.**

(Supreme Court of North Dakota. Oct. 5, 1921.)

(Syllabus by the Court.)

Venue ¶41—Change to residence county of private and corporate defendants, on joint demand of both, was proper.

Where a complaint alleges a distinct cause of action against a private defendant, and another, also, against a domestic corporation, and where the action is not brought in the county of the residence of either defendant, it is held, construing subdivision 6, c. 3, Laws 1919, and section 7417, Comp. Laws 1913, that a change of the place of trial to the county of the residence of the private party and of the corporation may be permitted, upon the joint demand of both defendants.

Appeal from District Court, Walsh County; Burr, Judge.

Action by the Farmers' Security Bank of Conway against H. B. Springen and another. From an order changing the place of trial to Grand Forks county, the plaintiff appeals. Affirmed.

H. C. DePuy, of Grafton, for appellant.

H. A. Libby and Bangs, Hamilton & Bangs, all of Grand Forks, for respondents.

BRONSON, J. The plaintiff instituted an action against the defendants in Walsh county. The complaint alleges that the defendant Springen was in its employ as cashier and that the defendant Trust Company by its guaranty contract covenanted with the plaintiff to reimburse it for pecuniary loss that it might suffer through acts of fraud and dishonesty on the part of Springen as cashier; that in 1920, Springen, as cashier, misappropriated some \$1,300 belonging to the plaintiff. The defendant Trust Company, in its answer, sets forth a general denial, alleged its office and principal place of business to be in Grand Forks county, and admitted the execution of the guaranty contract. The defendant Springen, in an amended answer, alleged, in addition to a general denial, an indebtedness of some \$774 owing to the plaintiff by him, as determined upon a final settlement, and the tender, the deposit, and the refusal of such amount.

The defendants, in proper time, made a demand for a change of the place of trial from Walsh county to Grand Forks county. Accompanying such demand, a showing by affidavits was made that the defendant Springen was and had been a resident of Grand Forks county for more than three years, and that the defendant Trust Company during the last ten years had had its

office and principal place of business in Grand Forks county. The plaintiff submitted a counter affidavit that the Trust Company transacted business in Walsh county. Upon hearing the trial court ordered the place of trial changed to Grand Forks county. The plaintiff has appealed from such order.

The plaintiff maintains that the provisions of chapter 3, Laws 1919, apply. The material portions thereof read, viz.:

"Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by statute: * * *

"6. All actions against any domestic corporation shall be tried in any county or judicial subdivision designated in the complaint and in which the defendant corporation transacts business."

The plaintiff further contends that, the venue being properly laid in Walsh county against the Trust Company, the defendant Springen is not entitled to a change, since he is properly joined as a party defendant.

These contentions may be answered by a consideration of plaintiff's cause of action. It will be noted that, as against Springen, it is for a misappropriation of moneys, a cause sounding in tort. As against the Trust Company, it is an action on a contract of guaranty. It is not alleged that Springen is a party to this contract of guaranty. The issues upon the pleadings determinative of the liability of Springen and the Trust Company are not necessarily the same. Further, it is plain that the liability of Springen must first appear before the contract of guaranty is operative. It may be admitted that the cause of action against the Trust Company alone, upon the showing made, would properly be triable in Walsh county. There exists, however, in addition, a cause of action against Springen. The statute does not provide, in terms, that all actions against any domestic corporation, whether joined with other actions or against other defendants, shall be tried in the county designated in the complaint. Section 7417, C. L. 1913, provides that—

"In all other cases, subject to the power of the court to change the place of trial as provided by statute, the action shall be tried in the county in which the defendant or some of the defendants reside at the time of the commencement of the action."

No repealing clause of any kind was attached to chapter 3, Laws 1919. The act should not be extended by construction to deprive a private defendant of his statutory right to the trial of the cause of action against him in the county of his residence,

where the domestic corporation consents thereto. It readily follows that the trial court did not err in transferring the entire cause of action, thus framed, to Grand Forks county.

The order is affirmed.

ROBINSON, C. J., and GRACE, BIRDZELL, and CHRISTIANSON, JJ., concur.

AMERICAN STATE BANK v. DAYTON et al.

(Supreme Court of North Dakota. Sept. 26, 1921.)

(Syllabus by the Court.)

Chattel mortgages $\S$ 229(1)—Evidence in conversion action held to warrant directing verdict for defendant purchasers from mortgagor.

In an action for the conversion of grain, upon which the plaintiff claimed a mortgage lien, the trial court directed a verdict for the defendants. The evidence is examined, and it is held that no error was committed in directing the verdict.

Appeal from District Court, Ward County; K. E. Leighton, Judge.

Action by the American State Bank, formerly the German-American State Bank, of Burlington, N. D., against A. C. Dayton and another, copartners under the firm name and style of Dayton & Carroll. From an order of dismissal, and an order denying a new trial, plaintiff appeals. Affirmed.

Greenleaf & Woledge, of Minot, for appellant.

B. H. Bradford, of Minot, for respondents.

BIRDZELL, J. This is an appeal from a judgment of dismissal and from an order denying a new trial. The action was brought to recover the value of certain wheat purchased by the defendants, upon which the plaintiff claimed a lien through a chattel mortgage given by one Gobernatz, the defendants' vendor. At the conclusion of the evidence the trial court directed the jury to return a verdict for the defendants. The facts are as follows:

In November, 1917, one Chris Gobernatz gave the plaintiff and appellant a chattel mortgage covering a large amount of personal property used by the mortgagor in operating a certain farm and the crop to be raised in 1918 upon the west half of section 5, township 157, range 83, to secure an indebtedness of \$2,781.32. In December, 1917, he gave another mortgage to the plaintiff, covering substantially the same property. During the following season the mortgagor farmed the land described in the chattel mort-

gages, and also the northwest quarter of section 6 of the same township and range. The owner of the land described in the mortgage was J. Olson, who was also the president of the plaintiff and appellant bank. Gobernatz was his tenant. During the fall of 1918 Gobernatz delivered certain grain to the Olson-Warner Grain Company at Burlington, for which payment was made to Olson, the landlord. He also turned over to the appellant the personal property on the farm without seizure under foreclosure proceedings. Some of this was disposed of by the appellant, and the remainder was still in its hands at the time of the trial. During the fall of 1918 Gobernatz sold and delivered to the defendants herein, at Glenburn, 569 bushels and 30 pounds of wheat, for which the latter paid the market price. It is this wheat that is the subject of the present controversy.

The respondents justify the judgment of the trial court dismissing the action upon several grounds. It is contended: (1) That the evidence is insufficient to identify the grain purchased by the defendants as grain raised upon the west half of section 5, township 157, range 83, covered by the appellant's mortgages; (2) that the mortgagor was not entitled to be filed under chapter 108, Session Laws of 1917, on account of their form; and (3) that the evidence fails to show the receipt by the mortgagor of copies of the mortgages at the time they were executed. After a careful examination of the record we find it unnecessary to consider any question other than the first, viz. that the evidence does not identify the wheat Gobernatz sold to the defendants as the wheat covered by the appellant's mortgages.

The nearest approach to evidence of the identity of the grain sold to the defendants is that of one Warner, an officer of the plaintiff bank. He testified that during the season of 1918 he was out to Gobernatz's place a number of times; that he was familiar with his farming operations, and knew what land he put into crops; and that he seeded and raised oats on the northeast quarter of section 6, which, he stated, was the only land he farmed, aside from the half section covered by the crop mortgages in question. He stated that he did not know, of his own knowledge, where the wheat, aside from that delivered to the Burlington elevator, was hauled to, or where any of the grain hauled by Gobernatz came from. We are of the opinion that this evidence is not sufficient to sustain the plaintiff's burden of proving that the defendants purchased the grain covered by the plaintiff's mortgages.

The sale of the mortgaged grain to the defendants would have involved a criminal act on the part of Gobernatz, and it cannot be assumed that such an offense was com-

mitted by him, where the evidence going to negative other sources of the grain sold is not stronger and more direct than that in the instant case. The source of wheat sold is not ordinarily a fact so difficult of proof as to require its establishment by evidence which is so remote and circumstantial as that in the instant case. The facts in this case are scarcely distinguishable from the facts in the case of *State Bank v. Bismark Elevator & Investment Co.*, 31 N. D. 102, 153 N. W. 459, in which it was held that the evidence did not do more than give rise to a suspicion. It was there held that a verdict founded on surmise, conjecture, or guess alone was not sufficiently supported by evidence.

For the foregoing reasons, we are of the opinion that no error was committed in entering a judgment of dismissal, and it is affirmed.

ROBINSON, C. J., and CHRISTIANSON, BRONSON, and GRACE, JJ., concur.

STATE v. LAYER.

(Supreme Court of North Dakota. Oct. 6, 1921.)

(Syllabus by the Court.)

1. Defendant convicted of murder on his plea of guilty.

The defendant was arrested and duly charged by a written information filed in the district court of McLean county, N. D., with the commission of the crime of murder in the first degree. After his arrest, and before the filing of the information, he made a written confession of guilt, admitting therein that he killed Jacob Wolff, with whose murder he was charged by the information, and further admitting that he also killed Jacob Wolff's five children and Jacob Hofer, the hired chore boy. He states that Mrs. Wolff was killed by the discharge of a certain shotgun when he was endeavoring to take the same away from Jacob Wolff. After the entry of his plea of guilty, the court made and entered a judgment of conviction, and thereafter sentenced defendant to the State Penitentiary at Bismarck, N. D., for the term of his natural life.

2. Defendant convicted of murder on plea of guilty moved for new trial.

Thereafter defendant made a motion for a new trial, and appealed from the judgment of conviction. The basis of the motion was that the written confession was procured from him by duress, coercion, intimidation, and fear, and that his plea of guilty was likewise procured, and that neither was voluntary.

3. Criminal law §956(4)—Evidence held to show no duress or coercion in procuring confession or plea of guilty.

An examination of the record discloses that no duress, coercion, or intimidation was exer-

cised in procuring the confession, nor was such used towards him to procure his plea of guilty to the crime charged in the information, and for these, and other reasons stated in the opinion, it is held that the court did not err in denying defendant's motion for a new trial.

Appeal from District Court, McLean County; W. L. Nuessle, Judge.

Henry Layer was convicted upon his plea of guilty of murder in the first degree, and from an order of the district court denying his motion to withdraw such plea, he appeals. Order and judgment affirmed.

Edward P. Kelly and James Morris, both of Carrington, for appellant.

Wm. Lemke, Atty. Gen., and M. Tellefson, State's Atty., and John E. Williams, Asst. State's Atty., both of Washburn, for respondent.

GRACE, C. J. This is an appeal from a judgment of conviction and from an order of the district court wherein it denied the motion of the defendant to withdraw his plea of guilty, entered by him to the charge of murder in the first degree, contained in the information duly filed in the district court of McLean county. Subsequent to the time defendant entered his plea, the judgment of conviction was entered, and thereafter he was sentenced to imprisonment in the State Penitentiary at Bismarck for life.

[2] Thereafter he made a motion before the same district judge, asking that the judgment of conviction be set aside, that his plea of guilty theretofore entered be withdrawn, and in lieu thereof he be permitted to enter a plea of not guilty, and to have a trial upon the merits. The motion was heard before the court in the city of Bismarck, N. D., on November 27, A. D. 1920, and on the 28th day of January, 1921, court made an order denying in all things the motion. This order was filed in the office of the clerk of court of McLean county, N. D. From this order and the judgment, defendant appeals.

[1] A statement of the material facts is substantially as follows:

On or about the 22d day of April, A. D. 1920, at the farm of Jacob Wolff, four or five miles from the village of Turtle Lake, in the county of McLean, state of North Dakota, one Jacob Wolff, his wife, their five children, and the hired chore boy, Jacob Hofer, were murdered. The instrument used in committing the murder was a shotgun. On April 24, 1920, about noon of that day, one Jacob Kraft called at the home of Jacob Wolff, knocked at the door, and, receiving no response, opened it and found a room in disorder, with the floor covered with blood. The dead bodies of Mrs. Wolff,

(184 N.W.)

Jacob Hofer, and three of the Wolff children were found in the cellar in one heap, at the bottom of the steps leading thereto. About 30 feet in front of the barn there was considerable blood, and a trail of blood led thence into a shed attached to the barn, and there the dead bodies of Jacob Wolff, and two of his small children were found covered with hay. The bodies of the dead persons were left where found until Sunday, when an inquest was held. Photographs of the bodies were taken about 2 o'clock Sunday morning, and before the bodies had been disturbed. Thereafter the bodies were removed, a post mortem examination held, and they were prepared for burial.

Upon the discovery of the crimes above mentioned, O. H. Stefferud, the sheriff of McLean county, N. D., and his deputy, Emil Haas, certain detectives, and Chris Martineson, chief of police of Bismarck, began a systematic and searching investigation with the view of discovering and apprehending the person or persons who committed the crimes. They interviewed the neighbors in the vicinity of the crime, taking from them affidavits as to their whereabouts on the day of the crime, and as to any knowledge or information they possessed which might assist in the discovery of the criminals. This investigation continued until about May 11, 1920. About this time the defendant, who was a farmer living about two and three-fourths miles north and east of the Wolff farm, was taken into custody and confined in the county jail at Washburn, McLean county. About 8:30 o'clock p. m. on the 12th day of May the defendant was taken to the sheriff's office, and there was questioned by two detectives, George D. McDowell, E. F. Hezner, Chris Martineson, chief of police of the city of Bismarck, and Sheriff Stefferud, of McLean county, and Haas, his deputy, with reference to the murder. At about 11:30, the deputy sheriff and Hezner, one of the detectives, retired. Those remaining continued to question Layer, and confronted him with conflicting statements, claimed by them to have been made by him in response to their inquiries. He was there shown photographs of the dead bodies, and finally acknowledged his guilt. He related in detail the manner in which he committed the crime; in other words, he made a written confession of his guilt, of which the following is a copy:

"Washburn, North Dakota, May 13, 1920

"I, Henry Layer, being first duly sworn, depose and say, that I make this statement out of my own free will, without any promise of whatsoever; that on Thursday, April 22d, I left my own house at about 11:00 o'clock a. m. and walked about one mile south, following the section line, and then walked from the north into Wolff's farmyard, arriving there at about 11:30 a. m. I then walked into the house and

there found Mr. Jacob Wolff, Mrs. Wolff, the five children, and the hired hand, Jacob Hofer. I began talking to Jacob Wolff, demanding damages for the injury done to my cow by Wolff's dog. I told Wolff to come and look at the cow and see for himself how much damage the dog had done to my cow. Wolff then told me to leave his yard and go away. This conversation took place while I and Wolff were standing in the doorway leading from the storm shed into the house proper. I then told him not to get mad, and he (Wolff) got the gun, a double-barreled shotgun, out of his front room. I then tried to take this gun away from him, and in the fight between Wolff and myself for the gun one shot went off, and then another in quick succession; one of the shots killed Mrs. Wolff. I did not see her fall, but saw her lay there. I then got the gun away from Wolff and then got more shells out of the bureau drawer in the front room, where I saw Wolff take two shells at the time he (Wolff) got the gun and then I reloaded the gun and began shooting. I do not remember at whom I shot first but I believe I shot at Jacob Wolff, who by this time had run out of the house across the yard towards the cow shed, and hit him, and I saw Jacob Wolff fall. I then went out of the house where Jacob Wolff lay, and fired another shot into Wolff's body. I then went into the cow shed, saw there Wolff's two girls, and shot them where they stood, in the northwest corner of the shed. I then returned to the house and there shot and killed the rest of Wolff's family. I then returned to the yard, carrying Wolff's coat, dragged Wolff's body into the shed, first covered the bodies of the two girls with hay, which I took out of the manger, threw Wolff's body on top of the pile, and the coat over Wolff's body, and then also covered his (Wolff's) body with hay; then returned to the house, opened the trap door leading from the kitchen into the basement, and threw the bodies of the dead laying about the kitchen, one after another into the basement, then put down the trap door. The reason I did not kill the baby was, I believe, because I did not go into the room in which the baby lay. I then pulled loose the telephone wires from the instrument. I then left the Wolff house, carrying the gun, closing the doors behind me as I walked out.

"Before leaving the house, I picked up all the empty shells, carrying them with me also. I then broke the gun, carrying the same, walked south through Wolff's yard towards the slough which I knew was there. When I got to the slough I threw the broken gun and shells I had in my pocket into the slough, and then turned east on the north side of Brekken Latke until I came to the draw leading north, and following this draw to the hills, and then crossed the hill and cut over towards the road north of Wolff's farm, and then followed this road to my house, a distance of about two miles. I don't know what time it was when I got home, but I believe it was about 2:30 o'clock p. m. I will also add that, after I finished the shooting in the cow shed, I threw about three or four empty shells from the cow shed into the hay loft, through an opened door. This is the whole truth.

[Signed] Henry Layer.

"Witness: George D. McDowell.

"Sworn and subscribed to before me this 18th day of May, 1920."

After having made and signed the above confession, the defendant signed the following written request, a copy of which is as follows:

"Washburn, North Dakota, May 13th, 1920.
"State of North Dakota, County of McLean—
ss.:

"I, Henry Layer, having confessed to the killing of the Jacob Wolff family and Jacob Hofer, do hereby request that I may be taken before the district court at the earliest possible date in order that I may enter my plea of guilty before the court and receive my sentence.

"[Signed] Henry Layer."

Thereafter, on the 3th day of May, 1920, he was taken before W. L. Nuessle, Judge of the Fourth judicial district, in the courthouse in the city of Washburn, McLean county. There was also present John E. Williams, state's attorney for McLean county, who appeared in behalf of the state, who, with consent of the court, then and there filed the written confession of guilt, and thereafter the information in writing, which charged the defendant with the crime of murder in the first degree, by effecting the death of Jacob Wolff in the manner and by the means set forth in the information. No question is raised as to the form and sufficiency of the information. The defendant in open court pleaded guilty to the charge contained in the information, as follows:

"State of North Dakota, County of McLean.
State of North Dakota, Plaintiff, v. Henry Layer, Defendant. In the District Court, Fourth Judicial District. Written Admission of Guilt.

"I, Henry Layer, the defendant in the above-entitled action, having heard read the information in the above-entitled action, and knowing the contents thereof, do hereby admit that I am guilty of the crime of murder in the first degree as therein set forth. I further state that this admission of guilt is made by me after matured deliberation, and without any promise of clemency or favor of any sort.

"Dated this 13th day of May, 1920.

"[Signed] Henry Layer.

"Witnesses:

"O. H. Stefferud.

"E. F. Hezner."

After the filing of the information, and prior to the time of the entry by the defendant of his plea, he was examined at great length by the trial court with reference to his legal rights where charged with such a serious crime. The court called his attention to the gravity of the crime with which he was charged, and that it was punishable by a very severe penalty. It informed him further of his right to the services of a lawyer who would appear for him. The defendant admitted he knew that the crime of murder in the first degree was a very serious one, and punishable by a severe penalty. He answered in the negative when asked if he wanted a lawyer, and stated several

times in answer to questions that he did not want a lawyer. He was then arraigned, and entered his plea of guilty. Thereafter, and prior to the passing of sentence, the court entered into an extended examination of the defendant, making many inquiries with reference to the defendant's connection with the commission of the crime. The defendant at that time was also informed by the court that it was not necessary for him to answer questions about to be asked unless he desired to do so. His answers to these questions in substance affirm the truth of the matters stated in his written confession.

On this appeal, the defendant assigns four errors, all of which have been carefully considered. Two of them only need discussion. The first relates to the refusal of the court to grant a new trial on the grounds of newly discovered evidence. It impresses us as having no great weight.

John Hofer, in his affidavit, states:

"That on or about the 18th day of November, 1920, this affiant was repairing a water tank near the house when his little daughter, Martha Hofer, who was then about four years old, came running up to him, holding in her hand a 12-gauge black shotgun shell and a woman's dust cap, upon which there were blood stains, and said to him, 'Look here what I found;' she then led this affiant to the place where she said she found them; that the place where his daughter led this affiant was to a clump of bushes about 16 steps east of the Wolff house, and there this affiant found a piece of old brown paper and a piece of table oilcloth, which looked as though it had been wrapped around something. Affiant's daughter picked up the oilcloth and shook it as if she was trying to shake out something. Affiant further states that about two days later he saw two sons, ages 6 and 9, respectively, playing with two pieces of cloth; the younger son had one piece of cloth about 6x8 inches over his face using it as a mask to frighten his little sister. This mask had eyes, nose, and a mouth cut in it. This affiant scolded said son and made him take the mask off. The son then put on the other piece of cloth, which was about the same size as the first, but had no holes cut in it. Both masks had strings tied to the corners with which the boy tied them around his head. This affiant asked his said son where he found the masks, and he told this affiant that they were in the same clump of bushes where the said Martha Hofer found the cap and shell above mentioned."

Magdalena, wife of John Hofer, also made an affidavit which in some respects corroborates that of her husband.

John Hofer, Jr., son of John and Martha Hofer, made an affidavit to the effect that he found one of the masks about five or six days before his father saw the two smaller boys playing with them; that the mask he found was the blacker one of the two, and had no holes cut in it. He also states that he found it in the pasture east of the Wolff farm buildings about 12 steps from the fence. He

states he picked it up and carried it to the house.

The affidavit of Mathias Kiemele, who has resided in McLean county for the past 18 years, and who owns a farm near Turtle Lake, which he had leased during the season of 1920, in substance shows that on the second day after the discovery of the dead bodies of the Jacob Wolff family, and during the month of April, he went to work on the Wolff farm; that he and his wife cleaned up the house and the premises, and that he finished seeding the land on the farm that was not seeded at the time that Jacob Wolff's family were murdered; that he took care of the stock on the said Wolff farm until the day of the sale; that from the day he commenced to work on the farm until the work was completed, a period of about two weeks, he was on the place every day; that he went over every part of the yard and over a large part of the farm, and that he knows where the alleged and so-called masks were supposed to have been discovered by the Hofer children; that he had been over that particular place many times during the time he worked on the Wolff farm; that on the Sunday after the murder was discovered there were hundreds of people in the Wolff premises and in the yard, and that practically every foot of the land was gone over by the people, who were looking about for any evidence they might find which would help to throw light upon the question of who committed the murder; that after he finished the work on the Wolff farm he kept his stock in the Wolff pasture, and watered them at the Wolff farm well, located on the Wolff farm, and went three times a week during the whole summer and fall; that he fixed up the fence which was within a very few feet of the place where the Hofer children are presumed to have discovered the so-called masks; that he seeded a small strip of ground which is within five or six feet from this fence; that the so-called masks are supposed to have been found in this strip of grass between the said fence and the ground seeded; that he did not see anything of the so-called masks at any time while on the Jacob Wolff farm; that he has seen the so-called masks which are in the possession of the sheriff, and which were this day shown him by Sheriff O. H. Stefferud, and that he never saw the same upon the Jacob Wolff farm at any time; that he also was shown the woman's dusting cap claimed to have been found on the Jacob Wolff farm by the Hofer children, and that he never saw the same on the Jacob Wolff farm.

The statements in Kiemele's affidavit are in several respects corroborated by the affidavits of Emanuel Hofer and Sheriff Stefferud.

After careful consideration of all the affi-

davits on behalf of the defendant relative to newly discovered evidence, and considering the length of time since the commission of the crime until the new evidence is alleged to have been discovered, and considering further the proximity of the place where the new evidence was discovered to the house of Jacob Wolff, and that immediately after the crime all of the premises was carefully searched by the officers and masses of people for the purpose of discovering evidence which would lead to the detection of the perpetrator, it is unbelievable that the masks and other alleged new evidence could have been theretofore undiscovered. We are therefore certain that the trial court did not err in refusing to grant a new trial on the grounds of newly discovered evidence.

The second error assigned, and the last to be discussed, is to the effect that the appearance of defendant, his waiver of preliminary hearing upon the criminal complaint, and his trial under the criminal information were procured, and his plea of guilty to the information made by him while under duress, intimidation, coercion, and fear. The defendant submitted several affidavits in support of the motion. To a large degree they detail what he maintains were his movements, and where he was all of the time on Wednesday, April 21st, the day before the crime, and on April 22d, the day of the crime, and on Friday and Saturday immediately thereafter. In his affidavit he states,

"That on Wednesday, April 21, the day before the murder was alleged to have been committed, I got up at the usual hour of about 5:30, did my chores, got breakfast, and spent the forenoon in cleaning my plow and getting it ready for the field work of that day. I had an early dinner, hitched up my team, and started to plow about 12 o'clock. I plowed continuously until about 7:30 in the evening, unhitched my team, came home, did my chores, ate supper, and went to bed. I was not away from my farm or off the premises during that day. On Thursday morning, the day the murder is alleged to have been committed, I got up at the usual hour of 5:30 o'clock, went to the barn, did my chores, harnessed six horses, had breakfast at about 7 o'clock, and immediately after breakfast hitched up my team and started to plow. I plowed continuously in the field near the house until about 12 o'clock, at which time I unhitched. I went to the house for dinner, put up my horses, gave them some hay, and went into the house to eat my own dinner. After I had finished eating, I went back to the barn and cleaned it, gave the horses some more hay before I went down to the well, a short distance north of the house, and pumped the tank full of water. I then returned to the house, stayed there until 2 or 3 o'clock; then hitched up my team and went to plowing again, and plowed continuously until about 7, when I unhitched and went home. I then did my chores, ate supper, and stayed home the rest of the evening. I never left my farm or premises at any time during the day of April 22d."

The affidavits attempt to show that defendant was occupied on Thursday in the manner above stated, so that the inference would follow, that, if he were so engaged, he could not have been on Wolff's farm on that day, and committed the crime with which he is charged and for which he has been convicted. It is here proper to notice that the time on Thursday between 12 and 3, when Layer states in his affidavit that he ate his dinner and stayed on his place during all of that time, is about the exact time when the Wolff family and Hofer were murdered, for Layer in his confession states that he arrived at Wolff's about 11:30 a. m., and returned to his home at about 2:30 p. m.

Layer in one of his affidavits makes statements to the effect that the confession which he signed was procured by reason of threats of and abuse by certain officers of the law, and was procured by them by fear instilled into him by them and by their representations to him. In his affidavits he states:

"After supper on May 12th, I was taken to the sheriff's office and questioned and shown pictures of the murder scene. They kept up the questioning until about 2:30 a. m., at which time the sheriff, Martineson, and the gray-haired heavy-set man, whom I believed to be a railroad detective, took turns at questioning me. They repeatedly told me that there was a mob outside, and that my only chance of saving my life from being strung up on a telephone pole was to make a confession, and for them to get me out of Washburn. They cursed me, took my chair away from me, and made me stand until I was dizzy and faint. All this time I maintained that I was innocent, and that I knew nothing of the murder; finally, the man that I thought was a railroad detective beat me along the side of my head, and took me by the hair and pulled, after which he sat down across the table from me and related to me just how the murder happened, and told me what I would have to say, and then he got up and shook a billy club in my face and told me if I would not say what he wanted, he would beat my brains out. I then gave up, started to cry, and said I would do and say what they wanted. Martineson and the sheriff called in a large tall man, who wrote down the story that I was compelled to tell. Whenever what I said did not suit this man, who I thought was the detective, he would stop me and tell me what to say. They next called in Williams, state's attorney, and made me tell the same story to him as nearly as I could remember. The detective still kept correcting me and forcing me to say what he wanted.

"After this, I asked to send for my wife or Will Brokofsky, but they would not let me. The next morning I was taken before a magistrate, but was told before they took me out of jail that I must stick to the story that they told me the night before, and that my only chance to save my life and get away from Washburn was to stick to that story, and not ask any one for an attorney or for a trial. After leaving the magistrate's office I was taken back to jail for a few minutes, and then again taken out and rushed down throughout

the basement of the courthouse and up to where Judge Nuessle was; on the way over, the sheriff told me to run in going between the jail and the courthouse, in order that no one would see me, for there was a mob in town who would get me if they could. When I was taken before Judge Nuessle, I again told the same story that I had been told the night before, believing that if I did not it would cause me to be kept in Washburn, where I was afraid of being hung by a mob, or being killed in the jail by the man who beat me the night before.

"I further state that I never owned a double-barreled shotgun, and that I never saw the gun that was found in the slough near Wolff's home until after I was placed in jail."

He further states in his affidavits that he was in no way implicated in the murder, and that he is innocent of the crime for which he has been committed to the state penitentiary.

George D. McDowell was present all of the time on the night of May 12th during the examination of Layer in the sheriff's office. E. F. Hezner, another detective, was not present all of the time. He was the person who wrote the confession made by Layer. It was written about 2 a. m. on the morning of the 13th of May.

One Myrle Cook, who was acting as a barber in the penitentiary, made the following affidavit:

"Myrle Cook, being first duly sworn, deposes and says that he was acting as a barber in the State Penitentiary at Bismarck, N. D., at the time Henry Layer was brought to the institution, and that, after the day the said Henry Layer arrived at the penitentiary, this affiant shaved said Henry Layer and gave him a haircut; that when this affiant went to work on him, he noticed that said Henry Layer was badly beaten up, and that both sides of his face and the top of his head were swollen, and it looked as if some one had beat him. The skin was not broken, but was bruised and swollen. As he got into the barber chair, this affiant noticed that he had been beaten, and asked him what had done it. Layer replied that he had been hit over the head by the man who had charge of him before he was brought to the penitentiary, and he broke down and commenced crying, saying that he was innocent, and cried: 'Oh, my children, my children.'"

The affidavit of Dr. C. E. Stackhouse is as follows:

"Dr. C. E. Stackhouse, under oath, deposes and swears that he examined Henry Layer in the North Dakota State Penitentiary May 15, 1920, and found him in normal physical condition. There were two areas of ecchymosis on his face, one over each cheek bone, about the size of a silver dollar. There was no swelling."

The affidavits of Cook and Dr. Stackhouse were wholly contradicted by the affidavits of Chas. McDonald, then warden of the penitentiary, Felix Smith, an employee there, and Richard J. Wilda, another employee, who was then captain of the cellhouse, except

that McDonald in his affidavit states that there was a red mark on his face.

The affidavit of one W. L. Brokofsky is to the effect that after Layer was confined in the penitentiary he talked with him, and that Layer told him he was innocent of the crime with which he was charged, and of the manner in which he had been compelled to sign that which was supposed to be a confession of the crime, and that his statements at the time were the same as herein set forth in his affidavit.

Lydia Layer, wife of the defendant, made an affidavit to the effect that she was at home the whole day of April 22d, the day of the crime; that she knew the whereabouts of her husband, and knew what he was doing that day; that he was engaged in farm work in the fields upon the farm and about the buildings, and did not leave, nor was he away from the farm any part of that day; that he was at the house at the noon hour, and had his dinner, and worked about the place doing the usual noon chores and odd jobs, and returned in the usual manner and time to his work in the fields.

[3] No more of the contents of the affidavits filed in defendant's behalf need be set forth. All of the statements in them have been carefully considered. On behalf of the state there were filed affidavits by Sheriff Stefferud, Emil Haas, his deputy, C. J. Martineson, chief of police at Bismarck, M. Tellefson, clerk of the court of McLean county, and John E. Williams, then state's attorney of McLean county, which, taken together, are an absolute denial of the statements contained in Layer's affidavit with reference to threats made against him and the exercise of duress and abuse of him, and acts putting him in fear. Their affidavits deny any conversation with him concerning a mob, and state that there was no talk of that character during any of the time they were examining him at the jail. The affidavits are not only a complete denial of the contents of Layer's affidavits, but of all corroborating affidavits made in support thereof.

Each of such officials then held important and responsible positions. They were unquestionably able, honest, and efficient officers. The fact that they were alert and active in seeking the perpetrator of these atrocious crimes is evidence that each was conscientious in the discharge of his duty. It is unbelievable that men and officials of this character could be guilty of the matters charged against them by Layer. Certainly they did not thus stultify themselves.

It is also to be remembered that, at the time Layer made his affidavits herein, he was an inmate of the penitentiary, and under the judgment and sentence of the court would remain so for the term of his natural life.

He knew that, so long as life should continue, he would be prohibited from free association with the world outside; that he had forfeited for the remainder of his lifetime the society of his family, of his friends, and relations. He knew that the sun of his personal liberty had forever set; his future held for him no hope, no ray of light. In these circumstances the binding force and sanctity of an oath might mean little to him. He in fact would be suffering no additional penalty should he make a false affidavit. In these circumstances, he would be quite free and fearless in swearing to the statements contained in his affidavits. In view of the facts stated in the affidavits by the officials above mentioned, his statements and his and corroborating affidavits are entitled to no credit. It is true, as contended by the defendant in his brief, that under the Constitution, one charged with crime is entitled to a trial by the jury, that he is presumed innocent until proven guilty, and that the state must prove him guilty beyond a reasonable doubt. It is likewise true that the defendant is the only person who can waive such rights. It is the law, however, in this state that the defendant has the right to waive, and the state to receive such waiver on the defendant's plea of guilty, and that upon such plea he may lawfully be convicted and imprisoned. It is likewise true that such waiver of such privilege must be a voluntary one, and free from all duress, fear, intimidation, and coercion; that is, he must not be induced or compelled to make his plea of guilty by reason of threats, or in any way forced to do so. In other words, his plea must be free and voluntary.

The appellant has cited a long list of authority which sustains this principle. Among others is *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *Little v. Commonwealth*, 142 Ky. 92, 133 S. W. 1149, 34 L. R. A. (N. S.) 257, Ann. Cas. 1912D, 241; *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38, 18 L. R. A. 838, 34 Am. St. Rep. 141. There is no doubt of the correctness of the legal principle stated in the above authorities, and other authorities to like effect cited by the defendant. The rule there stated is the well-settled and general rule. It does not, however, apply to the case at bar. In those cases it was either admitted or established by competent proof that the plea of guilty was entered while the accused was under duress, or that it was procured by intimidation or coercion; in other words, it was not a voluntary one. Here, however, that condition does not exist. The proof entirely fails to show that the defendant was under duress, or that he was intimidated, coerced, threatened, or abused and maltreated, and thus induced to enter his plea of guilty. On the contrary the proof is quite conclusive that his plea was

a voluntary one. If it could be established by competent proof that the defendant had by any means been coerced into entering his plea, or if any means were used to put him in fear, or if by fraud he was deceived, or if for any legal cause his plea was not free and voluntary when entered, all the proceedings thereafter occurring including his conviction and sentence would be a nullity. There is, however, no such proof.

While it is proper and lawful in this state for the trial court to receive a voluntary plea of guilty from one charged with crime, nevertheless the writer, speaking for himself only, is of the opinion that the ends of justice would be better subserved, where one is accused of a felony and offers to plead guilty, by rejection of such plea by the court, thus placing the accused upon his trial to the court and jury, providing for him, if necessary, an attorney who will protect and secure for him every right and privilege guaranteed him by the Constitution and provided for by the law of the land. This would afford an opportunity to determine if a confession was voluntary in cases where a confession, in part, is relied on by the state to establish the guilt of the accused, and would as well afford the accused an opportunity to show that he did not make the confession, or, if he did, that it was procured by fraud, duress, coercion, etc. It would also afford him an opportunity of cross-examination of those who procured the confession from him, and as well an opportunity to assert every lawful right in aid of his defense.

But, as above stated, defendant waived all these and other privileges by law secured to him, and this, as the record shows, freely and voluntarily. Hence the order and judgment from which this appeal has been taken should be affirmed, and they are affirmed.

ROBINSON, CHRISTIANSON, BIRDZELL, and BRONSON, JJ., concur.

PEARSON et al. v. ELLITHORPE et al.

(Supreme Court of North Dakota. Sept. 26, 1921.)

(Syllabus by the Court.)

Mines and minerals §66—Lease will not be canceled without showing of legal, equitable, or contractual cause, forfeiture not being favored.

The plaintiff brings this action to cancel a coal-mining lease, but there is no showing of either a legal, an equitable, or contractual cause for canceling the lease.

Appeal from District Court, Williams County; Frank E. Fisk, Judge.

Action by Arthur Pearson and another against Clarence Ellithorpe and another, to cancel a mining lease. From a judgment dismissing the action, the plaintiffs appeal. Affirmed.

Geo. A. Gilmore, of Williston, for appellants.

L. M. Ellithorpe and McGee & Goss, all of Minot, for respondents.

ROBINSON, C. J. The plaintiffs bring this action to cancel the lease of a coal mine and mining privileges on 80 acres of land, the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, 20—124—100. The lease is dated April 5, 1912, and it continues for 35 years, unless sooner terminated by the lessees. It includes the dwelling house and wagon scale, which the lessee agrees to keep in repair. As rental the lessee agrees to pay for all coal mined 25 cents a ton, and to pay the same on the 1st day of each month, and to pay not less than \$4.17 a month, or \$50 a year, and the lessee agrees to use his best efforts to open up and mine the coal for the best interests of both parties. It appears the lessee has made the regular minimum monthly payments, and has paid 25 cents for all coal taken from the mine, and has made extensive progress in the development of the mine to the amount of perhaps \$3,000 or \$4,000. He has constructed a long horizontal shaft leading to the mine, which is now in a fair way to operate with profit.

The complaint avers that the defendants are assignees of the lease, and that they have failed to keep the house in repair, and suffered it to go to wreck and ruin, and have not weighed all coal mined, and have not used their best efforts to open up and operate the mine for the best interests of the plaintiffs. Also, that Clarence Ellithorpe took possession of the mine on April 1, 1916, and since then, until November 21, 1919, has paid 25 cents a ton on only 2,004 tons of coal, and that most of his time is given to the development of an adjacent coal mine owned by him. Hence the plaintiffs demand that the lease be canceled, and appeal from a judgment dismissing the action.

The lease does not reserve to the lessor any right of forfeiture, and forfeitures are not favored at law or in equity. Indeed, the granting of relief against forfeitures is one of the most favored heads of equity jurisdiction. And by statute a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. Comp. Laws, § 5777. The transcript of the testimony, motions, exceptions, and objections cover nearly 200 pages. A review would serve no purpose. The case does not appeal to equity. There is no showing of either a legal, an equitable, or contractual cause for canceling the lease. The lease does not bind the lessee to rush in mining or to

do it any faster than it has been done. It binds the lessee to pay for all coal mined 25 cents a ton, and to pay a minimum of not less than \$50 a year. The lease contemplates a coal output of not less than 200 tons a year, and in case of a failure the penalty is that the lessee must pay a royalty on 200 tons. The case is not one of doubt. Indeed, there is no showing of facts sufficient to constitute a cause of action for the cancellation of the lease.

Judgment affirmed.

CHRISTIANSON, BIRDZELL, and
GRACE, JJ., concur.
BRONSON, J., concurs in result.

K. B. A. CHAIR CO., Inc., v. DAVIS et al.
(No. 22397.)

(Supreme Court of Minnesota. Oct. 7, 1921.)

(Syllabus by the Court.)

Sales ¶52(5)—Evidence held to support finding of sale of chairs to defendant.

The evidence in this case is sufficient to sustain the finding that plaintiff made a sale of certain chairs to defendants.

Appeal from Municipal Court of Minneapolis; C. L. Smith, Judge.

Action by the K. B. A. Chair Company, Inc., against A. Davis and others, in which the court found for plaintiff, and the defendants appeal. Order affirmed.

N. Rivkin, of Minneapolis (Geo. R. Smith and H. Stanley Hanson, both of Minneapolis, of counsel), for appellants.

Stevens & Stevens, of Minneapolis, for respondent.

HALLAM, J. This is an action to recover the price of certain chairs alleged to have been sold by plaintiff to defendants. The court found for plaintiff. Defendants appealed. The chairs were delivered. Plaintiff claims they were delivered pursuant to an agreement of sale. Defendants deny any such agreement. The question submitted to us is whether the evidence on the part of plaintiff is sufficient to sustain the finding that there was a sale. The evidence is for the most part that of plaintiff's general manager. His testimony is disconnected and at times confusing, but he did testify to a negotiation with two of defendants at different times, the effect of which was to make out a contract of sale. He is corroborated by the fact that a receipt was given for the chairs, unsigned though it was, and he testified that this was written out under the direction of

one of defendants, and delivered to him by the same defendant. There is the further fact that the chairs were never returned and plaintiff's witness testified that defendants never asked plaintiff to take them back before this suit was started. Considering all the evidence in plaintiff's behalf, we think it is sufficient to sustain the court's finding.

Order affirmed.

MINER v. PAYNE, Agent (STILES,
intervener). (No. 22353.)

(Supreme Court of Minnesota. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Attorney and client ¶190(4)—Evidence held not to require finding that amended complaint by attorney, intervening to enforce lien, was an attempt to fabricate cause of action.

The evidence was not such as to require a finding that an amended complaint in a personal injury case had been so framed as to set forth falsely the circumstances under which plaintiff had been injured, with intent to fabricate a cause of action.

2. Attorney and client ¶150—Amount in settlement without plaintiff's attorney's knowledge is basis for computing attorney's agreed percentage of recovery from defendant.

The amount received by the plaintiff upon a settlement of the case made without the knowledge of his attorney may be taken as the basis for the computation of the attorney's agreed percentage of the recovery, in a proceeding to establish his lien upon the cause of action and recover from the defendant the amount he was entitled to receive under his contract of employment.

3. Railroads ¶5½, New, vol. 6A Key-No. Series—Substitution of federal Agent as party authorized.

The Agent of the President under the Transportation Act of February 23, 1920, may be substituted for the original defendant in such a proceeding after the attorney's lien has been established, where such Agent was joined as a party to the proceeding and appeared and answered therein.

Appeal from District Court, Hennepin County; J. W. Molyneaux, Judge.

Action by Arthur Miner against John B. Payne, Agent, for personal injuries, which the parties settled without knowledge of George C. Stiles, plaintiff's attorney, who intervened. Judgment for intervener, and from an order denying a new trial, the defendant appeals. Order affirmed and cause remanded, with directions to entertain motion to substitute appellant, Agent of the President, as defendant in the action.

See, also, 179 N. W. 483.

Barrows & Metcalf, of St. Paul, for appellant.

F. M. Miner, of Minneapolis, for respondent.

LEES, C. While employed as a freight conductor in the state of Wyoming by the defendant railroad company, the plaintiff, Arthur Miner, fell from his train and was severely injured. About two weeks later one Benon, representing the intervener, George C. Stiles, obtained from Miner a signed statement in which he said he was going over his train from one car of lumber to another and went down between the cars; and that there were no grabirons except at the bottom of the car. At the same time Miner signed a contract employing Stiles as his attorney, to bring an action for damages against the railroad company, agreeing to pay him a sum equal to one-third of the amount received either by suit or settlement. Benon immediately telephoned to Stiles informing him of the retainer and of the facts of the case, and the latter at once commenced an action sending a copy of the complaint to Miner with a letter asking him to examine it and inclosing a check for \$100 as a personal loan. He wrote that he could not make out from what Benon had said whether plaintiff had fallen from the end of a gondola car or from the end of the car next to it, and asked him to tell him in his own way how he fell. He added that if necessary he would amend the complaint to set up the facts correctly. To this Miner replied that there had been a mistake as the letter was "not like it should be at all" and returned the check and asked Stiles not to do anything more until he notified him. About two weeks later, Benon obtained another statement from Miner in which he said he was on a bad-order box car which was loaded on a flat car and was going down the side of the box car; that the grabiron was driven into the side of the car and in making a step he swung around the end of the car and fell in between the cars. At the same time he either gave or exhibited to Benon a letter from a fellow employee named Fee, stating that Fee had checked the train and found the grabirons "bent against the body of the Penalty Defects car body."

In the original complaint it was alleged that plaintiff fell while climbing upon the end of a gondola car because the top grabiron on the car was missing. In the amended complaint served after Miner made his second statement, it was alleged that he fell while climbing down the side of a box car because the two lowest handholds in the ladder on the car were bent in against the side of the car. The railroad company answered denying liability and several months thereafter made a settlement with Miner paying him \$12,234 for a release of his

claim. The settlement was made while the case was on the trial calendar of the Hennepin county district court, was made without Stiles' knowledge, and immediately thereafter, Miner, who had been living in Minneapolis while his case was pending, left that city and returned to his home in Wyoming without paying Stiles anything for his services. On discovering these facts Stiles obtained leave to intervene in the action and filed a complaint therein setting up his contract of employment, the bringing of the action in pursuance thereof, the settlement made by Miner, his failure to pay him for his services, and claimed a lien upon the cause of action by virtue of chapter 98, G. L. 1917 (Gen. St. Supp. 1917, § 4955), for one-third of the sum Miner had received and demanded judgment for that amount against the railroad company and also against John Barton Payne as Agent of the President under the Transportation Act of February 28, 1920 (41 Stat. 456). Though the latter was named by the intervener as a defendant, so far as the record shows no order of substitution had been or ever was entered by the court. The defendants answered separately but by the same attorneys. Among other defenses, both alleged that Miner fell from a gondola car and that in that respect his original complaint was true; that his amended complaint was prepared by intervener after he learned that there was another car in the train which had a defective ladder and that the amendment was made with full knowledge that the accident did not occur on that account. The Agent of the President also alleged that the intervener had not been employed to sue and had not sued him. At the trial the principal issue was whether the intervener had caused plaintiff's complaint to be amended with knowledge that the cause of action finally pleaded was fabricated. There was a sharp conflict in the evidence bearing on this issue. The trial court decided it in favor of the intervener awarding him the amount claimed together with certain expenditures made for plaintiff's benefit, and the President's Agent has appealed from an order denying his motion for a new trial.

[1] 1. We have carefully considered the evidence relating to the issue already mentioned. It cannot be reconciled. According to the testimony of Miner and his wife, corroborated to some extent by the written evidence, Benon induced Miner to attempt to perpetrate a fraud by manufacturing evidence which would fit in with the theory that he fell from the box car on which Fee found the defective ladder. According to Benon and two other witnesses, the facts were as alleged in the amended complaint and Stiles was mistaken in setting them out as he did in the original complaint. A clear-cut issue of fact was presented to the trial

court, and we cannot hold that there was not sufficient evidence to sustain a finding in favor of the intervenor.

[2] 2. Citing *Lawler v. Dunn*, 145 Minn. 281, 176 N. W. 989, appellant insists that there could be no recovery without proof of the reasonable value of intervenor's services, and that he could not rely on his contract with plaintiff to establish the amount of his recovery. In *Davis v. G. N. Ry. Co.*, 128 Minn. 354, 151 N. W. 274, it was held that the amount of a settlement of a pending action for damages may be taken as the basis for the computation of the attorney's agreed per cent. of the recovery, if the settlement was made in good faith and without a purpose to defraud the attorney, and in *Southworth v. Rosendahl*, 133 Minn. 447, 158 N. W. 717, 3 A. L. R. 468, the rule announced in the *Davis* Case was referred to with approval. In *Wildung v. Security Mtge. Co.*, 143 Minn. 251, 173 N. W. 429, and in *Scharmann v. Union Pac. Ry. Co.*, 144 Minn. 290, 175 N. W. 554, it was assumed that the rule applied to such cases as the present one. The *Lawler* Case does not lay down a different rule and is not at all in point. It merely decided that an attorney discharged without cause could recover only the reasonable value of the services he had rendered to his client.

[3] 3. It seems to be conceded that the Agent of the President has never been substituted for the railroad company as defendant pursuant to section 206 of the Transportation Act of 1920. Intervenor's claim is one which is properly payable out of funds appropriated under the provisions of that act, and we see no reason why an order of substitution may not be entered nunc pro tunc, if applied for in the court below. The Agent of the President voluntarily appeared and answered, and the merits of the controversy with the intervenor have been considered and determined by the trial court, so that the objection that there has been no substitution is merely formal.

The order appealed from is affirmed, and the cause remanded to the district court, with directions to entertain a motion for the substitution of the Agent of the President as defendant in the action.

McNAMEE et al. v. HINES, Director General of Railroads, et al. (No. 22242.)

(Supreme Court of Minnesota. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Master and servant §113(1)—Sufficient clearance between railroad tracks.

The railway company constructed its switching yard 20 years ago with the clearance between tracks usual at that time. Switching

yards recently constructed usually have a greater clearance. If the yard was reasonably safe, continuing to use it without rearranging the tracks so as to provide a greater clearance is not negligence, unless it appears that such yards are no longer in common use or that changed conditions require a greater clearance.

2. Negligence §134(11) — Evidence must show cause of injury.

To entitle plaintiff to recover, the evidence must show a causal connection between the negligence charged and the injury suffered.

3. Master and servant §276(7) — Evidence held not to show cause of switchman's injury.

The evidence does not justify an inference that the accident resulted from the negligence charged rather than from some other cause.

Appeal from District Court, Pipestone County; L. S. Nelson, Judge.

Suit by Alice McNamee, as special administratrix of Clyde McNamee, deceased, and others, against Walker D. Hines, Director General of Railroads, and others. Judgment for defendants notwithstanding the verdict, and plaintiffs appeal. Judgment affirmed.

Davis, Michel & Morse, of Minneapolis, for appellants.

O'Brien, Stone, Horn & Stringer, of St. Paul, for respondents.

TAYLOR, C. Alleging that the death of her intestate, Clyde McNamee, resulted from the negligence of defendant, plaintiff sued for damages. The trial court submitted the case to the jury, who returned a verdict for plaintiff. Thereafter the court directed judgment for defendant notwithstanding the verdict, and plaintiff appealed from the judgment so entered. The only question presented by the appeal is whether the evidence was sufficient to sustain the verdict.

Clyde McNamee was foreman of a switching crew in the yards of the Rock Island Railway Company at Council Bluffs, Iowa. The tracks in this yard extend east and west and connect with a lead track in the usual manner at their western ends. The tracks are numbered from the south toward the north and the distance between the north rail of track 5 and the south rail of track 6 is 6 feet and 6 inches. An incoming freight train had been placed on track 6 and the crew of which McNamee was foreman were engaged in "breaking" up this train on the night of September 2, 1919. The crew consisted of an engineer and fireman who operated the engine, and Mr. McNamee and two helpers, W. A. Cone and J. A. Maher. After transferring a dozen or more cars from track 6 to other tracks, they "kicked" two refrigerator cars from the lead track east on

track 5. As soon as these cars had cleared the lead track, the engine proceeded east on track 6, passing the refrigerator cars which were moving slowly on track 5, and coupled on to the cars remaining on track 6. When they reached these cars McNamee and Cone, who had ridden to this point on the engine, got off on the south side of track 6. The number of the various tracks to which these cars were to be transferred had been marked on the cars with chalk by the yardmaster. McNamee directed Cone to take down these numbers as the cars passed him and signaled the engineer to back up. In this movement the engine fronted east and moved backward in pulling the cars toward the west lead track. Shortly after the train began backing up the two refrigerator cars drifting east on track 5 ran over Mr. McNamee, killing him instantly.

Two grounds of negligence are alleged: That the space between the tracks was not sufficient to afford a safe place for employees to stand while cars were passing over both tracks, and that there were "low joints" on track 5 which caused cars passing over it to sway or lurch from side to side.

[1] This yard was laid out and constructed some 20 years ago. Plaintiff's evidence is to the effect that in yards constructed at that time the usual, or standard, clearance between tracks was 6 feet and 6 inches as in this yard, but that in yards constructed recently the usual clearance is 7 feet and 6 inches. The duty of a railway company to exercise reasonable care to furnish a safe place for its employees to work does not require it to rearrange the tracks in its switching yards so as to conform to the latest methods of minimizing danger, in the absence of a statute requiring the adoption of such methods. If the arrangement is such that the yard is reasonably safe under existing conditions and such as is common in such yards, it is sufficient under the rules governing such matters. *Clay v. C., M. & St. P. Ry. Co.*, 104 Minn. 1, 115 N. W. 949; *Dolge v. N. P. Ry. Co.*, 107 Minn. 242, 119 N. W. 1066, 26 L. R. A. (N. S.) 600; and see *McMillan v. N. P. Ry. Co.*, 125 Minn. 7, 145 N. W. 613. We think that defendant is not chargeable with negligence in continuing to use a yard in which the clearance between tracks was only 6 feet and 6 inches, unless it also appears that such yards are no longer in common use or that changed conditions require a greater clearance. Plaintiff scarcely refers to this claim of negligence, but insists that the other claim was established. The witness Cone and the witness Ricketts testified that there were "low joints" in track 5. While the witnesses for defendant vigorously denied the existence of such "low joints," the evidence was sufficient to make this question a question for the jury if it were material.

[2, 3] The theory of plaintiff is that Mc-

Namee was between tracks 5 and 6, and that one of the refrigerator cars swayed or lurched against him in such a manner that he fell beneath the wheels of the rear refrigerator car. The theory of defendant is that McNamee was between the rails of track 5 and, while there, was struck and run over by the refrigerator cars. Plaintiff concedes that no recovery can be had if McNamee was not between tracks 5 and 6 but between the rails of track 5 at the time of the accident, and relies on the testimony of Cone as justifying the jury in finding that he was between tracks 5 and 6. The yardmaster testified that a few minutes after the accident when he was seeking information for the purpose of sending a report to the office, Cone stated that McNamee was between the rails of track 5 and that Cone repeated this statement to him the following morning. On the following afternoon Cone made a written statement to the claim agent in which he again said that McNamee was between the rails of track 5. At the coroner's inquest which was held 12 days after the accident, Cone was called as a witness and there testified that McNamee was between the rails of track 5. At the present trial Cone testified first that McNamee was between tracks 5 and 6; later that he, Cone, was facing toward the east taking down the numbers of the cars on track 6 as they passed and did not see McNamee at the time of the accident as McNamee was behind him, but that he had seen McNamee between tracks 5 and 6 a few moments before. Cone further testified that he had taken the number of the first car on track 6 and was taking the number of the second when one of the refrigerator cars on track 5 lurched against him turning him around and that he then saw McNamee's lantern come out from between the trucks of the rear refrigerator car as if thrown, which was the first knowledge that he had of the accident, and further testified that he did not see the refrigerator cars and did not know that they were still moving until they lurched against him. Mr. McNamee was found beneath the rear trucks of the rear refrigerator car lying flat on his back crosswise of track 5—his feet near the south rail and his head and shoulders projecting beyond the north rail. The wheels had passed over his chest. All the witnesses who saw him in this position state that he had not been dragged along the track. The cars were drifting and must have been moving very slowly when they reached McNamee for they came to a stop while the rear car was still over him. Consequently, according to plaintiff's witness Roe, who was the only witness who testified concerning this matter, they could not have had sufficient momentum at this point to cause them to lurch suddenly or violently when passing over a low joint. If Mr. McNamee was between the cars on track 5 and those on track 6, we are unable to con-

ceive how the slow swaying of the cars on track 5, conceding that they did lurch against him, could have caused him to fall in such a manner as to place his body in the position in which it was found, especially in view of the fact that the body had not been dragged along the track. All the facts are much more consistent with the theory that when he was struck he was in front of the on-coming cars. It is true that plaintiff may establish her case by circumstantial evidence, but such evidence must be something more than merely consistent with her theory. It must tend to show a causal connection between the negligence charged and the injury suffered. It must justify an inference that the injury resulted from such negligence rather than from some other cause. Unless it justifies such an inference it will not sustain a verdict for damages. *Rogers v. M. & St. L. Ry. Co.*, 99 Minn. 34, 108 N. W. 868; *Moores v. N. P. Ry. Co.*, 108 Minn. 100, 121 N. W. 892; *Bruckman v. C. St. P., M. & O. Ry. Co.*, 110 Minn. 308, 125 N. W. 263; *La Pray v. Lavioris Chemical Co.*, 117 Minn. 152, 134 N. W. 313; *Murphy v. Twin City Taxicab Co.*, 122 Minn. 363, 142 N. W. 716; *Mitton v. Oargill Elevator Co.*, 124 Minn. 65, 144 N. W. 434; *Crandall v. C. G. W. Ry. Co.*, 127 Minn. 498, 150 N. W. 165. As said in *Kludzinski v. Great Northern Ry. Co.*, 130 Minn. 222, 153 N. W. 529:

"The burden of proof is upon the plaintiff to prove that some negligent act of defendant caused the death of deceased. It is not incumbent on the defendant to show how the accident happened. If the cause of its happening is not established, the defendant is entitled to prevail. The proof must establish causal connection beyond the point of conjecture. It must show more than a possibility of injury from defendant's acts."

The evidence furnishes no basis for an inference that the accident happened in the manner claimed by plaintiff rather than in the manner claimed by defendant, and the trial court was correct in holding that plaintiff had failed to establish a cause of action.

Judgment affirmed.

LE SUEUR COUNTY v. GLOBE INDEMNITY CO. (No. 22483.)

(Supreme Court of Minnesota. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Drains §29—Petition filed before county board takes action for establishing county ditch is in time.

Under our statutes, regulating the establishment of county ditches, a bond filed before the county board takes any action is filed in time.

2. Drains §30—Notice to landowners mailed two days before publishing not void.

A notice mailed two days before it is published is not void under a statute providing that notice shall be mailed within one week after beginning of the publication.

3. Drains §30—Failure to mail notice to landowners affected may be waived.

Failure to mail notice to landowners affected as required by statute may be waived and if waived the proceeding is regular. The order establishing the ditch is prima facie evidence of the regularity of the proceeding.

4. Principal and surety §46—Surety for performance of a contract is estopped to assert its invalidity.

A surety who obligates himself to secure performance of a contract is estopped from asserting that the contract was void.

Appeal from District Court, Le Sueur County; C. M. Tiftt, Judge.

Action by the County of Le Sueur against the Globe Indemnity Company. The court found for plaintiff, and defendant appeals. Order affirmed.

Allen, Seifert & Allen, of Fairmont, for appellant.

Charles C. Kolars and L. W. Prendergast, both of Le Sueur Center, for respondent.

HALLAM, J. On December 11, 1911, Henry Kritzer and 10 others filed with the auditor of Le Sueur county a petition for a public ditch. On December 13 the auditor issued a notice of a hearing upon said petition on January 4, 1912. The petitioner's bond was filed January 4, 1912. On May 13, 1912, the report of the engineer and of viewers having been filed, the auditor gave notice of a final hearing on June 7, 1912. On May 14 the auditor mailed a copy of the notice to one of the landowners affected. On May 16 the publication of the notice was commenced.

There were many landowners affected. Their names appeared in the viewer's report and the auditor knew their post office addresses but he mailed the notice to but one. On the hearing, an order establishing the ditch was made. The contract for constructing part of it was left to Moffatt and Herrick. To secure performance of their contract, these parties gave a bond with defendant as surety.

Moffatt and Herrick entered upon the performance of their contract. In April, 1913, they claimed that the proceeding was void because of failure of the county auditor to mail notice to the property owners affected and requested that defects in the proceeding be corrected.

On May 7, 1913, the auditor issued notice of a new hearing to be held June 16. This

notice was published, posted and mailed. On the hearing, the county board declined to take action and the contractors abandoned their work. This action is brought to recover the damages sustained. The court found for plaintiff. Defendant appealed.

[1] 1. Defendants contend that the proceeding is void because the petitioner's bond was not filed before the notice of hearing on the petition was issued. The statute provides that—

"Before the county board shall establish any ditch, * * * one or more of such petitioners shall give bond." Chapter 384, § 1, Laws 1911 (Gen. St. 1913, § 5525).

The bond was filed before the county board took any action in the proceeding. The statute was complied with.

[2] 2. The statute provides that the auditor shall mail to all persons or corporations whose lands are affected a "printed copy" of the notice of the hearing upon the petition and reports, within one week after the beginning of the publication of the notice. Defendant contends that the mailing of a notice two days before the publication was a nullity. This slight deviation from the statute seems to us of immaterial consequence. Every purpose of the notice was subserved.

[3] 3. Defendant contends that the failure of the auditor to mail notices to numerous landowners affected, and whose addresses were well known, vitiated the whole proceeding. We have no doubt that this notice is necessary to bind the interest of the landowner affected. *Curran v. County of Sibley*, 47 Minn. 313, 50 N. W. 237; *Lager v. County of Sibley*, 100 Minn. 85, 110 N. W. 355. Perhaps it does not vitiate the proceeding as to others. *State v. Johnson*, 111 Minn. 255, 126 N. W. 1074; *State ex rel. v. Nelson*, 136 Minn. 272, 159 N. W. 758, 161 N. W. 576.

But this notice might be waived by the landowners. If all appeared at the hearing, no one could complain of the want of notice and the proceeding would be to all intents and purposes regular. The statute makes the order of the county board establishing the ditch prima facie evidence of the regularity of all the proceedings prior to the making of such order. *Laws 1905, c. 230, § 48* (Gen. St. 1913, p. 5574). See *Geib v. County of Morrison*, 119 Minn. 281, 138 N. W. 24, 9 A. L. R. 839. This prima facie evidence was not rebutted.

[4] 4. We are of the opinion, also, that defendant, having obligated itself to secure performance of the contract of Moffatt and Herlick, is estopped from asserting that the contract was void. *Moore v. Mayor*, 73 N. Y. 238, 29 Am. Rep. 184; *Love v. Rockwell*, 1 Wis. 382; *Madison v. Amer. Eng. Co.*, 118 Wis. 480, 95 N. W. 1097.

Order affirmed.

WELCH v. MORTON SALT CO. *

(Supreme Court of Wisconsin. Oct. 13, 1921.)

1. New trial $\S$ 99—Newly discovered evidence should be construed favorably to moving party.

On motion by plaintiff in a personal injury action for new trial on the ground of newly discovered evidence, where the question is whether such evidence shows actionable negligence of defendant, the evidence should be construed favorably to plaintiff.

2. New trial $\S$ 108(4)—Where newly discovered evidence might disclose liability for personal injuries, grant of new trial proper.

In an action for injuries sustained by a five year old boy through coming in contact with an auger salt conveyor in defendant's plant, where plaintiff, after nonsuit, moved for a new trial on the ground of newly discovered evidence, held that it was not an abuse of discretion to grant a new trial where the new evidence might show liability on defendant's part.

3. Appeal and error $\S$ 977(3)—New trial $\S$ 6—Discretionary with trial court.

The granting of a new trial is largely in the discretion of the trial court, and will not be disturbed except for cogent reasons.

Appeal from Superior Court, Douglas County; Solon L. Perrin, Judge.

Action by Kenneth Welch, by S. Welch, his guardian ad litem, against Morton Salt Company. Nonsuit was entered. From an order granting a new trial for newly discovered evidence, defendant appeals. Affirmed.

Action for personal injury sustained by plaintiff, an infant of about five years of age, on August 23, 1919, at defendant's salt works near Tower Bay Ship, Superior, by coming in contact with an auger salt conveyor claimed to have been left uncovered. Plaintiff was dumb, and his hearing was defective or entirely lacking. The day before the accident he had been at the plant of the defendant, and had been chased out by defendant's employees over half a dozen times. He persisted in coming back, and was there at 6 o'clock when defendant's foreman caught him, called up police headquarters, and asked if any one was looking for a boy 5 or 6 years old. Upon being told that no inquiries had come to the police station, the foreman started out with plaintiff in his arms, and after a number of inquiries was able to locate his home at 432 Tower avenue, where he took the boy and told his mother where he had been, and that it was a dangerous place to be. The next day at about half past 4 plaintiff again appeared in the cooper shop at the plant, and the evidence is that the foreman put him out and he went down the track. He next appeared in the sack room where the foreman, Hangartner, and one Anderson were

cleaning the machines with a steam hose. When discovered he started to crawl on top of the benches and play with the wheel of one of the machines. The foreman took him down and put him out through the door on the west side of the dock. The foreman soon after left the room for a few minutes and when he returned to the sack room he heard a scream. He ran back to the screw salt conveyor, and found plaintiff with his foot in it. Such was the substance of the evidence as to the circumstances under which plaintiff was injured. At the close of the trial the court granted a motion for a nonsuit on the ground that no negligence on the part of the defendant had been shown.

Later plaintiff moved for a new trial on the ground of newly discovered evidence. The nature of such evidence is disclosed by the affidavits of Theodore Rask and Marion Rask, who claimed to have been present at the time of the injury, but were not called as witnesses. The affidavits are as follows:

"Theodore Rask, being first duly sworn, on oath says that he resides in the city of Superior, Douglas county, Wis., and at No. 1008 North Eighteenth street; that he is in the employ of the Great Northern Railway Company as a freight conductor; that on the date of the accident and injuries to Kenneth Welch in the building of the Morton Salt Company, at Superior, Wis., on or about August 23 1919, this affiant was in said building; that affiant is the husband of Marion Rask, who formerly was employed at said Morton Salt Company's plant in the city of Superior, Wis.; that affiant came to call for his wife between 4 and 5 o'clock p. m. on day of accident; that when he came in the little Welch boy was in Jake Hangartner's arms, and Jake then spoke to me and told me about the boy, and showed me the tag; he then set the boy down on the floor, the boy walked over by the conveyor, and toward the drier room door. I saw the boy standing there looking into the drier room. I saw the auger conveyor at that time, and know it was not covered. In a few minutes after I heard the boy scream. Jake went over and was taking him out. I went over there and was present when Jake took the boy out. Mr. Luse came to our house some time in March, 1920, and I told him all I knew about the matter, as I have stated above; he said that made it look bad for the company. He inquired if we were going to be home right along, so they could call us for witnesses if they needed us. I said we were; that we might be away for a short time. We were home all the time after that until the present, except a few days we were on a visit in Minneapolis. I didn't know of the case being tried until November 19, 1920, when my wife told me. I immediately phoned Mr. Crawford that we were witnesses. Mr. Luse had told us that Mr. Crawford was the attorney for Mr. Welch. Jake didn't at any time try to put the boy out while I was there."

"Marion Rask, being first duly sworn, on oath says that she resides at 1008 North Eighteenth street, in the city of Superior, Douglas county, Wis., and is the wife of Theodore Rask; that on or about the 23d day of August, 1919, the date on which Kenneth Welch was injured in

the building of the Morton Salt Company, at Superior, Wis., this affiant was present; that affiant was formerly employed in the sewing or packing room of said plant of said company; that she had worked there in 1917 and part of 1918; that on the day of the accident she called at the plant to find out if they had installed the other machine in the packing room, as she intended to go to work there for a short while if they had. Affiant further says: I stood outside the packing room and watched two men using the steam hose cleaning in the packing room; while standing there Jake Hangartner came up and spoke to me, and he went into the packing room. I went right in after him, Jake talked to the men, and I stood there until he got through, just then the Welch boy came in and stood on the steps looking into the room; the boy came into the room. Jake told me that the boy was there the day before; Jake then talked to me, showing me the machine, and the boy climbed upon the table and played with the spout; Jake took the boy down and stood him on the floor, and continued showing the machine. The little boy came to where we were and started to take hold of the machine Jake was explaining and showing to me. Jake said the boy was very bright, and fond of machinery. The girls I was acquainted with had gone home. I said then I'd go and write a note to the girls. I then went out and into the girl's cloak room; Jake came out with me, and the boy was right beside him. He either had the boy by the hand or the boy was walking close to him. Jake and the boy stood right close by the auger conveyor, watching it, as I went into the girls' room. I stood writing the note, looking out at Jake and the boy. I saw Jake stoop down and either take the cover off, or the cover was off the auger, and he stooped down to do something about the conveyor. I then came out and stood in front of the packing room door where I could see the auger. Jake walked to me and the boy stood in front of the drier room door, which was open, looking in at the drier which was running, when Jake saw the boy hadn't followed him, he waved at him to come, but the boy didn't see him, so he went and picked him up and carried him to where I was standing, and showed me the tag on the boy. At that time the auger conveyor cover was off; just at that time, while Jake was showing me the tag on the boy, my husband came in, as I had told him to call for me; Jake explained to my husband about the little boy; that he was there the day before; that he was deaf and dumb; the boy wanted to get down so Jake set him down. Jake stood him on the floor, and was talking to us; the boy walked away, and I didn't notice him, and in a few minutes I heard him scream and then the boy was in the conveyor; Jake did not at any time attempt or make any effort to put the boy out of the room while I was there. I was there from the time I first spoke to Jake until the accident, 20, 25 minutes. Some time in March, 1920, Mr. Luse came to our house and I told him all I knew about the matter, as I stated above; he said that looked bad for the company; he said they might need us for witnesses, and they would call us if they'd need us. I was home during the time the case was tried, and saw it mentioned in the newspapers; I expected to be called, and later learned that the company won the case. My husband phoned Mr. Crawford

November 19, 1920, stating to him that we were there, and knew about the accident. I thought I shouldn't go to court as a witness until we were called. Enoch came out and put the cover on the auger after the accident."

There were also affidavits by plaintiff's father and attorney setting forth the diligence used to obtain evidence. The substantive facts set forth in the affidavits of Theodore and Marion Rask as to how the injury occurred are denied in affidavits of Jacob Hangartner and C. Z. Luse.

The court held plaintiff had used due diligence to prepare for trial, and granted the motion for a new trial because of the testimony to be given by the Rasks. From an order entered accordingly the defendant appealed.

Powell & Sprowls, of Superior (Edward H Stearns, of Chicago, Ill., of counsel), for appellant.

Grace, Fridley & Crawford, of Superior, for respondent.

VINJE, J. (after stating the facts as above). We shall not set forth the evidence as to the degree of diligence used by plaintiff to prepare for trial. Upon important points it is in conflict, and that being so it was especially a question for the trial court to decide. We cannot say there was an abuse of discretion in resolving that issue in favor of plaintiff.

[1] The serious question in the case is whether the newly discovered evidence, taken as true, shows actionable negligence on the part of the defendant. Such evidence is not as specific upon certain points as it should be, and is susceptible of different interpretations. The trial court construed it favorably to plaintiff, as he had a right to do, and should do upon such an application. We purposely forbear to express any opinion at this time upon the merits further than to say that it may appear upon the next trial that plaintiff at the time of the injury was an invitee upon the premises, and that the defendant failed to exercise the care it owed him as such, or that it is otherwise liable. Neither party should be foreclosed by expressions of opinion at this time because the new trial may develop a state of facts quite different from those considered upon this appeal.

[2] Here the question is, Did the trial court abuse its discretion in granting a new trial? We think not, because the new evidence may show liability on the part of defendant, and for that reason we cannot say there was any abuse of discretion.

[3] The granting of a new trial is largely in the discretion of the trial court, and will not be disturbed except for cogent reasons. *R. Connor Co. v. Goodwillie*, 120 Wis. 603, 98 N. W. 528; *Eggen v. Fox*, 124 Wis. 534, 102

N. W. 1054; *Godfrey v. Godfrey*, 127 Wis. 47, 106 N. W. 814, 7 Ann. Cas. 176; *Bailey v. McCormick*, 132 Wis. 498, 112 N. W. 457; *Gross Coal Co. v. Milwaukee*, 148 Wis. 72, 134 N. W. 139.

Order affirmed.

BLOOMER v. KOEPKE et al.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Appeal and error $\Leftrightarrow$ 979(2) — Granting a new trial because of persuasive evidence contrary to verdict not disturbed.

Action of court in granting in its discretion a new trial because of the very persuasive evidence contrary to the finding of the jury will not be disturbed.

2. Appeal and error $\Leftrightarrow$ 1033(10)—Defendants could not complain where court set aside a verdict and granted new trial instead of rendering judgment for plaintiff.

Where there was very persuasive evidence contrary to jury's finding for defendant, including admissions by the defendants, the defendants could not complain that court granted a new trial instead of setting the verdict aside and rendering judgment for plaintiff.

Appeal from Municipal Court, Outagamie County; Albert M. Spencer, Judge.

Action by William Bloomer against B. C. Koepke and John Bloomer, copartners, doing business under the name of the Appleton Construction Company. Verdict for plaintiff, and from order granting a new trial because of the contradictory nature of the verdict, defendant appeals. Affirmed.

Action to recover compensation for work done under a contract of hiring. Plaintiff claimed he was hired for the concrete paving season of 1920 as foreman in charge of a certain highway paving job for the sum of \$4,000; that he performed his part of the contract; that he was paid the sum of \$647.50 and no more; and that \$3,352.50 was still due him. Defendants claimed he was hired to complete the entire paving job for \$4,000; that he failed to perform the entire job; that, allowing him at the contract rate for the portion completed, he earned only \$1,715, of which \$647.50 had been paid him, leaving only \$1,067.50 due, for which amount they tendered judgment.

The jury found that: (1) The defendant did not agree to pay the plaintiff the sum of \$4,000 for his services for the season of 1920 for superintending the construction of the highway; (2) the plaintiff continued in the service of the defendants during the road-building season of 1920; (3) the defendants agreed to pay the plaintiff \$4,000 for his services for superintending the construction of the full and complete road job of 4.83

miles in length; and (4) they assessed plaintiff's damages at \$3,000 if the court was of the opinion plaintiff was entitled to recover.

The court was of the opinion that the verdict was contradictory, unsupported by the evidence, and perverse, and granted a new trial. The defendants appealed.

C. G. Cannon, of Appleton, for appellants.
Mark S. Catlin, of Appleton, for respondent.

VINJE, J. (after stating the facts as above).
[1] The trial court faced a situation by no means uncommon in jury cases. He felt that, in view of the very persuasive evidence to the effect that the hiring was by the season at \$4,000, justice had not been done, and yet he felt, in view of defendants' contradiction of such evidence, he ought not to change the first finding of the jury and render judgment for plaintiff, but that he would set aside the verdict and grant a new trial. He could not allow a pro rata compensation for the completed work as asked by the defendants because there was evidence that the work was delayed by reason of the defendants' failure to furnish material, and there was no evidence of the reasonable value of the services rendered. So he granted a new trial. His discretion in that respect cannot be disturbed.

[2] In view of the evidence of several witnesses besides plaintiff's to the effect that the hiring was by the season for \$4,000, and the admission of the defendants to the same effect both orally and in a letter to the state highway commission, the defendants certainly cannot complain because the court granted them another opportunity to go before a jury on such issue.

Order affirmed.

MARTIN v. ARMSTRONG.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Sales $\S$ 421—In action for failure to furnish cattle registration certificates, instructing that defendant was to comply within reasonable time held proper.

In buyer's action against seller of cattle for damages for failure to furnish certificates of registration and transfer for cattle, where the jury found that defendant had agreed to furnish the same, it was proper to instruct that it was incumbent on defendant to perform within a reasonable time.

2. Sales $\S$ 172—Seller held not excused from furnishing registration certificates in reasonable time.

As respects seller's liability for breach of contract by failing to furnish cattle registration certificates within reasonable time, the fact that the registering association required 30 days to 2 years to issue such papers will not

relieve the seller, where he took no active steps to secure such papers within reasonable time.

3. Sales $\S$ 418(3)—Damages for failing to furnish cattle registration certificate held difference between market value of cattle with and without certificates.

Record showing pedigree and ownership of cattle is a material element in establishing market value, and in buyer's action for seller's breach of contract by failing to furnish such certificate within a reasonable time the measure of damages would be the difference in market value with and without the proper registration and transfer papers.

4. Sales $\S$ 421—Instruction on duty to minimize loss held not warranted by evidence.

In an action against seller for breach by failing to furnish cattle registration certificates within a reasonable time, an instruction as to plaintiff's duty of minimizing the damages by securing registration and transfer papers himself held not warranted by evidence.

Appeal from Circuit Court, Rock County; George Grimm, Judge.

Action by F. L. Martin against Wilmer Armstrong. Verdict and judgment for plaintiff, and the defendant appeals. Affirmed.

This action was brought in the circuit court for Jefferson county and removed to the circuit court for Rock county to recover damages for the alleged failure of the defendant to furnish certificates of registration and transfer of four heifers sold by the defendant to the plaintiff on May 23, 1919.

The plaintiff contends that the defendant agreed to furnish with the four head of pure bred registered cattle at the time of delivery or within a reasonable time thereafter proper and authentic registration and transfer papers; that the cattle were delivered and the plaintiff immediately paid to the defendant the price agreed upon; that on November 26, 1919, defendant furnished the plaintiff with one registration paper, and on August 15, 1920, furnished the plaintiff with the balance of the registration papers, but neglected and refused to deliver transfer papers for the four head of pure bred registered cattle with proper breeding certificates, which are required by the Holstein-Friesian Association of America for the registration of the offspring of such cattle, and wholly failed and neglected to cause the registration certificates to be transferred of record to the plaintiff as agreed at the time of the sale of the cattle. Plaintiff further claims that the four cattle were represented to be young and exceptionally well bred, and that he purchased them for the special purpose of reselling them as pure bred registered Holstein dairy cattle; that if they had been of the kind and quality represented, and if the proper certificates of registration had been furnished as required

by the rules of the National Holstein-Friesian Association, the four cattle were of the then actual cash value of not less than \$250 for each, or a total of \$1,000; that without the proper certificates they were of the value of only \$100 each; and that he thereby was damaged to the extent of \$600. The plaintiff further claims that he shipped the four head of cattle to Hutchinson, Kan., and kept them on a place where he had a herd of cattle, partly pure bred and partly grades; that he had no means of identifying the cattle without the certificates of registration, which in the case of Holstein cattle bear a diagram showing the black and white markings of such cattle; that on August 28, 1919, plaintiff offered the said cattle at public auction and warranted the delivery of the certificates and transfers; that, not being able to produce the certificates and transfers at the time of sale, he only received one-half of their actual value for the cattle; that before the date of the sale he had written and telegraphed to the defendant for the papers, which defendant neglected to produce, and also neglected to answer the plaintiff's letters; that afterwards the purchasers at the said sale refused to pay for the same because plaintiff could not furnish the papers and returned the same to plaintiff's premises; that plaintiff could not keep the cattle separate without great expense and was obliged to sell two of said cattle which were returned to him as grade cattle at \$75 per head; that the remaining two head are now being held by the purchasers thereof at plaintiff's expense and plaintiff is obligated and will be obliged to return to the purchasers the money which they have paid therefor and the expense of their keep for a year and a half and take said cattle back.

Defendant answers that on November 26, 1919, he furnished the plaintiff with a registration certificate for one of the cattle, and on August 15, 1920, with registration certificates for the other three; that the four head of cattle were represented to be pure bred cattle of registered Holstein breed, as in fact they were; that plaintiff informed defendant at the time of sale that he intended to ship the cattle to his place at Hutchinson, Kan., where he intended to keep them for breeding purposes entirely separate from the grade cattle he also had, and that in order to identify the four heads of cattle he caused the same to be permanently marked; that, although under no obligation to do so, defendant made every reasonable effort to secure the registration and transfer papers from and through the former owner of the cattle from whom the defendant had purchased the same, and also through the Holstein-Friesian Association of America.

The case was tried before the court and a

jury. Verdict was rendered in plaintiff's favor in the sum of \$237.50 and judgment was entered thereon.

Appeal is taken from this judgment.

Charles E. Pierce, of Janesville, Robert C. Bulkley, of Whitewater, and Jeffris, Mounat, Oestreich, Avery & Wood, of Janesville, for appellant.

Mistele & Smith, of Jefferson, for respondent.

SIEBECKER, C. J., (after stating the facts as above). It is contended that the circuit court misdirected the jury in the following particulars: (1) In directing the jury that, if they found upon the evidence adduced that the defendant at the time of the sale of the cattle agreed to furnish plaintiff properly authenticated registration and transfer papers of the breeding records as kept by the Holstein-Friesian Association of America of the four cattle in question, the defendant was required to furnish such papers within a reasonable length of time after such sale under all of the facts and circumstances of the transaction, and in omitting to instruct the jury that under certain specific circumstances such papers could only be furnished by the defendant with plaintiff's assistance; (2) that the court erroneously instructed the jury that the measure of damages was the difference in market value of the four pure bred cattle with such registration and transfer papers and the market value without such papers; and (3) that the court erroneously omitted to instruct the jury that it was incumbent on plaintiff to minimize the alleged damages by such reasonable means as were within his power, and that upon the evidence of the case plaintiff could have reasonably obtained these registration and transfer papers at a nominal expense, and hence his recovery of any damages could not exceed the amount of such expenditures.

[1] It is evident from the record that the issue whether or not the agreement respecting the furnishing by defendant of the registration and transfer papers for the four pure bred cattle was entered into by the parties at the time defendant sold plaintiff the cattle was properly presented for trial. The evidence on the subject is in conflict and required determination of this question by the jury. Upon this issue the jury resolved the controversy in plaintiff's favor. Under this state of the case, did the court properly direct the jury that the defendant, in order to comply with his agreement to furnish these papers, was required to do so within a reasonable time after such sale? Since the jury resolved this issue in plaintiff's favor, it follows that it was incumbent on defendant to perform the contract within a reasonable time thereafter, in the light of the facts and circumstances of the transaction.

[2] It is claimed by defendant that the evidence shows without dispute that defendant was prevented from furnishing these papers because the Holstein-Friesian Association in the usual course of its business required from 30 days to 2 years to issue such papers. An examination of the evidence shows, however, that the jury was warranted to conclude that the defendant took no active steps to secure such papers until after the plaintiff had held a sale on August 28, 1919. Evidently the jury found that defendant was apprised of the fact that plaintiff contemplated holding this sale when the cattle were bought. Under these circumstances it is plain that defendant did not live up to his agreement, and that the court properly submitted this issue to the jury. The court applied the correct rule of law to this issue, and the jury was not misled by the instruction.

[3] It is urged that the court erroneously instructed the jury that, if plaintiff is entitled to recover, his damages were to be measured by the difference in the market value of these pure bred cattle with the proper registration and transfer papers having been furnished and the market value without such papers. There is evidence tending to show that the want of such papers is a factor in the market value of such cattle. Evidently the existence of a complete record showing the pedigree and ownership of such cattle is a very material element in establishing their market value. Under this condition, we are persuaded that the court submitted the correct rule of damages to the jury.

[4] But it is argued that the instructions on this question wholly omit to inform the jury that it was plaintiff's duty to do all he reasonably could to minimize the amount of the damages, and that the evidence shows that plaintiff could readily have secured these registration and transfer papers at a cost not to exceed \$15; that he made no effort in this respect, and his damages should have been limited accordingly. This claim is not sustained by the evidence. The records of the Holstein-Friesian Association showed that the cattle in question were owned by one C. E. Brenner, Williamsport, Ind., who had sold them to defendant. But there was no record of this transfer with the association. The claim that plaintiff could have procured such transfer papers under the by-laws of the association (article 4, § 42) is not correct. As stated in the letter of June 21, 1921, of the association to the plaintiff:

"In order to do this, however, it is necessary that we have from Mr. Armstrong proof of full payment of the animals in the form of a canceled check, or sworn statement, and as proof of delivery we must have from you dia-

grams of the colors and markings of the animals drawn from life."

As heretofore indicated, the jury found the defendant agreed to furnish these papers within a reasonable time after May 23, 1919, the date the plaintiff bought the cattle. It appears that defendant as late as January 21, 1921, had not complied with the requirements of the association to make a record of the transfer from Brenner to himself; manifestly the jury was abundantly justified in finding that defendant had not complied with the agreement and that he had breached the contract of sale.

It necessarily follows that he was liable in damage for such default. It is considered that the circuit court committed no error in submitting the issues to the jury, that the verdict is sustained by the evidence, and that the court properly awarded judgment in plaintiff's favor.

The judgment appealed from is affirmed.

STATE ex rel. PLUNTZ v. JOHNSON.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Officers §50—In absence of contrary provision, officers hold office until successor qualified.

As a general rule, where the law contains no contrary provision, an officer is entitled to hold his office until his successor is elected and qualified.

2. Sheriffs and constables §5—Where sheriff elected, he cannot hold over.

Const. art. 6, § 4, fixing term of sheriff at two years, and the statute providing that such term shall begin and end on the first Monday in January in each odd-numbered year, a sheriff who has been elected, and not appointed to fill a vacancy, cannot hold over; the end of the term necessarily marking the termination of his office.

3. Sheriffs and constables §5—Appointment of sheriff to fill vacancy is not only for unexpired term, but until successor qualified.

Under Const. art. 6, § 4, relating to appointments to fill vacancies, a sheriff, who has been appointed to fill a vacancy, holds, not only for the unexpired term, but also until a successor shall be elected and qualified.

4. Sheriffs and constables §3—Constitutional disqualification for office begins on qualification of successor of sheriff appointed.

Where a sheriff has been appointed to fill a vacancy, he holds office until his successor has been elected and qualified, and the two-year term of disqualification for holding another term prescribed by Const. art. 6, § 4, begins to run at that time, and not at the time of the expiration of the term which became vacant.

5. Courts — 107 — Judicial language limited to subject considered.

In construing legal decisions, judicial language should always be limited to the subject under consideration.

Appeal from Circuit Court, Barron County; W. R. Foley, Judge.

Action in the nature of quo warranto, brought on the relation of Herman Pluntz, against J. H. Johnson, to oust him from office as Sheriff. From an order sustaining a demurrer to the answer, defendant appeals. Affirmed.

Wylie & Sutherland, of Madison, for appellant.

Spencer Haven, of Hudson, for respondent.

OWEN, J. The answer alleges that—

"During the year 1917 defendant was appointed to the office of sheriff of Barron county for the unexpired portion of the term commencing on the first Monday of January, 1917. By virtue of such appointment, and while holding the said office for the unexpired portion of the said term and until his successor for the term commencing on the first Monday of January, 1919, should qualify, defendant performed the duties of sheriff of Barron county until the month of July, 1920, when his successor for the term commencing on the first Monday of January, 1919, qualified. Defendant received a majority of the votes cast at the general election in November, 1920, for the office of sheriff of Barron county for the term commencing on the first Monday of January, 1921, and duly qualified for the said office for the said term, and now holds the same by virtue of such election and qualification."

The averment that the defendant during the year 1917 was appointed to the office of sheriff of Barron county for the term ending on the first Monday in January, 1919, and that he continued to act as such sheriff until July, 1920, at which time his successor qualified, will be noted. If any curiosity should arise concerning the extraordinary length of time intervening between the 1st day of January, 1919, and the time when his successor qualified, the occasion thereof will be explained by a reference to the case of *State ex rel. Knutson v. Johnson*, 171 Wis. 521, 177 N. W. 899. The facts are that Johnson was elected to succeed himself as sheriff for the term beginning on the first Monday in January, 1919, and after the decision of this court holding him ineligible to such election, by reason of which a vacancy existed in the office, an appointment to fill the vacancy was made in July, 1920. Such appointee was the successor who qualified in July, 1920. This recital in no manner affects the legal effect of the answer. That document sets forth the situation with legal definiteness, but with a barrenness calculated to excite curiosity, which we feel the above statement may satisfy.

The question presented is whether the defendant, having served under his appointment, made during the year 1917, until July, 1920, was eligible to election for the term commencing on the first Monday of January, 1921. Section 4 of article 6 of the Constitution provides that—

"Sheriffs shall hold no other office, and be ineligible for two years next succeeding the termination of their offices."

If we fix the date upon which the defendant's office terminated, it can be determined whether he was eligible for election to the office for the term beginning on the first Monday of January, 1921, by a simple mathematical calculation.

It is the defendant's contention that his office terminated on the first Monday in January, 1919. If he had been elected to the office, such would have been the case. The section of the Constitution already alluded to provides that sheriffs and other county officers shall be chosen by the electors of the respective counties once in every two years. This plainly fixes the term of county officers at two years. The Constitution makes no provision as to when such terms shall begin and end, and consequently the statute has provided that they shall begin and end on the first Monday in January in each odd-numbered year. The constitutional provision under consideration does not provide that those elected to the office of sheriff shall hold over until their successors are elected and qualified.

[1] The general trend of judicial decisions in this country is to the effect that, where the written law contains no provision, either express or implied, to the contrary, an officer is entitled to hold his office until his successor is elected and qualified. While the constitutional provision under consideration provides that sheriffs and other county officers shall be elected for two years, and is silent as to their holding over until their successors are elected and qualified, it is also provided in the same section that—

"All vacancies shall be filled by appointment, and the person appointed to fill a vacancy shall hold only for the unexpired portion of the term to which he shall be appointed and until his successor shall be elected and qualified."

[2] In view of the express provision that those appointed to fill a vacancy shall hold until a successor shall be elected and qualified, the conclusion is irresistible that such was not the intention with reference to those who are elected. This conclusion is strengthened, so far as it applies to the office of sheriff, by the provision that sheriffs shall be "ineligible for two years next succeeding the termination of their offices." So far as the office of sheriff is concerned, at least, the constitutional purpose seems to have

been to constitute an elective term of two years and no more. Such being the term fixed by the Constitution, it may not be enlarged by legislative enactment, an effect ascribed by appellant's counsel to section 59.12, Stats. So we come to the conclusion that, if the defendant had originally come into the office by an election, his office would have terminated on the first Monday in January, 1919. That was the end of the term as fixed by statutory enactment supplementing the constitutional provision upon the subject. As one who is elected to the office of sheriff does not hold over, the end of the term for which he is elected necessarily marks the termination of his office.

[3, 4] But, as we have seen, the Constitution provides differently with reference to appointments to fill vacancies in the office of sheriff, if not all other county offices. In such cases the appointment is not only for the unexpired portion of the term, but until a successor shall be elected and qualified. The term for which Johnson was originally appointed, therefore, did not necessarily end on the first Monday of January, 1919. He was appointed to hold until that time and until such further time as his successor shall be elected and qualified. He himself was elected as his successor. He was ineligible for the office, and, while he pretended to qualify and act under such election such election furnished him no title thereto. He did have a good title to the office by reason of his appointment, which continued him in office until an eligible successor should be elected or appointed and should qualify therefor. This did not occur until July, 1920. His office, therefore, did not terminate until July, 1920, at which time his ineligibility attached, disqualifying him from holding the office for two years thereafter. It follows that he is not eligible to hold the office for the term beginning on the first Monday of January, 1921, and that the demurrer to the answer was properly sustained.

[5] Attorneys for appellant stress the following language used in the opinion in *State ex rel. Knutson v. Johnson*, 171 Wis. 524, 177 N. W. 900:

"By such appointment it becomes the appointee's office, and the expiration of the two-year period succeeding the election of the predecessor is as much the termination of the appointee's office as it would have been of the official elected had he continued therein. No other term than such particular two-year term is recognized in the Constitution. It is the one and same term no matter who the incumbent."

From this it is argued that appellant's term of office under and by virtue of the appointment terminated on the first Monday of January, 1919, and, upon a superficial consideration, there may appear to be a conflict between the language quoted and the

statements herein made. But it should be remembered that judicial language should always be limited to the subject under consideration. The question there was when the term—that is, the fixed term—for which the defendant was originally appointed ended. The fixed term for which he was appointed ended the first Monday in January, 1919. Until that time he had an absolute right to the office, the same as though he had originally been elected thereto. Although, as held in that opinion, he legally held over, there was nevertheless a vacancy in the office, and his title thereto after the expiration of the fixed and definite term was defeasible, and subject to be terminated whenever an eligible and lawfully elected or appointed successor should qualify therefor. His appointment was really for two periods of time; one was to cover the unexpired portion of the fixed term, and the other for such time thereafter as might elapse before an eligible successor should qualify for the office. The first period was fixed and definite. The latter period was indefinite and uncertain. While he held the office for more than 18 months after the expiration of the fixed term under and pursuant to his appointment, he was merely filling a vacancy in the office until some eligible person qualified therefor. While the original term for which he was appointed expired on the first Monday in January, 1919, his office did not terminate until the month of July, 1920, and his ineligibility did not attach until that time.

Order affirmed.

STATE ex rel. JARMAN v. ROOT et al., Town Sup'rs.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Highways ⇐68—Evidence not to warrant finding that highway extended beyond fence alleged to obstruct it.

Evidence that a highway was laid out in 1862 as four rods wide along a section line, but that the two rods west of the section line had never been used as a highway, or damages awarded to the owners on that side, who had continued to use the land to such line, and that the two rods on the east side had been continuously used as a road, and damages awarded to the owners, with other evidence, held to warrant finding that the highway did not legally extend beyond the west fence, and to rebut any presumption of an award or release or dedication.

2. Highways ⇐68—Proof or presumption of an award, or release, or dedication, necessary to show highway.

To constitute a lawfully laid out highway, there must be proof, or a presumption, that damages have been awarded, or a release obtained, or a dedication made.

Appeal from Circuit Court, Green County; George Grimm, Judge.

Application by the State, on the relation of John Jarman, for a writ of mandamus against P. H. Root and others, Supervisors of the Town of Brooklyn, to compel defendants to institute proceedings for removal of a fence as an obstruction of a highway. From a judgment refusing the writ, relator appeals. Affirmed.

The court found as facts that the highway in question running south from the center of section 21 was laid out in 1862 four rods wide; that only the east two rods were ever opened up or traveled; that a fence in substantially the same place it now occupies has been maintained north and south on or near the quarter line of the section, preventing travel on the west two rods of the road as described in the order laying out the highway; and that there is no record of any damages to the owners of land lying west of the quarter line of section 21, and such owners have continuously claimed and exercised the right to use as farm land the west two rods of the highway as laid out, and have maintained a fence on the east side of said two-rod strip since the road was laid out. The court found as conclusions of law:

"(1) That the highway mentioned in the relator's petition has no legal existence westerly of the fence now existing and standing substantially on the north and south quarter line of said section 21 and for a distance of 80 rods south from the center of said section.

"(2) That the supervisors of the said town of Brooklyn properly exercised their discretionary power in refusing to proceed to enforce the removal of the fence complained of in the relator's petition, in view of the attitude of the owner of said fence and of the land immediately to the west thereof, and in view of the fact that such action would involve them in uncertain litigation at best.

"(3) That the defendants are entitled to judgment denying the peremptory writ of mandamus, dismissing this action and for their costs and disbursements against the relator."

From a judgment entered accordingly, the relator appealed.

H. N. B. Caradine, of Monroe, Mahlon H. Caradine, of Brodhead, and John L. Sherron, of Monroe, for appellant.

W. H. McGrath, of Monroe, and Jeffris, Mouat, Oestreich, Avery & Wood, of Janesville, for respondents.

VINJE, J. (after stating the facts as above). It is not clear from the amended petition whether the action is one to compel the supervisors to remove the fence as an encroachment or one to compel them to in-

stitute proceedings under section 1830 et seq., Stats. 1919, for its removal. We shall construe it, however, to be the latter.

[1] The trial court found there is no record of an award of damages to the owners of the west two-rod strip of the highway as laid out, though there is evidence that other owners were awarded damages. Such a state of the record, in connection with the facts shown by the evidence, to the effect that there is no proof that the west two-rod strip was ever opened up as a part of the highway, that there is no proof that the fence had ever occupied a substantially different place than the one it is shown to have occupied since 1865, namely, on or near the north and south quarter line of the section, and that the owners have continuously since said date used the two-rod strip as a part of their farm, and have claimed the right so to do, rebuts any presumption that might arise from the lapse of time that damages had in fact been awarded or a release obtained. The witness W. R. Patterson, 69 years of age, testified in 1920 that his memory of the road and fence extended back 55 years, and that the fence on the west was an old fence when he first knew it in 1865; that it had brush and shrubs of considerable size growing close up to it, like old rail fences usually have.

The trial court, therefore, was justified in finding that the two-rod strip had never been opened up as a highway, and that no damages had been awarded to the owners of such strip, or a release or dedication made. We thus have this situation: No proof of the two-rod strip ever having been opened up as a highway, or that damages to its owners were awarded, but positive proof that for the last 50 years there has been a fence on the west side of the strip, and that such strip, for that length of time, at least, has been used as farm land under a claim of right by its owners to so use it. From such facts no other conclusion can legitimately be reached than that the two-rod strip never was and is not now a part of the highway, and that the fence sought to be removed is not an encroachment upon the existing highway.

[2] To constitute a lawfully laid out highway there must be proof, or a presumption, that damages have been awarded, or a release obtained, or a dedication made. *Dolphin v. Pedley*, 27 Wis. 469; *McKee v. Hull*, 69 Wia. 657, 35 N. W. 49. Here we have no proof of an award of damages, and the facts as to user of the two-rod strip and location of the west fence rebut the presumption of an award or release or dedication.

Judgment affirmed.

HOGAN v. CITY OF БЕЛОИТ.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Municipal corporations ⇨812(2)—Notice of injury from defective highway is essential.

Right of action against a municipal corporation for injuries from defect in street being purely statutory, conditions imposed are precedent to right of action, and failure to give notice required is fatal.

2. Municipal corporations ⇨816(5) — Complaint for injury from defective street must allege giving notice.

Failure of complaint against a city for injury from defective street to allege giving required notice of the injury is fatal on demurrer.

3. Pleading ⇨214(4)—Demurrer does not admit conclusions alleged from facts pleaded.

Where a complaint against a city set forth in *hac verba* the notice given, allegations as to its nature or contents would have been immaterial on demurrer to the complaint, as any conclusions from the facts alleged are not admitted.

4. Municipal corporations ⇨812(6)—Notice to city of injury from defect in street held insufficient.

A notice to a city that plaintiff on a stated date and street caught her foot on an obstruction and fell, breaking her wrist, that a doctor had set it, and "will advise you later as to expense," signed by plaintiff's son, did not state "that satisfaction therefor is claimed of such city," as required by St. 1919, § 1339, and was insufficient.

5. Municipal corporations ⇨812(6)—Notice which would enable city to ascertain facts by investigation held insufficient.

A notice to a city of claim for injuries from defect in street which did not state facts required by St. 1919, § 1339, could not be regarded as sufficient on the ground that such notice was given as would enable the city by investigation to discover the facts.

6. Municipal corporations ⇨812(6)—Defect in notice of claim for injury held not an inaccuracy to be disregarded.

Failure of a notice of a claim for injury from defect in street to state that satisfaction therefor was claimed from the city was not an inaccuracy as to time, place, defect, or repairs to be disregarded under the proviso of St. 1919, § 1339, relating to notice.

7. Estoppel ⇨62(5)—City not estopped from asserting insufficiency of claim for injuries to pedestrian because drawn by city engineer.

There was no waiver by or estoppel of a city as to the sufficiency of a notice of claim for injury to a pedestrian from a defect in street because the claim was drawn by the city engineer at the instance of claimant's son; such act not being in performance of any duty owing to the city.

8. Appeal and error ⇨1170(1)—Notice to city of injury not a "pleading" or "proceeding" within curative statute.

The notice required to be given a city of claim for injuries from defect in street by St. 1919, § 1339, is not a pleading or proceeding in an action within section 2829, authorizing disregard of error therein not affecting substantial rights; the notice being a condition precedent to the action.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pleading; Proceeding.]

9. Municipal corporations ⇨812(2)—No common-law liability for negligence in repairing street exists dispensing with necessity of statutory notice of injury.

A city in repairing a street acts in a governmental capacity, and there is no common-law liability for negligence, as in case of active independent negligence or trespass, which might dispense with the notice of claim for injuries from negligent conduct in making the repairs required by St. 1919, § 1339.

Appeal from Circuit Court, Rock County; Hon. George Grimm, Judge.

Action by Nellie Hogan against the City of Beloit. From an order overruling demurrer to the complaint, the City appeals. Reversed, with directions to sustain demurrer.

R. A. Edgar, of Beloit, for appellant.

Michael Levin and Julius E. Klefer, both of Milwaukee (H. W. Adams, of Beloit, of counsel), for respondent.

JONES, J. The complaint alleges that the plaintiff, on or about the night of October 18, 1919, while walking along the sidewalk of a well-traveled street, stumbled and fell over a barrier several inches high, which the defendant, city of Beloit, had placed there to protect some freshly laid concrete, and the presence of which had not been shown by lanterns or other guards. The amount of damages claimed was \$10,000. The other parts of the complaint which raise the questions necessary for consideration are as follows:

"That on the 21st day of October, 1919, and within 15 days after the happening of said injury above alleged, plaintiff caused to be given and served upon the defendant, through its city engineer, who is also chairman of the board of public works, in charge of said street and sidewalk and work, and also by causing the same to be given to each member of the council, and the mayor, and having the same delivered to the city clerk on said date, and read by the said city clerk in presence of each alderman and the mayor, a notice, in writing, stating therein the place where such damage occurred, substantially as above alleged, and describing, generally, the insufficiency and want of repair which occasioned the injury above alleged, the injury received by the plaintiff, and that satisfaction therefor was claimed by her, a copy of which notice is hereto attached, marked 'Exhib-

it A,' and made a part of this complaint; that said notice was drawn up at the instance and request of plaintiff by the said city engineer of the city on said date, to whom was given all the facts in detail, with reference to said injury, and said notice was drawn by him, and that the city engineer informed the plaintiff, through her agents, that said notice would be sufficient, and at once caused the same to be delivered to the proper city officials, who had the same read at the council meeting on said night."

The notice annexed to the complaint was as follows:

"Mrs. Nellie Hogan, aged 60, 227½ E. Middle, on Sat. Oct. 18, 1919, walking on west side of Fourth at Merrill, caught her foot on a 2-inch plank laid across walk and fell, breaking bone in left wrist. Dr. Anderson set bone. Will advise you later as to expense. Olaf Hogan, 227½ E. Middle."

Olaf Hogan was the son of the plaintiff, and the writing was drawn at his request by the city engineer, who caused it to be delivered to the mayor.

The defendant demurred, and in support of the demurrer argued that the notice was not within section 1339 of the Statutes, which provides, in part, that the notice shall be "signed by the party, his agent or attorney," and that it shall state "that satisfaction therefor is claimed of such * * * city. * * *"

Counsel for the plaintiff contends that there has been a substantial compliance with the purpose of the statute. He also claims that irrespective of the statute he has a cause of action, since the city undertook the repair of the sidewalk and negligently left an obstruction, and as a result of such negligence the plaintiff sustained the injury alleged.

[1, 2] At common law travelers had no cause of action for injuries caused by insufficiency or want of repair of highways. The right to maintain such actions is purely statutory. In granting the right the Legislature may impose such conditions as it may see fit and a substantial compliance with those conditions is a condition precedent to recovery. This is a rule often declared by this court, from which the other rule follows that if the complaint fails to state such compliance it is demurrable. Since one of the conditions imposed by the statute conferring the right is that a written notice be given, the failure to allege such notice is a fatal defect. *McKeague v. Green Bay*, 106 Wis. 577, 82 N. W. 708; *Benware v. Pine Valley*, 53 Wis. 527, 10 N. W. 695; *Wentworth v. Summit*, 60 Wis. 281, 19 N. W. 97; *Daniels v. Racine*, 98 Wis. 649, 74 N. W. 553.

[3] In this instance the notice of the injury is set forth in *hæc verba*, and allegations in the complaint describing its contents or nature would be immaterial.

"A demurrer does not confess or admit a conclusion of law deduced by either party from

the facts pleaded; neither does it admit any construction placed by him on any instrument pleaded and set forth in the complaint, or facts impossible in law." 21 Ruling Case Law, 508.

One important condition imposed by the statute is that the notice must show that satisfaction for the injury is claimed of the municipality. Numerous decisions of this court have held the obvious rule that this is an essential requirement of the statute.

[4] One of the questions presented is whether the written notice given in this case satisfies this clause of the statute. Plainly there is no express statement that satisfaction will be claimed by Nellie Hogan or any one else. Information is given of the time and place of an accident, of an injury and attendance by a physician, Dr. Anderson, and the statement is added, "Will advise you later as to expense." The notice is addressed to no one. It is not signed by the person injured or by any one described as her agent or attorney. It is true that the city authorities might have indulged in speculation or drawn the inference that Olaf Hogan was the agent of Mrs. Hogan, and that she intended to file a claim against the city, but there is certainly no claim for satisfaction for the injury. Construed most favorably for the plaintiff, it is only a notice that a specified injury had happened to her in the city on a sidewalk which was defective; that she had had medical attendance; and that she would in the future give information as to expense. While this informed the city officials of the accident and injury, it fell far short of notice that Nellie Hogan intended to bring suit against the city for \$10,000, or any other amount, unless compensated.

There is a very material difference between a casual notice in writing that an injury has been sustained by reason of a defective street and that expense has been incurred or will be incurred and a notice which makes a claim that satisfaction is demanded. In the former case the vital part of the statutory requirement is omitted. In the latter case the officials of the city are put upon notice, not only that there is a defective street, but that a claim is asserted which may result in heavy loss to the city.

[5] It is argued by counsel for plaintiff that such notice was given to the city that its officers could by investigation have ascertained all the facts. But it is not the only purpose of the statute to bring notice to the municipality that an injury has happened on a defective highway at a given time and place. This was illustrated in the case of *McKeague v. Green Bay*, 106 Wis. 577, 82 N. W. 708. In that case a formal notice in due form was given by a wife. The action for the injury was brought by her husband and it was held that the notice did not satisfy the statute, because not given by the plaintiff himself, claiming satisfaction for the injury,

Other cases holding that there must be a substantial compliance with the statute are: *Weber v. Greenfield*, 74 Wis. 284, 42 N. W. 101; *Sowle v. Tomah*, 81 Wis. 349, 51 N. W. 571; *Daniels v. Racine*, 98 Wis. 649, 74 N. W. 553; *Benson v. Madison*, 101 Wis. 312, 77 N. W. 161.

[6] It is argued by counsel for plaintiff that they are aided by the provision in the statute that:

"No notice given hereunder shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the time, describing the place, or the insufficiency or want of repairs which caused the damage for which satisfaction is claimed, provided it shall appear there was no intention on the part of the person giving such notice to mislead the other party and such party was not in fact misled thereby,"

—but it will be observed that the defect in the notice does not relate to the time, place, or insufficiency or want of repairs. This provision in no way relieves the claimant from stating that satisfaction for the injury is claimed. As stated in *Uhlenberg v. Milwaukee Gas Light Co.*, 138 Wis. 148, 151, 119 N. W. 810, 811:

"The fact that the statute has provided that certain requirements thereof are not essential to the validity of the notice, where no one is misled and there is no intention to mislead, would indicate that its other provisions must be substantially complied with."

Apart from this provision in the statute it seems to have been the legislative policy not to extend the privilege of bringing actions under section 1339. In the Revised Statutes of 1849 and 1858 the right of action was not conditioned on notice. In the statutes of 1878 this was made a condition precedent. Since that time the 90-day notice to cities has been cut down to 15 days. It would of course be competent for the Legislature to remove or change the condition imposed by the statute; but so long as the statute remains in force we do not deem it our duty to so construe it that its most essential requirements may be ignored. To give the statute the construction contended for by plaintiff's counsel would make almost any notice or memorandum suffice, provided it could be shown by parol that the municipality had knowledge of the facts and had not been misled. This would be contrary to the rule which has long prevailed in this court. *Sowle v. City of Tomah*, 81 Wis. 349, 51 N. W. 571. We are convinced that for the reasons already stated the complaint was fatally defective.

It is urged by counsel for the defendant that the notice was also defective for the reason that it did not purport on its face to be signed by the plaintiff, her agent or attorney. In view of the conclusion we have reached it is not necessary to decide this question.

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[7] It is argued by plaintiff's counsel that the allegations of the complaint show a waiver and estoppel by defendant. It is plain that in preparing the notice the city engineer was acting on the request of the son of the plaintiff, and not as agent of the defendant. He was charged with no duty as city engineer or as chairman of the board of public works in respect to filing or considering claims of this character, and plainly had no authority by any such act or statement to waive the condition prescribed by the statute. Although it appears from the complaint that the notice was read in the presence of the mayor and aldermen, it does not appear that any further action was taken in respect to it.

The notice simply brought to their attention the facts therein stated. Since it was not such notice as the statute requires, their knowledge of the facts did not avail the plaintiff as a waiver of the condition precedent. *Sowle v. Tomah*, supra; *Dorsey v. Racine*, 60 Wis. 292, 18 N. W. 928.

With commendable industry counsel for both sides have cited many cases decided by this court and other courts bearing on the questions of waiver and estoppel. Many of the cases arose between individuals or between private corporations. In such cases the rules applicable may be quite different from those which govern when the acts of officers of municipal corporations are considered. Such officers are creatures of the law, and their powers are strictly limited.

It suffices to say that in our opinion no action was taken by defendant which misled the plaintiff, and that there are no facts alleged in the complaint which show a waiver or which estop defendant from relying on the condition precedent created by the statute. Whether the city could waive the condition or be estopped by its acts from relying on it, need not be decided.

[8] Plaintiff's counsel cite section 2829, R. S., which provides:

"The court shall, at every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect"

—and claim that even if the notice was defective, the court may disregard the defect. It seems a sufficient answer to this argument that the notice required by section 1339 is not a pleading or proceeding in an action within the meaning of section 1339. On the contrary, it is a condition precedent to the commencement of an action, and unless it is complied with, if the objection is properly raised, the action cannot be maintained.

[9] The further claim is made by plaintiff's counsel that under the facts stated in the

complaint no notice whatever to the city was required, because the city itself by its negligence created a condition which caused the injury, and that such active negligence was actionable independent of section 1339.

Counsel rely upon *Smith v. Milwaukee*, 18 Wis. 63*, and *Milwaukee v. Davis*, 6 Wis. 377*, and especially upon *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407. In the latter case it appeared that the plaintiff's horse became frightened at a large wooden roller in the street, whereby the injury to the plaintiff was caused. The case of *Little v. Madison*, 42 Wis. 643, 24 Am. Rep. 435, where the city licensed a street exhibition of a bear, is also cited. Another case relied on is *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50, where a municipality diverted water from a pond discharged it upon the land of the plaintiff. The general subject is quite fully discussed in a later case, *Bunker v. Hudson*, 122 Wis. 43, 99 N. W. 448, where the city so graded a street that earth was washed over the plaintiff's land.

These cases are easily distinguished from the one before us. They were for the most part cases where the municipality created a nuisance in the street, or where an injury in the nature of trespass was caused. They are not cases in which the city, in the performance of a governmental duty to travelers, was performing a lawful act, but in a negligent or improper manner. The true distinction is well pointed out in *Ziegler v. City of West Bend*, 102 Wis. 17, 78 N. W. 164. In that case the complaint alleged that the plaintiff was injured by falling into the manhole of a catch-basin, the cover of which was so improperly adjusted as to be dangerous. Other cases bearing on the question under discussion are *Evans v. Sheboygan*, 153 Wis. 287, 141 N. W. 265, 45 L. R. A. (N. S.) 98, and *Morrison v. Eau Claire*, 115 Wis. 538, 92 N. W. 280, 95 Am. St. Rep. 955.

It seems clear to us that in repairing the walk by putting in the two squares of concrete the city was acting in a governmental capacity and that no common-law liability is shown by the complaint.

Cause remanded, with directions to sustain demurrer.

LINDQUIST V. DULUTH ST. RY. CO.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Street railroads $\Leftrightarrow$ 114(10)—Finding of negligent speed causing injury held justified.

In an action by an automobile passenger for injuries in a collision at a street intersection, where it appeared that the collision would not have happened if defendant's street car had been proceeding within the maximum speed

of 10 miles per hour allowed by ordinance, held that the jury were justified in finding defendant guilty of negligence causing the injury.

2. Street railroads $\Leftrightarrow$ 114(14)—Verdict exonerating automobile driver from negligence held justified.

In an action by an automobile passenger for injuries in a collision with defendant's street car at a street intersection, evidence held to justify a verdict exonerating the automobile driver from negligence in proceeding to cross the tracks ahead of the street car, which was 122 feet away and approaching at a forbidden rate of speed when the automobile, going 9 miles an hour, was 46 feet from the point of collision.

3. Street railroads $\Leftrightarrow$ 99(14)—Automobile passenger held not negligent in failing to prevent driver's crossing track.

Where the driver of the automobile in which plaintiff was a passenger was not negligent in attempting to cross ahead of defendant's street car, plaintiff, confronted with same conditions, was not negligent in taking no active steps to prevent the driver's crossing.

Appeal from Circuit Court, Douglas County; W. R. Foley, Judge.

Action by Christina Lindquist against the Duluth Street Railway Company. Judgment for plaintiff, and the defendant appeals. Affirmed.

This action was brought for personal injuries sustained by the plaintiff on October 5, 1919, when a street car belonging to the defendant company and the automobile in which the plaintiff was a passenger collided at the corner of Twelfth street and Tower avenue in the city of Superior, Wis. Tower avenue is a main traveled street, and runs north and south. It is 60 feet wide from curb to curb, and the sidewalk is 20 feet wide. Twelfth street runs east and west, and intersects Tower avenue at right angles; it is 40 feet wide, and the sidewalks on Twelfth street are 15 feet wide. The defendant company maintains two parallel tracks on Tower avenue, the distance between the tracks being 5 feet. The distance from the curb to the rail is 22½ feet.

At the time of the accident plaintiff was seated between two other women in the rear seat of a seven-passenger Chalmers car driven and owned by Arthur Dahlberg. After having driven to various places during the evening, Mr. Dahlberg stopped at Holden's Tire Shop on the south side of Twelfth street and about 150 feet east of Tower avenue. He then proceeded to the opposite side of Twelfth street, to within 3 or 4 feet of the curb on the north side of Twelfth street, and then drove across Tower avenue, going straight west. As the rear wheels of the automobile cleared the first rail the street car struck the automobile, crushing in the side and top, bending the frame, and

breaking three wheels. The street car pushed the automobile forward a short distance, then moved the rear end to the left and off the track so that the automobile faced south, and then passed beyond the automobile. Plaintiff received the injuries complained of.

Plaintiff contends that the automobile was being driven with due care, but that the street car was being operated at a high, dangerous, and negligent rate of speed, contrary to the regulations of an ordinance of the city, and that the defendant neglected to give any warning of the approach of the street car. Defendant claims that the collision was caused by the negligence of the driver of the car in which plaintiff was riding, and that plaintiff and the driver were engaged in a joint enterprise, and that plaintiff is therefore precluded from recovery in this action.

By a special verdict the jury in the case found that the motorman of the street car failed to exercise ordinary care in the operation of the street car before the collision; that this failure to exercise ordinary care was the proximate cause of the injury to the plaintiff; that no want of ordinary care on the part of the driver of the automobile contributed to cause the plaintiff's injury; that the sum of money to compensate her for her injuries is \$1,975.

Judgment was entered in conformance with the special verdict, from which judgment appeal is taken.

Grace, Wridley & Crawford, of Superior, for appellant.

E. S. Geraldson, of Superior, for respondent.

SIMBOKER, C. J. (after stating the facts as above). [1] An examination of the evidence shows that the jury was justified in finding that the street car in question was being operated at approximately a rate of speed of $23\frac{1}{2}$ miles per hour from the time it was in view of the driver of the automobile from the Twelfth street crossing. This rate of speed was in violation of the city ordinance regulating the rate of speed of street cars at the place in question, which limited the speed to 10 miles per hour. It is also shown that the driver of the automobile looked to see if a street car was approaching when he approached and drove onto Tower avenue, and that he saw this street car coming from the south. The respective distances of the automobile and the street car from the point of collision at the time the automobile reached the curb line of Tower avenue required the automobile to travel 46 feet while

the street car traveled 122 feet. It is well established that the automobile was proceeding at the rate of 9 miles per hour. Had the street car been traveling at a rate of speed not exceeding 10 miles per hour it is obvious that the automobile would have safely passed the street car tracks at the place of collision.

[2] Under the facts and circumstances shown, the jury was well sustained in concluding that the driver of the automobile did not know that the street car was traveling at a high and forbidden rate of speed at the time he had reached the curb of Tower avenue. In the light of the evidence the court properly refused to interfere with the verdict finding defendant guilty of negligence in operating the street car immediately before the collision. Nor is the claim well founded that the verdict of the jury exonerating the driver of the automobile from negligence is not sustained by any evidence. It was clearly for the jury to determine upon the evidence adduced whether or not such driver was guilty of a want of ordinary care in operating the automobile and attempting to cross the street car tracks in the manner he did.

[3] We discover no similarity in the evidentiary facts of this case and the facts involved in *Holdridge v. Mendenhall*, 108 Wis. 1, 83 N. W. 1109, 81 Am. St. Rep. 871. As there stated:

"It was practically undisputed in the case that the boy unexpectedly stepped or ran in front of the car when only a few feet distant, and when it could not have been stopped, nor effective warning given, before it ran over him, whatever its speed."

The instant case presents no such conditions. It is considered that the court properly refused to set aside the verdict upon the ground that plaintiff omitted to pay attention to her safety in the attempt to cross the street car tracks in front of an approaching car. As indicated, the conditions presented to the occupants of the car, under the facts and circumstances of the case, would be the same as those presented to the driver of the automobile, who, as the jury found, exercised due care. It logically follows that the plaintiff was not guilty of a want of ordinary care in taking no active steps to prevent crossing the tracks in the manner undertaken by the driver. We have examined the evidence, and are satisfied that the damages awarded by the jury cannot be disturbed by this court as excessive.

The judgment appealed from is affirmed.

OHRMUNDT v. SPIEGELHOFF.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Fraud §57—Evidence as to value of property parted with admissible.

In an action for false representations, inducing an exchange of plaintiff's farm for defendant's plat of ground and dwelling house, evidence as to the value of plaintiff's farm was admissible.

2. Fraud §20—Reliance on representations as to quantity of land held authorized.

Where defendant, in inducing plaintiff to exchange his farm for defendant's plat of ground and residence in the city, told him there were $4\frac{1}{2}$ acres in the plat, and that the second fence from a certain point, and not the first fence, was the boundary of the property, whereas the tract contained about $2\frac{1}{2}$ acres, and the first fence was the boundary, the representations were such as to authorize the plaintiff to rely thereon.

3. Fraud §23—Reliance on representations as to quality of land held authorized.

Where there was no opportunity for adequate examination as to the quality of the soil, as where plaintiff visited the premises only once before the trade was made, when there was snow, ice, and water on the ground, he might rely on the representations of the owner as to the quality of the soil.

4. Trial §28(1)—Purpose of view stated.

A view is had to enable the jury to understand and correctly weigh the evidence, and if it is conflicting the view may be used to aid them in determining whose evidence is the more credible, and in a suit for false representations as to the quantity of land in a city tract and the quality of the soil it was not error for the court, in view of conflicting evidence, to grant a view over objection.

5. Fraud §59(2)—Measure of damages stated.

The measure of damages for false representations as to the quantity and quality of land exchanged was the difference between the value of the property as it actually was at the time of exchange and as it would have been had it been as represented.

6. Trial §296(2)—Instruction held not error, when construed with preceding one.

In action for false representations as to property exchanged, an instruction that, as to material representations relied on by purchaser without knowledge or means of knowledge, the question whether, in the exercise of ordinary care and prudence as an intelligent man, he ought or ought not to have relied thereon, was immaterial, was not subject to exception in connection with the preceding charge that, if false representations were made as to the value of the property and its quality as to productiveness, plaintiff could not recover damages for such misrepresentations, if in the exercise of ordinary care and prudence he ought not to have relied thereon.

7. Fraud §22(1)—Diligence required.

Where material false representations have been established, the question is, was plaintiff actually misled by them? and not, would an ordinarily careful and prudent man be misled by them?

8. Fraud §13(2) — False representations, made in good faith, actionable.

If false representations were made and relied on by plaintiff, to his injury, it is immaterial that the person making the same in good faith believed them to be true.

Appeal from Circuit Court, Dodge County; Martin L. Lueck, Judge.

Action by Herman Ohrmundt against John Spiegelhoff to recover damages sustained by the plaintiff by reason of false representations made by the defendant as to the quantity of land and quality of soil of a plat of ground and dwelling house traded by him for plaintiff's farm. Verdict for plaintiff, assessing his damages at \$2,400, and defendant appealed. Affirmed.

Skinner & Thauer, of Watertown, and Charles B. Rogers, of Ft. Atkinson, for appellant.

Otto Kuenzli, of Watertown, for respondent.

VINJE, J. This is the third trial of the case. The first trial in Jefferson county resulted in a verdict of \$500 for plaintiff. Upon defendant's motion the verdict was set aside and a new trial granted, and a change of venue had to Dodge county. On the second trial the jury failed to agree. A number of false representations in addition to those mentioned were alleged in the complaint and testified to, but the two mentioned are the most material ones, and if sustained by the evidence would warrant the verdict rendered, and require an affirmance of the judgment, unless prejudicial error in the trial requires its reversal.

[1] Some evidence was received as to the value of the farm traded for the Watertown house and ground, but after a colloquy between court and counsel it was stricken out. Defendant claims it was not all stricken out, and that other evidence as to the value of the farm came in over his objection, and a number of assignments of error on this ground are argued. The evidence was admissible, and should not have been stricken out. It appears that plaintiff's equity in the farm was worth between \$4,000 and \$5,000. It was incumbent upon him to establish, not only that false representations had been made to him, but that he relied upon them in making the trade. If he can show that he parted with a consideration equal to the value of the premises received in trade as

represented by the defendant, it is pretty persuasive proof that he relied upon the representations. Thus, if land is worth \$100 per acre, and A. claims B. pointed out a tract that contained three acres, but B. claims he pointed out only a two-acre tract, the fact that A. paid him \$300 is strong evidence that he relied upon B.'s representations as to quantity. If the proof showed he paid only \$200, the jury might well say that no reliance was placed upon the representations that there were three acres, or that such representations were never in fact made. Since such proof was admissible in evidence, all assignments of error predicated upon its wrongful retention or admission fall.

[2] Plaintiff testified that defendant told him there were $4\frac{1}{4}$ acres in the city tract; that looking from the barn the second fence therefrom, and not the first fence, through which there was a gate, was the boundary of the property, whereas, in fact, the tract contained only about $2\frac{1}{2}$ acres, and the first fence was the boundary. Defendant denies this testimony, but there is nothing in the evidence from which we can say the jury erred in finding for the plaintiff, so the finding must stand. That the representations made as to quantity of land were of such a character and made under such circumstances as to authorize the purchaser in relying upon them is established by abundant authority in this state. *Bird v. Kleiner*, 41 Wis. 134; *Tyner v. Cotter*, 67 Wis. 482, 30 N. W. 782; *Davis v. Nuzum*, 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774; *Middleton v. Jerdee*, 73 Wis. 39, 40 N. W. 629; *Castenholz v. Heller*, 82 Wis. 30, 51 N. W. 432; *Gunther v. Ullrich*, 82 Wis. 222, 152 N. W. 88, 33 Am. St. Rep. 32; *Porter v. Beattie et al.*, 88 Wis. 22, 59 N. W. 499; *Nelson v. Allen*, 117 Wis. 91, 93 N. W. 807; *Westra v. Roberts*, 156 Wis. 230, 145 N. W. 773.

[3] Plaintiff also testified that defendant told him the soil of the city tract was very fertile and well adapted for a market garden. It was quite conclusively shown that the soil consisted of a black clay or muck, that was not fertile, and would cake and harden in dry weather, and be impossible to work in wet weather. Defendant meets this charge by saying that no such representations were made, and that, since plaintiff examined the premises, he had no right to rely upon the statements, if made. Upon conflicting evidence the jury had a right to find that the alleged representations were in fact made. The evidence also shows that plaintiff visited the premises only once before the trade was made, and that it was some time in March, when there was snow, ice, and water upon the ground, and plaintiff claims it was not possible to examine the soil, and he did not do so, but relied upon the defendant's representations as to its quality. The jury could properly find that there was no opportunity

for adequate examination as to the quality of the soil. Under such circumstances the purchaser may rely upon the representations in respect thereto made by the seller. *Rogers v. Rosenfeld*, 158 Wis. 235, 149 N. W. 83; *Miranovitz v. Gee*, 163 Wis. 246, 157 N. W. 790, and cases cited supra.

[4] Error is assigned because the court at the close of the evidence granted a view of the premises over defendant's objection. A view is had for the purpose of enabling the jury to understand and correctly weigh the evidence. *Washburn v. Milwaukee & Lake Winnebago R. R. Co.*, 59 Wis. 364, 18 N. W. 328; *Munkwitz v. Chi., Milwaukee & St. P. R. Co.*, 64 Wis. 403, 25 N. W. 438; *Seefeld v. Chi., Milwaukee & St. P. R. Co.*, 67 Wis. 96, 29 N. W. 904. If the evidence is conflicting, the view may be used to aid the jurors in determining whose evidence is the more credible. *Washburn v. Chi., Milwaukee & St. P. R. Co.*, 59 Wis. 364, 18 N. W. 328; *Seefeld v. Chi., Milwaukee & St. P. R. Co.*, 67 Wis. 96, 29 N. W. 904. Here the evidence as to the value of the city tract was conflicting, and the court properly permitted a view, to enable the jurors to more correctly weigh it. In *Serdan v. Falk*, 153 Wis. 169, 140 N. W. 1035, this court said:

"Under our practice and the provisions of section 2852, Stats. 1919, it rests within the sound discretion of the trial court whether or not a view shall be had. The exercise of such discretion cannot be successfully assigned as error, unless palpably wrong and prejudicial"—citing many cases.

In the instant case the discretion of the court was exercised in favor of justice.

[5] It is claimed the damages are excessive. The court correctly instructed the jury that the measure of plaintiff's damage was the difference between the value of the house and tract of land as it actually was in March, 1917, and as it would have been, had it been as represented. The proof of actual value took a wide range, and it is sufficient to say that the verdict is within the evidence, and supported by it to such an extent that it cannot be disturbed by the court.

[6, 7] Defendant excepted to this instruction:

"But as to material misrepresentations relied upon by the purchaser, he having no knowledge or means of knowledge on the subject, the question whether, in the exercise of ordinary care and prudence as an intelligent man, he ought or ought not to have relied thereon, is immaterial."

The defendant claims that this should have been qualified by the statement that where the buyer, having means of knowledge at hand and available and having inspected the property to be purchased, does not avail himself of those means and opportunities, he cannot be heard to say that he was drawn

into the bargain by the vendor's misrepresentations. Had defendant noted the sentence in the charge preceding the one excepted to, he would undoubtedly not have taken any exception to it. That sentence reads:

"If false representations were made as to the value of the property and its quality as to productiveness, the plaintiff cannot recover damages for such misrepresentation, if in the exercise of ordinary care and prudence he ought not under the circumstances to have relied upon the representations."

It will thus be seen that the court imposed upon plaintiff the duty to exercise ordinary diligence to inform himself of the facts, but that, having exercised such diligence, he might recover, though he was more credulous than the ordinary careful and prudent man. The question, in cases where material false representations have been established, is, was plaintiff actually misled by them? and not, would an ordinarily careful and prudent man be misled by them? *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406; *Kaiser v. Nummendor*, 120 Wis. 234, 97 N. W. 932.

[8] The defendant excepted to this instruction:

"If you find that the representations, or any of them, were made, that they were false, relied upon by the plaintiff, and caused his injury, it is immaterial whether the person making the same in good faith believed them to be true; that of itself would not defeat plaintiff's right to recover."

The correctness of the instruction is established by a long line of cases in our court among which there are *Mateson v. Rice*, 116 Wis. 328, 92 N. W. 1109; *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923, 105 Am. St. Rep. 1016; *Palmer v. Goldberg*, 128 Wis. 103, 107 N. W. 478; *Chalutz v. Wisconsin Cent. Ry. Co.*, 143 Wis. 623, 128 N. W. 425; *First Nat. Bank v. Hackett*, 159 Wis. 113, 149 N. W. 703.

A number of exceptions were taken to remarks made by plaintiff's counsel in his argument to the jury. Most of them were ruled out by the trial court, and as to some of them the jury was instructed to disregard them. They consisted largely in the statements of conclusions which plaintiff's counsel claimed the evidence sustained. We have carefully examined all the remarks excepted to, and are convinced that none of them prejudiced the jury in arriving at their verdict. No benefit would accrue to the legal profession by a detailed discussion of them.

The court submitted the case to the jury under instructions that were not only legally correct, but that set forth fully the claims of both parties, and the jury reached a result sustained by the evidence.

Judgment affirmed.

UNITED STATES CASUALTY CO. v. SUPERIOR HARDWARE CO.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Master and servant §375(2) — Injury to salesman on way to visit first customer held compensable; "performing services growing out of and incidental to his employment."

A soliciting salesman whose duties did not require him to go first to his employer's place of business, and who was injured on the street while on his way to make his first call of the day on a customer, was "performing services growing out of and incidental to his employment," within Workmen's Compensation Act (St. 1919, § 2394—3[2]).

2. Municipal corporations §706(8) — Negligence of automobile driver injuring pedestrian held for jury.

Evidence tending to show, among other things, that automobile driver who injured pedestrian was at the time to the left of and beyond the center of the street in turning to the right, in violation of St. 1919, § 1636—49b, held to make the driver's negligence a question for the jury.

3. Master and servant §404—Findings of Industrial Commission admissible in suit by compensation insurer against wrongdoer.

The findings of the Industrial Commission in proceedings on an employe's claim for compensation were admissible in a suit by a casualty company who paid the compensation and succeeded to the rights of the employe against defendant, who caused the injury, though such findings were not conclusive on defendant's liability.

Appeal from Superior Court, Douglas County; Solon L. Perrin, Judge.

Action by the United States Casualty Company against the Superior Hardware Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded and new trial granted.

One Louis Stern, a city salesman of the Eimon Mercantile Company of Superior, Wis., was injured by an automobile truck. Upon due proceedings had before the Industrial Commission the amount of compensation and medical expenses under the Workmen's Compensation Act was determined to be \$3,144.92. Such sum was paid on behalf of the employer by this plaintiff, its insurer. Suit was thereupon brought by the plaintiff as succeeding to all the rights of the injured person against the defendant on account of such accident.

Mr. Stern was employed to go from customer to customer along the streets of the city of Superior to solicit orders. Ogden avenue runs north and south in said city and is intersected by Broadway, running east and west. Mr. Stern left his home on the morning of September 26, 1919, according

to custom, and went west on the south side of Broadway, and before reaching the center of Ogden avenue was struck and carried or pushed some distance to the south and near to the east curb of Ogden avenue; the specific negligence here relied upon being the running by the auto truck to the left of and beyond the center of Ogden avenue in making the turn from the west to the right and south at the time of colliding with Mr. Stern, and therefore in violation of section 1636—49b, Stats., which reads as follows:

"1. * * * Any such person so operating a motor vehicle shall, at the intersection of public highways, keep to the right of the center of such intersection of such highway when turning to the right. * * *"

Subsection 2 provides for a penalty by fine or imprisonment for a violation of the foregoing provision.

When plaintiff rested the court granted defendant's motion for a nonsuit. This upon two grounds: First, that under the situation disclosed Mr. Stern was not within the terms and conditions of the Workmen's Compensation Act (St. 1919, §§ 2394—1 to 2394—95), so as to be entitled to compensation from the employer for any such injury, and for that reason the plaintiff had no right of action; secondly, that it had not been made to appear that there was any actionable negligence in the operation of the car.

The plaintiff thereafter moved for a new trial, the motion was denied, and judgment was thereupon ordered in favor of the defendant dismissing the complaint upon the merits. From such judgment plaintiff has appealed to this court.

Steele & Tipton, of Superior, for appellant.

Pickering & Rieser, of Superior, for respondent.

ESCHWEILER, J. (after stating the facts as above). Mr. Stern's duty did not require him to go first to his employer's place of business before starting out to make the rounds of his customers in the city, and he had no other present objective in view while crossing Broadway and Ogden avenue at the time of the accident than the visit to his prospective first customer, whose place of business was on Broadway about a half a block west of the place of accident:

To entitle him to compensation from his employer under the provisions of section 2394—3 (2) it must be shown that at the time of the accident "the employé is performing service growing out of and incidental to his employment." That such a city salesman, injured by an accident attendant upon his being upon the highway while soliciting orders for his employer, is so entitled to such relief has heretofore been declared by this court (Schroeder & Daly Co. v. Ind. Com., 169 Wis. 567, 173 N. W. 328), and under

the ruling in that case this plaintiff's right to compensation would be beyond question if, at the time of the accident, he had reached a point in his daily journey beyond the first customer and on the way to another.

[1] We can see no substantial ground for holding that the liability of the master should be any less in the situation here disclosed than that in the case just above cited. Mr. Stern, not being required to first report to and then start from the employer's place of business in the performance of his services, must be, and is now so held, to have been in the course of his employment at the time of this particular accident.

We are satisfied that such conclusion is also well supported by the following decisions: City of Milwaukee v. Fera, 170 Wis. 348, 174 N. W. 926, where the employé of a city garbage collector was driving back to his employer's barn after his last load for the day; Moran's Case, 234 Mass. 566, 125 N. E. 591, where a solicitor and collector for a life insurance company was fatally injured while running to catch a street car; Globe Indemnity Co. v. Commission, 36 Cal. App. 280, 171 Pac. 1088, a bookkeeper injured by an automobile as he was crossing a public street to mail a letter for his employer; Kunze v. Detroit Shade Tree Co., 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A, 252, a supervising foreman on his way in the usual course of his employment from inspecting work being done by defendant at one place to another; In re Harraden, 66 Ind. App. 298, 118 N. E. 142, where a fire insurance agent whose duties required him to travel from one city to another was injured by slipping on the sidewalk on his way from the train to the hotel.

We have examined the cases cited and relied upon by respondent claimed to support the contrary view, but we do not deem them applicable to the present situation and certainly not controlling here or necessary to be discussed.

[2] We are also forced to the conclusion that the nonsuit cannot be supported upon the second ground upon which it was placed by the trial court. By the testimony of the defendant's president on adverse examination it was defendant's automobile truck that caused the injury. The testimony of Mr. Stern is sufficient to warrant the conclusion that at the time of the collision he was east of the center of Ogden avenue. If the auto truck came on Broadway from the west at the time, the inference would be proper that in so doing it had violated the law of the road quoted above. A witness who was walking south on Ogden at the time of the accident and had passed Mr. Stern at Broadway, and who subsequently assisted in removing Mr. Stern from under the truck, testified that there was an auto truck resembling the one

causing the injury at a point on Broadway west of Ogden, and that at such time he saw no other approaching automobile. We think there was sufficient evidence to require the submission of the issues involved to the jury.

[3] Complaint is made by defendant of the reception in evidence on plaintiff's offer of the findings made by the Industrial Commission in the proceedings upon the claim for compensation by Mr. Stern against his employer and the plaintiff as its insurer. Being in the nature of a judgment or final determination of a dispute between other parties, it could not be considered conclusive upon the question of defendant's liability herein. It could be properly considered, however, as at least making prima facie proof of the facts necessarily alleged in the complaint herein, viz., of claim having been made by Mr. Stern against the employer and that the claim had been allowed and paid, and such allegations being put in issue by defendant's answer. *Grand Rapids L. Co. v. Blair*, 190 Mich. 518, 526, 157 N. W. 29; *O. S. N. Co. v. O. T. E.*, 134 N. Y. 461, 469, 81 N. E. 987, 30 Am. St. Rep. 685; *Jones on Ev.* (2d Ed.) § 590; 23 Cyc. 1271; 15 R. C. L. 1021.

The judgment of nonsuit therefore having been improperly granted, plaintiff's motion for a new trial should have been allowed.

Judgment reversed and the cause remanded for further proceedings, and a new trial granted.

DELANEY et al. v. GLOBE SHIPBUILDING CO.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Sales ¶199—Intent as to when title passes determined by written evidence, if possible, or parties' statements and surrounding circumstances.

When transfer of title under a sale contract takes place depends on the parties' intent, which may be determined by the written evidence, or, if doubtful, by the parties' statements, subject to the limitations on the reception of parol evidence, and the surrounding circumstances.

2. Shipping ¶24—Buyer held liable for purchase price of tug sunk before delivery.

In view of St. 1919, § 1684t19, subd. 1, title to a tug sold unconditionally while afloat in a harbor tied to the seller's dock in a deliverable condition passed immediately to the buyer, at whose risk it was when afterwards sunk, though the seller failed to notify him of its defective condition.

Appeal from Circuit Court, Douglas County; W. R. Foley, Judge.

Action by William Delaney and others against the Globe Shipbuilding Company.

Judgment for defendant, and plaintiffs appeal. Affirmed.

This is an action to recover damages sustained by the plaintiffs, resulting from the sinking of a tug in Superior harbor at the defendant's dock and of which the defendant had been the owner. On February 23, 1920, it was afloat in Superior harbor, tied to the defendant's dock, and had been advertised for sale. Negotiations between the plaintiff Delaney and McKellar, defendant's manager, were carried on at the yard in Superior after an examination by the plaintiff. The following memorandum was made:

"Globe Shipbuilding Company,

"Superior, Wis., Feb. 23, 1920.

"Received from Capt. Delaney the sum of \$10.00 as part payment of the steamer Globe, the balance of \$2,740.00 to be paid within 30 days from date. James McKellar."

Plaintiff then returned to Buffalo, N. Y., his home; nothing further being done about the possession or delivery. Plaintiff stated that he would be back about April 1. The next communication was a telegram as follows:

"Buffalo, N. Y., Mar. 17, 1920.

"James M. Kellar

"Globe Ship Co., Superior, Wis.

"Will mail you Monday Chicago draft for balance due on tug Globe. Any one making inquiry of her value please place her value eighty-five hundred dollars. Kindly keep her equipment oil in tank and close watch of her until I reach there about April seventh.

"Capt. Wm. Delaney."

This telegram was not answered. The next communication was a telegram as follows:

"Buffalo, N. Y., March 23, 1920.

"Globe Shipbuilding Co.

"Superior, Wis.

"Wiring you Postal Telegraph to-day eighteen hundred dollars account tug Globe make draft bill of sale attach for balance nine hundred forty dollars through Manufacturers and Traders Bank Buffalo make bill of sale read eighty-five hundred to Captain William Delaney James J. Pendergast and Company.

"Captain William Delaney."

Defendant received in due course the \$1,800 and did not reply.

Owing to the condition of the tug in the ice, the water overflowed, and on March 19 the tug began to sink, and sunk on March 22. On April 2 plaintiff wrote to defendant that the bill of sale and draft had not arrived, and also wrote that he had heard rumors that the boat was not in good condition, that her frames were broken, and deck beams badly rotted, and that the engine was of no account. On April 8 plaintiff paid the final draft in Buffalo. In a letter dated April 9

defendant expressed surprise at the reports of the condition of the tug and stated that the defendant had made no guaranty of the condition of the vessel, and that the condition did not enter into the sale, and that they had not been called on to make any statements relative to the boat. The letter also stated that the draft for the balance had not been received. When the defendant made his draft for the balance there was attached to it a bill of sale. This bill of sale was in ordinary form, describing the defendant as sole owner and that defendant had bargained and sold, "and by these presents do bargain and sell," etc. On April 22 plaintiff arrived in Superior. He had had no notice whatever that the boat had sunk. He then requested McKellar to raise the tug. McKellar said he would have nothing to do with it, and said that plaintiff had salvage enough in the boat to pay him. There was evidence that the expense of raising the tug and other items amounted to \$1,800. The court submitted but one question to the jury, namely, the question of how much the market value of the tug was decreased by the sinking.

Grace, Fridley & Crawford, of Superior, for appellants.

Hanitch, Hartley & McPherson, of Superior, for respondent.

JONES, J. (after stating the facts as above). It was alleged in the complaint that it was mutually agreed that the defendant should sell the tug for the sum of \$2,750, "and deliver the same upon full payment of the purchase price in the condition in which it was at the date of said agreement and at the defendant's dock, afloat and anchored thereat," and that it was "understood and agreed between the parties that defendant would retain possession of said tug until the full payment of said purchase price was made, and preserve the same from damage or loss, and upon full payment of said purchase price deliver said tug to plaintiffs at the place and in the condition in which said tug was at the time of making said agreement."

[1] There was no evidence of any such agreement, and the case was tried by the plaintiff on the theory that without any such agreement the title and the risk remained in the defendant until the execution of the bill of sale. There was no parol testimony showing the intention of the parties as to the date of the delivery or the time when the title should pass. It is elementary that the time when the transfer of the title takes place depends upon the intent of the parties to the contract. That intention may be determined by the written evidence, and if the subject is left in doubt, intention may be shown by the statements of the parties, subject to the limitations governing the reception of parol

evidence, and by the circumstances surrounding the transaction.

[2] Plaintiffs' counsel lay great stress upon the claim made by them that there was no delivery of possession, that no actual possession was given, and could not be given, and that this bears upon the question of intention.

Under the conditions existing when the memorandum of sale was made, the following section of the statute is very significant:

"Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." Section 1684t19, subd. 1, Stats.

This was undoubtedly an unconditional contract of sale of specific goods. We see no reason why the tug was not in a deliverable state on the 23d of February, and the fact that it may not have been then practicable to remove the boat to Buffalo seems to us immaterial.

In a very recent case this section of the statute was construed by this court. It was a case perhaps involving more difficulty than the instant case, since the claim was vigorously made that the sale was conditional. In the opinion by Mr. Justice Rosenberry, it was said:

"Whether or not the title to the goods described in the contract passed to the defendant depends upon the intention of the parties. Section 1684t18, Wis. Stats. The contract itself does not in terms say when the title should pass. Recourse must be had, therefore, to rules of construction. Section 1684t19 establishes the rules for ascertaining the intention of the parties as to the time at which the property and goods is to pass to the buyer where there is no specific provision in the contract. * * *

"In this case the goods were ascertained and in a deliverable state. The buyer had the right at any time before June 1, 1920, upon payment of the remainder of the purchase price, to take the goods, and if the plaintiff had, upon tender being made to it, refused to deliver the goods the right of the defendant to recover the same in an action of replevin would have been complete." City of Boscobel v. Muscoda Mfg. Co., 183 N. W. 963, 964.

Plaintiffs' counsel argue that it must have been the intention of the parties that further acts were to be performed before the transfer of title should take place—at least, that a bill of sale was to be executed—but no mention of a bill of sale was made until more than a month after the bargain was made.

It is also contended that the language in the bill of sale in which the defendant is described as owner, and the words of bargain and sale, afford evidence that the title

had not been transferred; but we regard the bill of sale as merely formal evidence of the bargain which had been made on February 23.

Plaintiffs' counsel argue that whatever may have been the technical rights of the parties, the defendant was guilty of such concealment and fraud that he should respond in damages. There is no claim that the defendant was in fault for the sinking of the tug. This was the result of natural causes for which neither party was to blame. When the defendant heard of the danger, he did what he could to prevent it pursuant to the telegram of March 17.

In these transactions neither party seemed to be acting from purely altruistic motives. On the one hand, the defendant failed to notify the plaintiff of the condition of the tug. On the other hand, plaintiff Capt. Delaney requested defendant to place the value of the tug at \$8,500 to any one making inquiry, and he caused that amount to be placed in the bill of sale as the consideration, although the purchase price was only \$2,750. There was testimony that he had told his associates that he had paid \$8,500.

The defendant insisted that the tug was at the risk of the plaintiff after February 23. In view of the statute and the authority above quoted, we consider that this claim rested upon solid ground, and it cannot be said that he was guilty of any actionable fraud.

We agree with the trial court that the title passed on February 23. Defendant's counsel argue that even if this was not true, plaintiff would be prevented from recovering by section 1684t3, subd. 3, because the contract was for the sale of specific goods, and indivisible, and that since plaintiff did not elect to rescind and recover the purchase money paid, but took the boat in its damaged condition, he was bound to pay the purchase price. In view of the conclusion we have reached, it is not necessary to consider this question.

Judgment affirmed.

SEIFERT v. DIRK et ux.

(Supreme Court of Wisconsin. Oct. 18, 1921.
Dissenting Opinion Oct. 19, 1921.)

1. Brokers $\S$ 43(2)—Having performed services, may recover on quantum meruit notwithstanding invalidity of parol contract.

Real estate broker, having performed services under a parol brokerage contract, may recover on quantum meruit, where the benefits of performance have been knowingly accepted and retained by the owner, notwithstanding invalidity of contract because not reduced to writing as required by St. 1919, $\S$ 2305m.

2. Brokers $\S$ 82(1)—To recover on quantum meruit for services rendered under invalid parol brokerage contract, must plead such cause of action.

Broker, having performed services under brokerage contract, invalid because not in writing under St. 1919, $\S$ 2305m, to recover on a quantum meruit, must properly plead such cause of action, either originally or by amendment.

Owen, Rosenberry, and Jones, JJ., dissenting.

Appeal from Waukesha County Court; David W. Agnew, Judge.

Action by Gustav Seifert against John E. Dirk and wife. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

The complaint alleged in substance: That plaintiff is a real estate broker and a licensed member of the Wisconsin real estate board; that the defendants listed with him as such broker certain real estate of which they were the owners for sale or exchange; that the defendants promised and agreed to pay plaintiff for his services in and about such sale or exchange the usual and customary brokerage or commission paid for such services in the city of Milwaukee, that is, 3 per centum of the price fixed, either for sale or exchange, of \$17,000; that through the services of plaintiff an exchange was made of defendants' property with that of another owner of property, and the defendants entered into possession and control of such other property pursuant to such exchange.

By stipulation between the parties there was inserted in the complaint, in order that the question here raised might be deemed to be squarely presented, the following:

"That no contract in writing for a commission was entered into, by, and between plaintiff and said defendants."

It was further alleged:

"That the defendants became and are indebted to the plaintiff as a real estate broker for the worth and value of the work, labor, and services performed and rendered by plaintiff for them in and about the said exchange of their property for said other property, for which said defendants agreed to pay the plaintiff; that said services were, and are reasonably worth the sum of \$510."

It was also alleged that the said sum became due, that demand therefor was made, and payment refused, and judgment was demanded for said sum of \$510. The demurrer to such complaint being sustained, and a judgment of dismissal being thereafter entered, plaintiff appealed therefrom.

F. P. Hopkins, of Milwaukee, for appellant.

Otto A. Lemke and M. H. Sell, both of Milwaukee, for respondents.

ESCHWEILER, J. (after stating the facts as above). The complaint was treated in the court below and on its presentation here as sufficient in form to state a claim upon quantum meruit, as well as upon an express contract to recover for rendered and accepted services in the exchange of real estate by the plaintiff as real estate broker for the defendants. We shall so treat it here, though the language of the complaint, so far as it purports to set out a cause of action quantum meruit, may not be as precise and definite as the usual rules of pleadings for such cause of action requires.

The demurrer to the complaint was sustained in the court below upon the view that, since the enactment of chapter 221 of the Laws of 1917 there can be no recovery for services rendered by real estate agents in procuring either a buyer or a seller of real estate except and unless such express contract be in writing, in accordance with the conditions specified in said chapter, and that, falling such express contract, there can be no recovery upon any implied contract to pay what the services were reasonably worth. Said chapter 221 of 1917 created a new section inserted in chapter 104, Stats., "Concerning fraudulent conveyances and contracts relating to real estate," and reads as follows:

"Section 2805m. Every contract to pay a commission to a real estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or some note or memorandum thereof describing such real estate, expressing the price for which the same may be sold or purchased, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller, be in writing and be subscribed by the person agreeing to pay such commission."

This precise statute has been before the court twice since its passage; in *Gifford v. Straub*, 172 Wis. 896, 179 N. W. 600, where the written memorandum relied upon was held not to be a compliance with this statute, and for that reason a judgment for the defendant was sustained; and in *Brown v. Marty*, 172 Wis. 411, 179 N. W. 602, where the written contract there sued upon was held to be sufficient. In neither of these cases, however, was the question now before us presented or considered.

The conclusion of the court below in sustaining the demurrer to each of the causes of actions attempted to be set forth in the complaint herein is undoubtedly in accord with the general line of authorities upon statutes similar to the one here under consideration. It being generally stated that, where a statute such as here requires written authorization, a broker who acts under an oral contract of employment cannot recover the value of his services as upon implied promise; 19 Cyc. p. 220; 4 R. C. L. 300; 25 R. C.

L. 437. Such statement is supported by a number of decisions.

In *McCarthy v. Loupe*, 62 Cal. 299, passing upon the precise question here presented as to whether the right still existed to rely upon an implied promise to recover the value of such services rendered, it was held that, inasmuch as an express contract was required by statute, the law would no longer imply a contract. The rule has been repeatedly declared in that jurisdiction in many cases intermediate the decision above cited, and the case of *Ryan v. Walker*, 35 Cal. App. 116, 169 Pac. 417; the same view is expressed in *Indiana*. *Selva v. Talbott*, 175 Ind. 648, 95 N. E. 114, 33 L. R. A. (N. S.) 973, Ann. Cas. 1913C, 724, and again in *Peters v. Martin*, 69 Ind. App. 436, 122 N. E. 16.

In *Idaho* it was stated that to hold otherwise would be to absolutely nullify the statute. *Wetherhead v. Cooney*, 82 Idaho, 127, 180 Pac. 760.

In *Michigan*, while recognizing that recovery quantum meruit may be permitted for services actually performed under other kinds of contracts, if void under the statute of frauds, yet it was held under just such a statute as here that to make the same rule applicable would nullify the new statute, and that as to this particular class of contracts no recovery could be had in any form of action in the absence of compliance with such a statute. *Paul v. Graham*, 193 Mich. 447, 160 N. W. 616; *Smith v. Starke*, 196 Mich. 311, 162 N. W. 998.

In *Iowa*, in passing upon a Nebraska statute, limited, however, to the obtaining of a purchaser only, it was held that, an oral contract for such services being invalid in Nebraska, where made, could not be held valid or enforced in Iowa. *Brown & Brammer v. Pearson Co.*, 169 Iowa, 50, 150 N. W. 1057. The Nebraska court so interpreted their statute. *Barney v. Lasbury*, 76 Neb. 701, 107 N. W. 989. The same view is held in *Parker v. Bruggeman*, 72 Wash. 309, 130 Pac. 358.

In *Oregon* the statute made an agreement of such kind not valid unless in writing, but also provided that evidence of the agreement shall not be received other than the writing itself, or secondary evidence thereof, and under such statute it was held that there can be no recovery as upon an implied contract. *Taylor v. Peterson*, 76 Or. 77, 147 Pac. 520.

In two jurisdictions acts have been passed punishing as a misdemeanor the offering to sell the real estate belonging to another without written authority. Upon an action brought to recover a commission, the breach of such statute was urged as a defense, but it was held that such legislation was an arbitrary infringement upon the rights of persons engaged in a lawful occupation, but intimated that, had it been an act for the purpose of regulating the business of brokerage or the statute of frauds a different question would be presented. *Fisher v. Woods*, 187

N. Y. 90, 79 N. E. 836, 12 L. R. A. (N. S.) 707. A similar penal statute was, however, held valid in Missouri, and prevented the recovery of a commission for a sale made in violation of its terms. *Rothwell v. Gibson*, 121 Mo. App. 279, 98 S. W. 801.

[1] We are compelled, however, to reach a contrary conclusion, and hold that the common-law right to recover quantum meruit for services of such a nature as those here involved, the benefits whereof are knowingly accepted and retained by the party against whom the claim is made, still remains, though the express contract under which the services were entered upon is declared to be void because not reduced to writing. Such right to recover quantum meruit is grounded in the common law. Page on Cont. par. 30. It has long been firmly established here. *Wheeler v. Hall*, 41 Wis. 447, 450; *McMillan v. Page*, 71 Wis. 655, 661, 38 N. W. 173; *Miller v. Tracy*, 86 Wis. 330, 58 N. W. 866; *Wojahn v. National Union Bank*, 144 Wis. 646, 667, 129 N. W. 1068; *Grossbler v. C. St. P., M. & O. R. Co.*, 173 Wis. 503, 509, 181 N. W. 746.

While it is undoubtedly true that the existence of an express contract between parties generally repels any inference of an implied contract for the same subject-matter, nevertheless, where such express contract is void by reason of some provision of public policy, as expressed in other than penal statutes, the possibility of an implied contract being inferred is not excluded. Page, Cont. (2d Ed.) par. 1438.

There is no need here of considering, because of the substantial difference in the basis of the holdings, the many decisions declaring the doctrine that there can be no recovery in any form upon a contract which is made in violation of the provisions of a penal statute, such as for money loaned for gambling (*Schoenberg v. Adler*, 105 Wis. 645, 81 N. W. 1055), or those based upon a violation of the Sunday law (*Sentinel Co. v. Meiselbach M. W. Co.*, 144 Wis. 224, 230, 128 N. W. 861, 32 L. R. A. [N. S.] 436, 140 Am. St. Rep. 1007; *Jacobson v. Bentzler*, 127 Wis. 568, 107 N. W. 7, 4 L. R. A. [N. S.] 1151, 115 Am. St. Rep. 1052, 7 Ann. Cas. 633); although as to even such void Sunday contracts, where services in intended compliance with such contracts are thereafter rendered, and the benefits thereof accepted, a recovery may nevertheless be had for their reasonable value (*Thomas v. Hatch*, 53 Wis. 296, 10 N. W. 393, where pleadings were allowed to be amended on the trial to change the cause of action from the express contract made on Sunday to one on implied contract; *King v. Graef*, 136 Wis. 548, 117 N. W. 1058, 20 L. R. A. [N. S.] 86, 128 Am. St. Rep. 1101, sale of personal property made on Sunday and delivery on secular day; *Wausau Lumber Co. v. Ind. Com.*, 166 Wis. 204, 206, 164 N. W. 836).

The substance of the old English statute of

frauds aimed to prevent perjury and the establishing of unjust and unfounded claims (*Baumgarten v. Cohn*, 141 Wis. 315, 124 N. W. 288, 18 Ann. Cas. 1076; *Gifford v. Straub*, 172 Wis. 396, 400, 179 N. W. 600) relating to contracts have continuously appeared as a part of our statutory law since at least as early as the revision of 1849. The two concerning real estate are: Section 2302, providing in substance that no estate or interest in lands (other than leases not over one year) shall be created, etc., unless by act or operation of law or by deed or conveyance in writing; and section 2304, which makes void every contract for leasing of real estate for a longer period than one year, or for the sale of any lands or interest therein unless the contract or memorandum thereof expressing the consideration is in writing and properly subscribed.

As to contracts relating to personal property and services, section 2307 declares void every agreement that by its terms is not to be performed within one year from the making thereof unless expressed in writing, etc. That the latter two of these sections contain the word "void," while such word does not appear in section 2302, Stats., supra, makes no material difference in the consideration of the question here presented.

The new statute (section 2305m) now before us is no more drastic or emphatic as to the necessity of a writing and the effect of the failure thereof than is the language of the other provisions of the statute of frauds above mentioned. As to each of such earlier provisions of the statute of frauds, it has uniformly and consistently been held that, even though a party may bring his action to recover, basing it in the first instance upon a contract which must be declared void by reason of such statutes, he may nevertheless be permitted, upon proper pleading, to disregard and hold as naught such express contract and recover the reasonable value thereof upon an implied contract to pay for the same subject-matter as that included and covered by the express contract. The fact that the parties did enter into the undertaking in supposed compliance with such express contract is not a bar to the right to recover under such implied contract.

Such is the effect of the following and other cases: *Clark v. Davidson*, 53 Wis. 317, 10 N. W. 384, one taking possession of a farm under a parol agreement void under section 3202, Stats., supra, and performing labor thereon may recover quantum meruit. 53 Wis. 323, 10 N. W. 386.

An oral contract for services rendered under a promise to devise and bequeath real and personal property as compensation for such services being void under section 2304, Stats., as to the real estate, and being indivisible, void in part, and failing wholly, does not prevent the right of the person rendering such services to recover therefor quantum meruit.

Among the many cases so holding are the following: *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; *Estate of Kessler*, 87 Wis. 660, 667, 59 N. W. 129, 41 Am. St. Rep. 74; *Martin's Estate*, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 896; *Loper v. Sheldon's Estate*, 120 Wis. 26, 32, 97 N. W. 524; *Taylor v. Thleman*, 132 Wis. 38, 45, 111 N. W. 229, 122 Am. St. Rep. 943; *Laughnan v. Laughnan*, 165 Wis. 348, 162 N. W. 169; *Nelson v. Christensen*, 169 Wis. 373, 172 N. W. 741.

In *Koch v. Williams*, 82 Wis. 186, 191, 52 N. W. 257, the same rule was recognized in an action for architect's services rendered under an express contract to pay therefor by the conveyance of land, which defendant offered to do, yet nevertheless the plaintiffs were permitted to disregard the express contract and to recover on quantum meruit as the inevitable result from holding the contract void; this court in that case adopting what was said in *Salb v. Campbell*, 65 Wis. 405, 27 N. W. 45, that the parties in such a situation stand as though no contract existed between them. In *Seifert v. Mueller*, 156 Wis. 629, 146 N. W. 787, a similar result was reached as in *Koch v. Williams*, supra, the express agreement being for services of a real estate broker as in this case. *Draheim v. Evison*, 112 Wis. 27, 87 N. W. 795, and oral contract for labor on a farm void under section 2307, Stats., being for a period longer than one year, yet for the services rendered recovery might be had upon quantum meruit. In *Cohen v. Stein*, 61 Wis. 508, 21 N. W. 514, the express contract was for services of husband and wife for more than a year, and void under section 2307, still recovery was permitted on quantum meruit. To the same effect, *Chase v. Hinckley*, 126 Wis. 79, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328.

[2] It is of course necessary in all such situations that the matter should be presented properly by pleadings either originally or by amendment; otherwise the party must stand or fall on his express contract. *Pearson v. Kelly*, 122 Wis. 660, 100 N. W. 1064; *Manning v. School District*, 124 Wis. 84, 104, 102 N. W. 356; *Gist v. Johnson-Carey Co.*, 158 Wis. 188, 203, 147 N. W. 1079, Ann. Cas. 1916E, 460. We can see no logical basis for applying a different rule of construction for this new provision from that long given to the older statutes, or why the term "void" should be more far-reaching when inserted in the modern than when used in the older statutes.

The former statutes have been consistently held to affect only the express, and not the implied contract. That has been left as at common law, and practically unimpaired, and no change has been made by legislative declaration to the contrary in all these years of repeated judicial interpretations of these provisions of the statutes of frauds. The new provision is to effect the same general

purpose, is imbedded in the same surroundings as is its elder sisters, and should receive similar treatment. There is no more nullification of the new by the present holding than of the older statutes by the former rulings of that court as cited supra.

We hold, therefore, that section 2305m, Stats., makes void the express contract only, and that the right to recover, under the proper state of facts, quantum meruit, upon the implied promise to pay for such services rendered, the benefits whereof are accepted, has not been legislated out of existence. It follows therefrom that the demurrer to the complaint, so far as it stated a cause of action upon quantum meruit, should have been overruled.

Judgment reversed and the cause remanded, with directions to overrule the demurrer to the plaintiff's complaint.

OWEN, J. (dissenting). There is no more fundamental rule than that in the construction of a statute the intention of the Legislature in enacting it should be given effect. In ascertaining the intent of the Legislature—

"The court can and should consider the 'surrounding circumstances, the existing condition of things, the evils to be remedied, the objects to be attained, look at the whole and every part of the statute and the apparent intention derived from the whole, to its subject-matter, to its effects and consequences, and to the reason and spirit, and thus ascertain the true meaning of the Legislature.'" *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 9, 128 N. W. 1041, 1044, 35 L. R. A. (N. S.) 853.

Section 2305m, Stats., has been before this court on two prior occasions. *Gifford v. Straub*, 172 Wis. 396, 179 N. W. 600; *Brown v. Marty*, 172 Wis. 411, 179 N. W. 602. No doubt was then entertained concerning the object and purpose of the Legislature in enacting the statute. In the former case it was said:

"The statute was doubtless enacted for reasons similar to those which led to the enactment of the statute of frauds. It was to prevent frauds and perjuries. Its enforcement will sometimes protect brokers who have rendered valuable services too little appreciated. More often it will protect owners from unfounded claims. It will tend to prevent the flood of litigation arising out of misunderstandings between well-meaning persons."

It is notorious that claims made by real estate brokers against owners of property for commissions arising from the sale of land, which claims were often founded upon mere casual conversations the owners did not understand to amount to a contract, have been a most fruitful source of litigation. It was for the purpose of suppressing litigation of this kind that the legislation was enacted. The construction placed by the court upon section 2305m again opens the floodgates for

such litigation, and leaves the matter worse than if no legislation had been enacted.

Previous to the enactment of the statute the owner could at least limit his liability by an oral contract. This he cannot now do. Although the oral contract be held void, nevertheless the broker may bring action to recover for the reasonable value of his services. By virtue of the construction placed upon it by the decision in this case, the legislative purpose in enacting the statute is defeated, and its effort to suppress actions of this kind is rendered entirely futile. I contend that, where the purpose of the Legislature in enacting a statute is so plain as to have received affirmative expression in the decisions of this court, no rule of construction, no precedent of prior judicial decision, should be held sufficiently potent to prevent a construction which will give effect to the plain legislative intent. I have supposed that the office of accepted rules for the construction of statutes was to enable the court to discover and give effect to the legislative intent, and that all rules must be subordinated to the dominating rule that statutes must be construed so as to effectuate the legislative purpose. It seems clear to my mind that this has not been done in the instant case. I think it was the purpose of the Legislature to prohibit any recovery of broker's commissions for the sale of real estate unless the right to that commission should be established by a written contract. I think the trial court was right, and that the judgment should be affirmed.

I am authorized to state that Mr. Justice ROSENBERRY and Mr. Justice JONES concur in this dissenting opinion.

WAUKESHA GAS & ELECTRIC CO. v. WAUKESHA MOTOR CO.*

(Supreme Court of Wisconsin. Oct. 18, 1921.)

Public Service Commissions § 19½, New, vol. 12A Key-No. Series—Railroad Commission's jurisdiction over rates of public utilities does not oust courts of jurisdiction over controversy regarding failure to furnish gas and electricity.

Railroad Commission Law (St. 1919, §§ 1797—37m and 1797—12a), as to jurisdiction of the commission over questions of overcharges or inadequate service, does not oust the courts of jurisdiction to hear an action or counterclaim based on failure of a public utility to perform its contract duty, or duty established by law, or otherwise, such as the failure of a gas and electric company to perform its contract to furnish a certain quantity of gas and electricity; for the jurisdiction of the commission is confined to prescribing rates and regulations for the future, and it has no jurisdiction to redress wrongs or grievances arising from past conduct of the utility.

Appeal from Circuit Court, Waukesha County; Martin L. Lueck, Judge.

Action by the Waukesha Gas & Electric Company against the Waukesha Motor Company, in which defendant interposed a counterclaim, to which plaintiff demurred. From the order sustaining the demurrer, defendant appeals. Order reversed, and cause remanded.

The plaintiff is a public utility furnishing gas and electric service in the city of Waukesha. The defendant is the proprietor of a manufacturing plant located in that city. In an action brought by the plaintiff against the defendant the defendant interposed a counterclaim, in which it was alleged, in effect, that the plaintiff had entered into a contract by which it undertook and agreed to furnish the defendant with all of the electric energy necessary to properly operate its plant, and with 2,000,000 cubic feet of gas per month; that by reason of this contract it equipped its plant with electric motors and with proper appliances; that plaintiff breached said contract by failing to furnish electrical energy in sufficient quantity to enable defendant to properly prosecute its manufacturing business, and that it failed to furnish it with the 2,000,000 cubic feet of gas per month, which resulted in embarrassment and delay in the prosecution of its manufacturing business, all to its damage in the sum of \$150,000.

A demurrer to the counterclaim was interposed, upon the ground that the court had no jurisdiction of the cause of action, and on the further ground that no facts were stated to constitute a cause of action. The court made an order sustaining the general demurrer, generally. While the order did not state the grounds upon which the demurrer was sustained, an opinion filed by the trial judge indicates that it was sustained because the court had no jurisdiction. This appeal is from the order sustaining the demurrer.

Frame & Blackstone, of Waukesha, for appellant.

M. A. Jacobson, of Waukesha, for respondent.

OWEN, J. (after stating the facts as above). The counterclaim sets forth a cause of action for a plain breach of contract. That it sets forth facts sufficient to constitute a cause of action is not seriously challenged here. A demurrer thereto was sustained on the ground that the court had no jurisdiction of the cause of action. The trial court was of the opinion that the Railroad Commission had exclusive jurisdiction to deal with the subject. Respondent seeks to maintain that position by reason of the analogy between our Public Utility Act and the Interstate Commerce Act,

— For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Motion for rehearing denied December 13, 1921, with \$25 costs.

under the express terms of which, as construed by the federal court, exclusive jurisdiction is vested in the Interstate Commerce Commission to deal with certain controversies arising between shippers and carriers. But it must be remembered that this exclusive jurisdiction springs from the express provisions of the Interstate Commerce Act, and that it does not extend to controversies of every nature, kind, and description arising between the shipper and the carrier. It is confined and limited to the determination of matters calling for the exercise of the administrative power and discretion of the commission. This is well settled. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *Galveston, etc., Ry. Co. v. Wallace*, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. Ed. 516; *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; *Illinois Central Railroad Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306. Consequently courts have no jurisdiction of controversies growing out of excessive charges or inadequate service. What is a reasonable charge or adequate service is a matter committed by Congress to the determination of one agency of nation-wide jurisdiction, the Interstate Commerce Commission, and courts will not attempt to determine questions relating thereto in advance of their determination by the commission. The reason for this, as stated in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 441, 27 Sup. Ct. 350, 355, 51 L. Ed. 553, 9 Ann. Cas. 1075, is that—

"If the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

Our own Railroad Commission Law, §§ 1797—37m and 1797—12a, provide in effect that any person aggrieved by reason of any overcharge or inadequate service may make complaint to the Railroad Commission, upon which the commission shall have power to investigate the complaint, to hear the same, and decide upon the merits thereof; that upon the finding of the amount of said excess charge the carrier may lawfully pay the same to the shipper, and if it refuses so to do, the party complaining may maintain an action in the courts of this state to recover the amount of such excessive charge as found by the commission, and the finding of the commission shall be prima facie proof of the facts found by it. This remedy was held to be exclusive, in so far at least as an attack

on a schedule rate is concerned, in *Graham Ice Co. v. Chicago, M. & St. P. R. Co.*, 153 Wis. 145, 140 N. W. 1097. The reason for such holding is well summarized in the following excerpt from the opinion:

"The statutes referred to show that the whole matter of fixing rates and the remedies for excessive charges is lodged with the Railroad Commission. The rates in the schedule made and filed constitute the lawful rates until changed in the manner provided, on application to the commission. The schedule rates being by the express terms of the statute the lawful rates, the railroad companies have not authority to charge different rates. They are prohibited by statute from so doing. They can charge neither more nor less than such rates. In a common-law action, therefore, to recover for excessive rates the courts cannot say that the schedule rates are unlawful rates. This obviously is necessary in order to preserve equality and uniformity in rates and the carrying out of the system established by the Legislature in creating the Railroad Commission."

But it has been said by the federal Supreme Court, speaking of the Interstate Commerce Act, that—

"It did not supersede the jurisdiction of state courts in any case new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the commission, or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive." *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; *Illinois Central R. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306.

And we accordingly find numerous instances in the books where courts have entertained actions at law to recover damages growing out of a failure of the carrier to perform its contract duty, or some other duty definitely established by law, or otherwise, where the determination of the Interstate Commerce Commission is not necessary in order to determine such duty. Thus, in the cases of *Galveston, etc., Ry. Co. v. Wallace*, supra, *Altschuler v. Atchison, etc., Ry. Co.*, 155 Wis. 146, and 144 N. W. 294, 49 L. R. A. (N. S.) 491, and *Wooster v. Chicago & Northwestern Ry. Co.*, 167 Wis. 6, 166 N. W. 431, the railway companies were held in actions at law for damages resulting from breaches of their contracts in their failure to make delivery in accordance with their contracts of shipments; and in *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867, and *Illinois Central Railroad Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306, actions were entertained to recover damages for failure to provide sufficient cars and for unjust discrimination in furnishing cars in violation of the carrier's own rule to furnish all shippers on equal pro rata basis. The nature of the causes of action of which the

Interstate Commerce Commission has exclusive jurisdiction is well illustrated by the case of *Wooster v. Chicago & Northwestern Ry. Co.*, 167 Wis. 6, 166 N. W. 431. That was an action to recover damages because of the failure of the carrier to deliver a shipment of race horses to the Allentown fair grounds. The question was whether such failure constituted a breach of the contract of shipment or whether it was due to a misrouting. If the latter, the matter was within the exclusive jurisdiction of the Interstate Commerce Commission. If it constituted a breach of contract the court had jurisdiction of the action. Another illustration appears in the opinion of the federal Supreme Court in *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867, where it is said:

"But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in section 9.

"But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts."

If more time than necessary has been spent in pointing out the limitations of the exclusive jurisdiction of the Interstate Commerce Commission in the matter of controversies arising between shipper and carrier, it is because of the sincere assurance of the learned counsel for respondent that the principle of those cases in which it has been held that the Interstate Commerce Commission has exclusive jurisdiction of the subject-matter involved applies to the cause of action set forth in the counterclaim, as it is apparent that an understanding of the limitations of that jurisdiction is a self-refutation of the contention. Such exclusive jurisdiction is dependent upon the statute, and where there is no statute comparable to the provisions of the Interstate Commerce Act conferring such

jurisdiction, no similar jurisdiction exists. We have no statute in this state clothing the Railroad Commission with any power or authority to determine controversies such as are presented by the counterclaim. That pleading sets forth the fact that the plaintiff entered into a contract with the defendant by which it agreed to furnish it with a certain amount of gas and electrical energy for the purposes of running its manufacturing plant. It then alleges that the plaintiff failed to fulfill its agreements and obligations in such respect, and that damages to the defendant resulted because of such failure. Now we ask where the power is vested in the Railroad Commission to determine the issue thus presented, or grant relief for the wrong and damages sustained? It is true that the Railroad Commission has a supervisory and regulatory control over the public utilities of this state in the matter of prescribing reasonable rates and fixing standards of adequate service. But its orders in such respect relate solely to the future. It has no power to redress any wrongs or grievances arising from the past conduct of the utility. In this case the findings of the Railroad Commission can be of no assistance to the court. The obligations of the utility are measured by the terms of its contract with the defendant. If that is a valid contract, and we now are so assuming, the only issue to be determined is whether there was a breach thereof on the part of the utility and the amount of the damages sustained because of such breach. This is a judicial question, pure and simple. It is a wrong sustained by the defendant which the Railroad Commission has no power to redress, neither can it be of any assistance to the courts in determining the rights of the parties.

We have already said that we assumed the contract to be legal. The counterclaim is properly subject to criticism because it does not allege that the contract called for rates approved by the Railroad Commission, and by virtue of section 1797m33 the utility cannot accept for its service any rates other than those approved by the Railroad Commission. However, under the liberal rule of construing pleadings most favorably to the pleader, we have assumed that the contracts referred to in the counterclaim were legal contracts. If they were legal, we see no reason why they should not be binding upon the utility and why it is not responsible for the damages resulting from the breaches thereof. If for any reason they were illegal, that matter may be pleaded as a defense. However, as the pleadings now stand, the counterclaim states a valid cause of action, of which the court has jurisdiction. It results that the order sustaining the demurrer should be reversed.

Order reversed, and cause remanded for further proceedings according to law.

In re DERUSSEAU'S WILL.

CRAITE et al. v. MORNEAU.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Wills $\S$ 52(6) — Testamentary incapacity cannot be presumed because testator had epilepsy.

While the fact that a testator had epilepsy may be important in determining the question of testamentary capacity, neither insanity nor testamentary incapacity can be presumed from the fact that he had long suffered from epilepsy.

2. Wills $\S$ 55(5)—Evidence held to show that a testator was competent to execute his will.

Evidence held to show that a testator, afflicted with epilepsy, had mental capacity to execute a will.

3. Wills $\S$ 163(2)—Evidence held to show no fiduciary relationship existed with devisee.

Evidence that a testator lived for a period of one month in the home of devisee, who was sometimes present with others when the testator transacted financial affairs, did not show a fiduciary relationship, so as to change the ordinary rule as to the burden of proof.

4. Wills $\S$ 166(2)—Evidence held to support the finding that testator was not unduly influenced.

Evidence that testator lived in the family of the devisee for about five years under an agreement to leave devisee his property by will in return for support and medical attention during his life, and that the devisee was sometimes present when the testator transacted financial affairs, and went with testator to have the will drawn, but was not present when instructions for drawing it were given, supported the finding of the trial court that testator was not unduly influenced.

5. Wills $\S$ 66—No breach of contract by devisee to care for testator, defeating the will.

Where the devisee under a will had made a contract with the testator to provide him with support and medical attention during his life in return for being made sole devisee under the will, that the devisee after several years took testator to an insane asylum, when it became impracticable for him to remain in devisee's household, is not a ground for contesting the will.

Appeal from Circuit Court, Barron County;
W. R. Foley, Judge.

Application of John Morneau for probate of the will of John Derusseau, deceased. From a judgment affirming the judgment of the probate court, admitting the will to probate, Rose Craite and others appeal. Affirmed.

This is an appeal from a judgment of the circuit court for Barron county, Hon. W. R. Foley, circuit judge, affirming a judgment of the county court admitting to probate an

instrument purporting to be the last will and testament of John Derusseau, deceased. The will in question was executed on April 29, 1912, the respondent being named sole beneficiary, and the appellants, brothers and sisters of the deceased, being expressly excluded. At the same time a contract was entered into between the respondent and the deceased, whereby the respondent, in consideration of \$15 a month and his being named sole beneficiary, agreed to take the deceased into his home and provide food, clothing, and medical attention for him during his life, and care for him as he would for one of his own infant sons.

The deceased lived at the home of the respondent from the early part of April, 1912, until his removal to the Eau Claire Insane Asylum, after an application by the respondent, in January, 1917. In October, 1917, a brother-in-law secured his release and took him to Rice Lake. He returned him soon after to the asylum, but in December, 1917, he again secured his release and arranged for his care in a Catholic Sisters' Home in Dubuque, Iowa, at which place he died in August, 1918, at the age of 39 years. The deceased had suffered from epileptic fits since early childhood. Because of this affliction, relatives as well as strangers were reluctant to have him in their families. As a consequence, since the death of his mother in 1902, he had lived at various places for short terms, sometimes with relatives, sometimes on the farms of neighbors as a farm hand, and a few seasons in the woods, with logging crews. For approximately two years previous to the making of the will and contract, he had been employed on the farm of one of his brothers-in-law, John Dorsey, at whose request he was taken to the home of the respondent.

The heirs at law objected to the probate of the instrument in question as the will of the deceased, on the ground that it had been procured by undue influence, and that at the time of its execution the deceased was of unsound mind and not possessed of sufficient mental capacity to make a will. There was testimony to the effect that E. Craite, a brother-in-law, acted on various occasions as business adviser of the deceased, and this witness claims to have influenced him to make certain deals, as well as to have attended to the details. There was testimony to the effect that the respondent was nearly always present when any money was paid to the deceased. Several of the brothers and sisters stated that the deceased talked and acted queerly and foolishly; that he was very forgetful, and sometimes forgot when he had lent money; that he could not be trusted to do certain tasks because of this forgetfulness; that he could not carry on a connected conversation, except at rare intervals; that

no one seemed to like to talk to him or be in his company; that some of his relatives were afraid of him; and that at school he was not able to learn. Mr. Craite testified that the deceased had told him in 1917, and after he had returned from the asylum, that he had never made a will; that, although he had made arrangements with the respondent, he wanted the others to have equal shares. Most of the testimony as to the eccentric conduct and conversation of deceased was given by relatives interested in breaking the will.

The respondent called several witnesses who testified that they had had business transactions with the deceased, in which he acted like any one else, and always seemed to be able to look after his interests. Numerous witnesses for proponent testified that they noticed nothing unusual in his talk or actions, except when he had the seizures; that he did not talk or act foolishly, except at such times; and that when well he was a good worker and could be trusted. Mr. Whitaker, a notary public who conducted an abstract office, testified to numerous business transactions with him as to drawing satisfactions, mortgage assignments, and deeds. Sometimes he would go to the office alone; sometimes, with others. These transactions continued from 1901 to 1912. Mr. Whitaker's evidence was that testator was keen in business matters. Other disinterested witnesses gave similar testimony as to his business transactions. Other facts will be stated in the opinion.

M. S. Hines, of Rice Lake, for appellants.
Arthur E. Coe, of Barron, for respondent.

JONES, J. (after stating the facts as above). If it were not for the testimony that the deceased had suffered from epilepsy since childhood, the facts in this case would call for very little discussion. The testimony given by relatives as to the peculiarities, forgetfulness, lack of reliability, and foolishness in conversation which they attributed to the deceased was far outweighed by evidence given by disinterested witnesses concerning his general intelligence, and especially his ability to attend to his business affairs. Except for an item of evidence by one of his relatives that he had forgotten a small loan he had made, there is no testimony of any unwise business transactions. On the contrary, the evidence shows that by his industry and frugality, notwithstanding the untoward conditions of his life, he had increased his small inheritance from \$2,000 to \$3,500. In a small way he had become a capitalist, and had invested and reinvested his money with at least average prudence. It is true that sometimes Mr. Craite, his brother-in-law had advised with him in these transactions, but at other times he went to the conveyancer alone, and seemed to exercise ordinary business

judgment, and was "keen enough to get 7 per cent. when he could."

It is strongly urged by the appellants, however, that any preponderance of the testimony as to the general business capacity of the deceased is overcome by the fact that he had been an epileptic since infancy. There was testimony that he sometimes had these seizures once or twice a day, sometimes once or twice a month; that sometimes he would be unconscious for an hour, sometimes for a day. Dr. Wallis, witness for contestants, testified that the disease is a progressive one, "in which the seizures become more intense and more frequent until death occurs, which usually does eventually, and during this time the mind is in a progressive state of deterioration," and that the epileptic seizure is followed by mental derangement of some degree, which may last from a few hours to a few days. The doctor further testified:

"It's a mental disease, because it is a progressive mental disease, in which the mentality of the patient deteriorates from the minute of the first seizure in direct proportion to the intensity and the frequency of the attacks, until the mind is lost, or death ensues, or the patient is cured. Those are the three conditions."

Contestants' counsel rely largely upon this testimony, and upon the fact that deceased was committed to the insane asylum, as evidence tending to establish his testamentary incapacity when the will was made. This commitment was made 4 years and 8 months after the execution of the will. There was a little testimony to the effect that his mental condition was not very different at the time of the commitment from the condition when the will was made. The evidence is clear, however, that the seizures had become more violent at the later period, and he died about 17 months after the commitment. The testimony convinces us that the mental and physical condition of the testator had greatly changed in the interval between the execution of the will and the commitment to the insane asylum.

We have been surprised to find that the effect of epilepsy upon testamentary capacity has been so seldom passed upon by the courts of last resort. Only one such case is cited in the briefs of counsel, to wit, *In re Michael Lewis' Will*, 51 Wis. 101, 7 N. W. 829. In that case, the general testimony showing peculiarities and weakness of mind of the testator was more weighty than in the instant case. In that case the testator was about 60 years of age when the will was executed. He had been absent from Wisconsin for several years, and returned to the state for the purpose of selling his land. The will bore date March 12. On the day before he had been seized with a fit and became unconscious. There was another seizure within

about 5 minutes after the execution of the will, and on the 14th of March he died. In an opinion by Mr. Justice Lyon, the will was sustained, and it is stated:

"It is doubtless within the knowledge of almost every person of ordinary intelligence that the victims of that malady frequently retain their mental faculties fully to the moment of attack, especially in the earlier stages of the malady."

In the present case there is no proof of any seizure for some weeks before or after the execution of the will. The testimony shows that the testator first went to his notary public, and then to Mr. Coe, who prepared the will, and on both occasions in their judgment seemed in a normal frame of mind. Undoubtedly he had long been the victim of a deplorable mental disease, and there had probably been some impairment of his mental powers before the execution of the will. From the answers filed in by the medical examiners when the testator was adjudged insane, it is argued by proponent's counsel that he was not then insane; but it is unnecessary to decide this question. Presumptions are not generally retrospective and even if he was insane at the time of the commitment, it does not follow that he was insane 4 years and 8 months before.

[1] Neither insanity nor testamentary incapacity can be presumed from the fact that a testator has long suffered from epilepsy. It is true that such a condition may be an important fact, in connection with other facts in the determination of the question; but it is a matter of common knowledge that many persons have long been the victims of this dread disease, and yet possessed in the intervals between attacks a high degree of mental power. In Ray's Medical Jurisprudence of Insanity, it is said, at page 477:

"Zacchias contends that epileptics should not be responsible for any acts committed within 3 days of a fit, before or after. The principle is undoubtedly sound as it regards criminal acts; and certainly civil acts performed within 2 or 3 days after a fit deserve to be closely scrutinized. Not infrequently, however, the intellect may be as clear and strong as usual up to the very moment of an attack, and therefore it would seem as if other and satisfactory reasons should be required for invalidating transactions executed under such circumstances."

It cannot be said that, because a person is an epileptic, he is therefore insane. In re Will of Rapplee, 66 Hun (N. Y.) 558, 21 N. Y. Supp. 801; In re Johnson's Will, 7 Misc. Rep. 220, 27 N. Y. Supp. 649; Estate of Jansa, 169 Wis. 220, 171 N. W. 947.

[2] There is no testimony that the testator had hallucinations or delusions in the intervals between attacks. Neither the will nor the accompanying agreement was so complicated as not to be easily understood. We

are convinced from the whole testimony, including that relating to epilepsy, that the testator had sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were or should or might have been the objects of his bounty, and the scope and bearing of the provisions of his will, and that he had sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. We therefore hold with the county judge and the circuit judge that the testator was competent to execute the will in question.

[3, 4] It is strongly urged by contestants that the will was obtained by undue influence. As the basis of their argument it is urged that the proponent of the will sustained a fiduciary relation toward the testator. There is no evidence that the proponent had been the trusted agent of the deceased prior to the execution of the will. On the contrary, the evidence shows that Mr. Craite, husband of one of the contestants, had been much more active than the proponent in assisting the testator in his business affairs. Apparently there had been no greater intimacy between John Derusseau and Morneau than had existed with other relatives. It is true the deceased had at times lived with Mr. and Mrs. Morneau; but he had also at times lived with other members of his family. Any inference of a fiduciary relationship must rest upon the bare facts of the relationship and residence in the same household with the proponent for about a month just prior to the execution of the will. We do not consider that the evidence shows any such fiduciary relation before, or at the time of, the execution of the will as to change the ordinary rule as to the burden of proof.

As furnishing one of the elements of undue influence, it is argued that the other relatives were not informed of the execution of the will. As bearing on this subject, it is an important fact that the testator had offered to make a similar arrangement by will to his sister, Mrs. Craite, if she would agree to support him, and that she had rejected the offer. His plan of disposing of his property thus became known to one of his sisters, and perhaps it is fair to assume that it became known to the others. We do not believe that under the circumstances it became the duty of the respondent to discuss the subject with other members of the family.

It is urged that the deceased was one easily subject to undue influence by others. This subject is partly covered by the foregoing discussion as to his competency. There is a singular lack of testimony that he had been influenced against his will by John Mor-

neau or any one else. The evidence that Mr. Craite had in one or two instances given advice, which had been followed, is the only evidence bearing on the subject.

It is urged that John Morneau showed a disposition to gain an undue advantage, and that he had the opportunity for so doing. Unless the will and the agreement afford such evidence, there is nothing to support this contention. There is no evidence of any importunity on his part, nor that he in any way took any advantage in his business dealings with the testator. It is true that when the testator went to Mr. Whittaker and asked him to draw a will, proponent went with him and heard the conversation. Mr. Whittaker had long known that the testator had epileptic seizures, and for that reason advised him to go to a lawyer, who would understand the subject better. When he went to Mr. Coe, the proponent was not present during the interview in which the instructions were given. Mr. Coe had known the deceased for years and was aware of his affliction. He therefore took unusual care to ascertain whether there was testamentary capacity. He testified as follows:

"I did something on that occasion that I never did before and I never have done since. I made an effort, by examining this man, John Derusseau, as to his past history, and his relatives, and his property, to test his mental capacity, and to that end I went with him to the county judge's office—Judge Meadows was county judge—and I asked him a lot of questions in Judge Meadows' presence as to his history and his previous life, and after hearing his answers I returned to the office with him and then drew his will. And from his answers, upon his answers, I base my statement that he was, at the time he executed his will, of sound and disposing mind and memory."

At this interview in the presence of the county judge, the proponent was not present.

It is urged by counsel that the will and accompanying agreement are evidence of undue influence; that it was unnatural and unfair to exclude all other relatives, and to make John Morneau the sole beneficiary under the will. The testator was profoundly conscious of his sad condition, and knew that he could not be a welcome inmate in the households of his brothers and sisters. His sister, Mrs. Dorsey, had requested that the Morneau take him into their home. Mrs. Craite went with the testator to her sister, Mrs. Morneau, and asked her to take care of him. We do not agree that it was unnatural for John Derusseau under those circumstances to make some provision with his little property by which his deplorable condition could be to some extent ameliorated, and we do not think that testamentary provisions of this character should be lightly set aside.

Under the circumstances, even if John

Morneau had first suggested and requested that some arrangement be made by which he should be compensated for the burden he was to assume, that would not be sufficient proof of undue influence; but it is evident that the idea of some such provision had been entertained by the testator before he went to the home of Morneau. The testimony shows that the other relatives of the deceased had no peculiar claim upon his bounty. Mr. Craite testified that they were—

"financiers, living off the interest of their money; they are not farmers; got money to live. They live in the city, and are retired farmers. They are not business men."

[5] It is argued that Morneau breached his contract by taking the testator to the insane asylum. He had borne the burden and responsibility of kindly caring for his brother-in-law for 4 years and 8 months. The time then came when it was no longer practicable that he should remain in the household. Morneau's own son then had epileptic seizures, which greatly complicated the situation.

We are satisfied with the finding of the trial judge that the will was not obtained by undue influence. Even if John Morneau did breach his agreement nearly 5 years afterward, that would not be ground for a contest of the will.

Judgment affirmed.

LAMBERSON v. LAMBERSON et al. *

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Witnesses $\S$ 178(4)—Plaintiff's testimony as to transaction with decedent admissible, where deposition introduced by defendants.

In action to compel conveyance by executor of land deeded by decedent, where plaintiff was fully examined by defendant before trial and cross-examined at trial as to portions of such examination, and defendants made his deposition a part of the record without qualification, plaintiff's testimony as to transactions with decedent was competent, despite St. 1919, $\S$ 4069; the door being opened to permit him to so testify, as though examination had been at trial by calling him as an adverse witness under St. 1919, $\S$ 4068.

2. Depositions $\S$ 101—When offered in evidence by party taking, deponent may use it.

While a deposition is not a part of the record until offered, the party taking it may offer it, whether the party examined be present or not (St. 1919, $\S$ 4096, subd. 2), and, though it cannot be offered by the party whose deposition is taken, it may be used by him when offered as evidence for the other party, as though he were called in rebuttal to testify concerning transactions therein testified to.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Motion for rehearing denied December 13, 1921, with \$25 costs.

3. Specific performance §121(6) — Evidence held sufficient to support finding of sale by deceased father to son not in possession.

In an action against an executor to compel conveyance of land sold by decedent to his son, evidence held sufficient, in view of the relations between father and son, to support a finding that plaintiff and decedent signed the contract, that it covered the property in question, that its terms were substantially as testified to, and that it was intended to vest title in plaintiff, though the latter did not take possession, demanded no accounting, and made no assertion of ownership during his father's life.

4. Appeal and error §1071(5)—Findings, not essential to support judgment, may be disregarded.

Findings, not essential to support the judgment, may be disregarded.

5. Specific performance §121(10)—Evidence held to show claimant did not abandon rights under contract of sale by decedent.

In an action by a son against an executor to compel the conveyance of land sold to him by his deceased father, evidence as to the relationship between the parties, the understanding of members of the family that plaintiff was not physically fitted to manage a farm, that he was occupied in other pursuits with his parents' approval and consent, that his father was able to supervise the management of the farm, and arranged to have it conducted by plaintiff's brothers or their sons, together with plaintiff's natural hesitancy, in such circumstances, to deal with his father on a strictly business basis, held to justify the court's conclusion that he did not abandon his rights under the contract, though he did not occupy and manage the farm.

Siebecker, C. J., and Owen, J., dissenting.

Appeal from Circuit Court, Trempealeau County; L. H. Bancroft, Judge.

Action by Lloyd Lamberson against Alfred Lamberson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The plaintiff brought this action to compel conveyance to him of a certain farm of 160 acres in Trempealeau county, Wis., and also to compel an accounting for the profits from the same accruing during the lifetime of his father, the alleged grantor, and from the defendant Alfred Lamberson, who, as executor of the father's estate, had subsequently retained possession. The trial was had before Hon. George Clementson, to whom the case had been transferred, and upon his death prior to its determination, by stipulation, the record was submitted to and a decision made thereon by Judge Clementson's successor, Hon. Levi M. Bancroft.

The question of accounting under the second cause of action was sent to a referee for hearing, and upon stipulation by the parties there a determination was had that the debits and credits on any such accounting were equal, and no amount due either party

from the other in such matter. Such finding of the referee was confirmed by the judgment herein.

John C. Lamberson owned and managed considerable farm property in the neighborhood of Whitehall in said Trempealeau county. His family consisted of his wife and four children, in the order of their ages as follows: Alfred, Berenice Lowe, George, and Lloyd. Lloyd was the only minor, and about 19 years of age in December, 1901, and then living with his parents. In November, 1901, John C. Lamberson was stricken with what appeared to have been some trouble with his heart, from which he recovered shortly thereafter to a considerable extent, yet he never thereafter carried on the active management of his property. A short time thereafter he gave up his home at Whitehall, purchased a homestead at Winona, Minn., and resided there with his wife until his death in 1917. From about the 1st of December, 1901, and during substantially the whole of said month, he gave considerable and serious consideration to the matter of disposing of his property interests in case of his death. He consulted with Mr. Ekern, then practicing law at Whitehall, and numerous drafts were prepared by Mr. Ekern of land contracts as to certain real estate and also forms of wills. The record does not disclose which, if any, of such proposed wills were signed by him at that time.

He submitted to the three older children some at least of such proposed land contracts and wills, and invited suggestions from such children with reference to their contents. He had in April, 1897, conveyed to the second son, George, a farm, the deed therefor placed in escrow with a bank at Whitehall, which was not to be delivered to George until after the death of the father. It remained there until after the father's death, and was then recorded. This conveyance was expressly referred to in the several drafts of subsequent wills, and expressly confirmed and ratified in the probated will of Mr. Lamberson made in 1915.

In December, 1901, it appears that he had left three farms, one of which consisted of about 160 acres, 40 acres of which had formerly belonged to a man by the name of Daggett and 120 to a man named Dowd, and which was designated at times by Mr. Lamberson and the family as the Dowd-Daggett farm, which is the one here involved.

Some question was raised on the trial as to whether Mr. Lamberson owned the entire interest in this property in December, 1901, but it is not deemed material in the disposition of this case, for it is alleged in the complaint and admitted in the answer that he was, at the time of the transaction here involved, the owner of said farm.

On December 24, 1901, Mr. and Mrs. Lam-

person signed and acknowledged two copies each of land contracts to the sons George and Alfred, respectively, of two of the three several farms. One land contract was written out in full in typewriting; the other was on a printed blank, filled in by typewriting, and each set dated as of December 18th. Each fixed a purchase price for the respective pieces, with a provision that the payment of the substantial part of such purchase price was not to be made until after the death of the father, and provided for annual payments of interest during his lifetime at a rate of approximately 8 per cent.

Alfred and George entered into possession of such farms, and continued to hold the same until the death of the father. Such land contracts were not recorded during the father's lifetime. One copy of the land contract to George was kept by him, and both copies, the one in George's and the one in the father's possession, had indorsed upon the backs thereof the payments made from time to time of the interest. The typewritten duplicates of the land contract to Alfred were both kept by the father in the bank with his other papers, and to which it appears Alfred had also access. The indorsements of payments were made on but one of these land contracts.

After the death of the father there was found among his papers a land contract with the plaintiff's name as grantee, and which had been signed by the father and mother. This was taken with other papers by the son Alfred, and placed in a box in the vault in the bank at Whitehall and, as appears from his testimony, upon making a search therefor at his mother's request some ten days or two weeks subsequently, he was unable to find the same, and it was not produced at the trial. Due notice to produce the same was given on behalf of the plaintiff to defendants prior to the trial.

The mother, widow of John C. Lamberson, testified that she did on December 23, 1901, with her husband, sign a land contract of the 160 acres, in which the son Lloyd's name appeared as grantee. She testified that she neither saw it signed by Lloyd nor delivered to him, he coming into Mr. Ekern's office, where the various transactions were had, just as she was leaving.

The plaintiff never took possession of this farm or assumed any direction with reference to its management, and never demanded any accounting as to its proceeds during his father's lifetime. The relationship between the father and the three sons continued to be always friendly. The plaintiff, apparently with his parents' consent, was taking a course in a business college at about the time of the transaction, was subsequently in the harness business at Whitehall, and traded the same for a farm in the northern part of the state, but never undertook to

run the same, and was subsequently and up to the father's death and thereafter employed as an accountant for the Studebaker corporation in Indiana, where he was living at the time of the trial.

This particular farm was for one season rented to the husband of Mrs. Lamberson's daughter by a former marriage. Thereafter, and until the death of the father, it was rented on shares by the sons Alfred and George or their respective sons. Accounts appear to have been kept by the father during the balance of his life as to the transactions with reference to this particular farm and accounts stated by him from time to time with reference to the charges, expenses, and proceeds thereof. In such of the statements as are in evidence it appeared that it was therein designated by the deceased under the term Dowd or Daggett farm. No writing was produced in which the deceased designated it as belonging to Lloyd or appeared to keep an account of it with him.

In one of the drafts of his proposed will drawn in December, 1901, and preserved in Mr. Ekern's files, he speaks of three land contracts to the three sons, naming them. In 1915, apparently upon ascertaining that he was then suffering from cancer, he executed his last will, subsequently admitted to probate, in which he specifically devises this particular 160-acre farm to the son George, subject to a charge of \$7,000, making no reference to any possible interest of Lloyd in the same. The general nature of this will appears to have been known at about the time of its execution to the sons Alfred and George. Neither his wife nor daughter, however, had any information concerning the same prior to his death, as they had of his proposed wills in 1901.

The daughter, Mrs. Lowe, testified to her father having brought to her in the early part of December, 1901, three proposed forms of land contracts unsigned, and also of a will; that she and her father read them over at the time and discussed them and particularly the contract for Lloyd, and that in the form of will shown her at that time the fact of the execution of three land contracts was expressly mentioned; that she was asked by her father to discuss the various documents with her husband, and write fully her opinion. She did so write him a letter in the record, of December 9, 1901. She further testified: That on New Year's day following her father came to her house, and stated to her:

"I have got those papers all signed up now, and everything is finished, and it doesn't make any difference whether I am dead or alive."

That at the time of the first interview he expressed himself as not intending that Lloyd should go on the farm, owing to Lloyd's condition of health, and that he

could do better at some other kind of work, and that he, the father, could just as well manage the place; the other two boys living right near there.

On Mrs. Lowe's cross-examination she was asked by defendant's counsel as to whether she knew that there was a contract signed by Lloyd, and the following took place:

"A. My father said it was signed. That is all I know about it. Q. Simply said it was signed? A. Yes; he said it was signed, and his business all completed. I have a letter in which he states that everything is done. Q. I am not asking for your letter now. A. All right."

No reference appears to have been subsequently made on the trial to this letter, nor was it produced. She further testified on direct examination that a number of times subsequently he spoke of this farm as being Lloyd's place.

The mother also testified that it was referred to by the father between 1901 and 1907 as Lloyd's place. A lady who lived near the family in Winona while visiting at Whitehall was also told by the father that this farm was Lloyd's, and that he had given three farms to his sons.

At the close of the oral testimony, when defendant's counsel stated that he was through with their part of the case, he also stated that there were certain depositions taken in the matter which were to be considered as in the case, plaintiff's counsel stating that it was the same for their side with examinations they had also taken. Defendant's counsel then stated that he referred to the deposition of Mrs. Lamberson, the widow, "the adverse examination of Lloyd Lamberson," and other depositions. The court then ruled that all those are now introduced subject to any objections that could be now made. Defendant's counsel then announced that their case was closed.

The findings of fact by the trial court who determined the case, in substance, so far as being material on this appeal, were to the effect that the land contract as alleged by plaintiff was executed by the deceased and his wife December 23, 1901; the death of John C. Lamberson leaving a last will which was duly admitted to probate and the devising therein of the lands in question to the defendant George Lamberson; that after the making of the contract of December 23, 1901, the original of said contract was by mutual consent left in the possession of John C. Lamberson; that by mutual arrangement between the parties to such contract John C. Lamberson was left in possession and was to receive the rents and profits and pay the taxes and assessments and account to the plaintiff for any difference over and above such and the \$125 annual payment specified in said contract; the readiness and ability during the lifetime of John C. Lamberson

of the plaintiff to pay anything that might be due from him on account of said contract and the same so far as the executor is concerned, but that plaintiff was unable at any time, either from the said John C. Lamberson or his executor, to obtain any statement of account in such matter, and has therefore been unable to pay the same; that the plaintiff has demanded possession of the real estate and an accounting with the executor; that there has been a refusal on the part of the executor to convey, and the defendant George Lamberson claims an interest in the said real estate under the will aforesaid; that the contract has never been revoked or abandoned by the parties thereto, and is still of force and effect.

As conclusions of law: First, that the plaintiff is entitled to judgment for the immediate possession of the land; second, for an accounting; third, that the defendant George Lamberson is barred from all right, title, and interest in and to the real estate.

As appears from his memorandum decision, the trial court deciding the case considered the evidence of the plaintiff as to the execution of the contract by the deceased, and in effect overruled the objection interposed by defendants to such testimony, but apparently on the ground that the proper objection had not been interposed.

From the judgment entered in favor of the plaintiff the defendants Alfred Lamberson as executor and George Lamberson have appealed.

Tawney, Smith & Tawney, of Winona, Minn., and Ole J. Eggum, of Whitehall, for appellants.

Cowie & Hale, of La Crosse, and A. V. A. Peterson, of Whitehall, for respondent.

ESCHWEILER, J. (after stating the facts as above). Laying aside for the time consideration of the testimony of the plaintiff, there is ample evidence in the record upon which the findings of the court can and should be upheld so far as they determine that a land contract for this farm of 160 acres was signed by John C. Lamberson and his wife on December 23, 1901, at Mr. Ekern's office at Whitehall and on an occasion when the plaintiff was at the same office. The testimony of Mrs. Lamberson was properly received, and without objection, to that effect. It also appears from defendants' own testimony that a land contract wherein Lloyd Lamberson was named as grantee and signed by John C. Lamberson and his wife was found among the father's papers in the safety deposit box after his death. It therefore may be considered as conclusively shown that when Mr. Lamberson, then evidently considering the future disposition of all of his property and giving by his land contracts of December 24th two of these three farms to Alfred and George, did on the preceding day

go so far at least as to have reduced to writing and signed by himself and wife a land contract making the plaintiff the grantee under substantially similar conditions of the remainder of his real estate, the farm here involved. He had thus evidently by December 23d and 24th reached a definite and declared conclusion as to the disposition he wished to make of his property, and in accordance with the suggestions, in a general way at least, embodied in the forms of contracts and wills that had been submitted to the two older sons and the daughter, and concerning which the advice of each of them had been sought. It negatively appears that Lloyd, the youngest, a minor, and not deemed presently able to carry on farm work, was not consulted concerning the matter, although evidently the subject of the parents' solicitude and affection. As late as December 19th, in a letter to the son Alfred, the father says:

"Look the contracts over and see if they are what you expected and let me know by return mail as my will has got to be based on these contracts."

No suggestion appears in the record that any objection was made by any of the three older children to the fairness of the proposed division or the particular provision for Lloyd.

George testifies that he knew the father contemplated giving Lloyd the Dowd-Daggett farm about the time that his, George's, contract and Alfred's contract, were made out. He also testifies that he saw all three contracts at about that time, that Alfred's was then executed, his was not, and Lloyd's was not. It is evident, however, from the face of the land contracts to Alfred and George, in each of which the date of acknowledgment of December 24th is written in with pen and ink rather than by typewriter, that he must be confused or mistaken as to the precise time when he saw these land contracts, because it is a verity that the contract to Lloyd was signed and preceding either of the others.

The preservation by the father of this signed land contract to his youngest son among his valuable papers, rather than leaving them in Mr. Ekern's office files, as was the case with the drafts of the unexecuted wills and land contracts; the evident intention in December, 1901, of making a complete future disposition of all of his real property; the absence of anything showing that he was wavering in his mind as to whether he would give this 160-acre farm to either Alfred or George rather than to Lloyd; the disposition he was then making and did make for these two elder brothers; the fact that the only changes suggested during this period were more as to matters of details than as to the general scheme; his stating to the daughter New Year's Day that all was finished—are very persuasive in con-

firming the conclusion of the trial court that there was then a completed, effectuated disposition of all of his real property by the signing and acknowledging of three land contracts of equal force and validity, rather than, as contended by defendants, a halting by him after he and his wife had signed and acknowledged the land contract to Lloyd, and thereby changing in such substantial manner his general scheme for division, and as against his youngest child, and without any apparent cause for so excluding him.

The apparent assertion by the father in his last will, made in 1915, of a then contrary intent as to this farm by his devise thereof to George can have no weight therefore in the disposition that must be made here of the rights of the plaintiff arising, if at all, by the transaction of December, 1901. *Jones v. Caird*, 153 Wis. 384, 386, 141 N. W. 228, Ann. Cas. 1914A, 88.

Considerable stress is laid by appellants upon the testimony of Mr. Ekern and his then stenographer, to the effect that the copy of the signed land contract to the plaintiff, which was found in the office files as late as 1919, was the original ribbon copy, and the one which, under the custom of the office, would be the one to be signed by the parties, and the improbability of the sister, Mrs. Lowe, being able to recollect the description of the property covered by the land contract is not of much significance, in view of the undisputed fact that some form of a land contract was signed by Mr. and Mrs. Lamberson, with Lloyd named as grantee, that Mrs. Lamberson knows that it was of this particular property, that it was subsequently so referred to by the father as being plaintiff's farm, and, perhaps what is more significant than all, that Alfred Lamberson, executor of the estate, the only one who saw the contract after the father's death, does not testify that such contract was not of this particular farm; also that there was no other real estate belonging to Mr. Lamberson at that time than this farm, which was not then disposed of by deed or land contracts to the other sons.

[1] Unless defendants have by their procedure on the trial waived the objection which was properly interposed under section 4069, Stats., as to the want of competency of Lloyd to testify to a transaction or communication with his father, now deceased, his testimony as to the contents of the land contract of December 23, 1901, cannot be properly considered in this case. *Felz v. Felz's Estate*, 170 Wis. 550, 553, 174 N. W. 908. And the same would hold good as to his testimony of his signing the land contract in the presence of his father, having then received it and immediately returning it. *Jackman v. Inman*, 137 Wis. 30, 118 N. W. 189, 22 L. R. A. (N. S.) 559; *Chase v. Woodruff*, 138 Wis. 641, 646, 120 N. W. 499. We think however, that this testimony of

(184 N.W.)

the plaintiff was properly before the trial court for consideration in disposing of this case. On the adverse examination of plaintiff taken at the instance of the defendants more than a year prior to the trial, he was examined fully by defendants' counsel upon a stipulated notice that he should produce on such examination the written evidence, records, etc., of transactions between plaintiff and said John C. Lamberson. He was there asked as to whether he took any part in the leasing of the farm after December, 1901; as to having the original or a copy of the alleged contract of December 23, 1901, and testified without objection that he did have the original in his possession at the time it was signed by him and at the date thereof. As to the number of copies that were signed and in response to a question as to whether he could recall the contents of the alleged contract he answered:

"I knew the general provisions of all three contracts, as I read them at the time I signed my contract, and Mr. Lamberson was particularly careful about showing me the other boys' contracts, and I read these contracts as well as my own, and read the will, made at that time, providing for the disposal of his property, in which will, I believe, these contracts are all mentioned."

Defendants' counsel then moved to strike out all that part of the answer after the words, "I know the general provisions of all three contracts, as I read them at the time I signed my contract," as being unresponsive to the question. This objection, however, was not renewed at the trial.

When called as a witness on his own behalf at the opening of the trial he testified without objection as to being called by his father to Mr. Ekern's office December 23, 1901, that a written instrument was handed him at that time, which he read over carefully. Defendants' counsel then objected to his testifying to the effect that he was asked to sign it by his father, on the ground that it was incompetent and being a conversation with a deceased person, the court received it subject to the objection, and plaintiff then testified that he did sign it in the presence of two witnesses, and after the signature of his father and mother were made.

The suggestion then being made that the contract was lost, which was not disputed, he was permitted to testify as to its contents over objection on the ground that it related to a transaction with a deceased person. He also testified that he turned his contract over to his father the same day for safe-keeping, objection being interposed by defendant to this as a transaction with a deceased person. The court overruled the objection.

On cross-examination, referring to his direct examination as to the transaction of December 23, 1901, in Mr. Ekern's office,

he was asked by defendants' counsel who was present at the time that he signed his copy and his father's copy. He was then interrogated concerning certain portions of his adverse examination before trial on the subject of how many copies were executed, and whether he had not there testified that he had signed his name only once, and that he did not carry the paper away with him and had not seen it since. He was further cross-examined as to the contract providing that he was to have possession immediately; as to the form of the contract, and as to when he signed the document, answering that he signed it after his father and mother had signed it.

On redirect examination plaintiff's counsel asked to have the witness testify as to all that was said between his father and himself at the time of the execution of the contract. The court held that there was not sufficient opening of the door by the adverse party to permit him to so testify, and nothing further was done in this regard on the trial.

We think that the use on the cross-examination of the plaintiff by defendants' counsel of the portion of the deposition of plaintiff as an adverse witness was sufficient opening of the door to permit the witness' testimony as to his signing of the contract after the father and mother had signed it to stand as a part of his case.

Manifestly if this examination of the plaintiff had been made at the trial by defendants calling him as an adverse witness under section 4068, Stats., the door would have been opened by such examination to permit the plaintiff to testify in that regard at least. *Drinkwine v. Gruelle*, 120 Wis. 628, 632, 98 N. W. 538. It was as effectual as though it had been based upon an express offer on defendants' part so to examine as to the transaction as in *Johnson v. Bank of Wisconsin*, 163 Wis. 369, 373, 158 N. W. 59.

[2] Furthermore, the defendants themselves made all the plaintiff's testimony on his adverse examination part of the record in this case by their offer of the whole of the deposition without qualification or reservation of any kind at the closing of the testimony. While it is true that such a deposition is not a part of the record on the trial until it be offered, yet the express right is given by section 4096, Stats., subd. (2), to the party taking the examination to offer the same, whether the party so examined be present or not. It is also true that such cannot be offered by the party whose deposition is thus taken (*Lange v. Heckel*, 171 Wis. 59, 175 N. W. 788), and followed in *Thomas v. Lockwood Oil Co.*, 174 Wis. —, 182 N. W. 841, yet by defendants' own offer of the deposition they made it their own evidence, subject to proper objections to the whole or parts thereof by the other party. *Maldaner v. Smith*, 102 Wis. 30, 40, 78 N. W. 140; *Sloux Land Co.*

v. Ewing, 165 Wis. 40, 45, 160 N. W. 1059. The testimony thus made a part of the record, may as properly be used by the plaintiff in the consideration of this case as though he had been called in surrebuttal to testify as to transactions concerning which the defendants had already thus offered evidence, as was done in the case of *Anderson v. Anderson*, 136 Wis. 328, 331, 171 N. W. 801.

[3] We are satisfied therefore that there was in the record ample to support the finding of the court that there was a signing of this land contract by the plaintiff as well as by the father and mother; that it covered the property in question; that its terms were substantially as testified to by the plaintiff and the other witnesses; and that it was intended to be and considered an effectual transaction, whereby the minor son, then a member of the family and under the father's direction and control, became vested with the same rights in and to the real estate described in his land contract as did the sons George and Alfred in their respective pieces. That possession was not taken by Lloyd of his piece of land, as was done by Alfred and George of their respective portions, that no accounting was ever demanded by Lloyd during his father's lifetime, and no assertion of ownership made by him during that period, is not sufficient, in our judgment, in view of the situation and relationship existing between the two to overthrow the findings of the trial court.

[4] The plaintiff was not permitted to testify as to any express agreement between his father and himself in December, 1901, for the carrying on of the farm thereafter, if any such agreement were made, and the findings excepted to by defendants, to the effect that there was such agreement, are without direct evidence for their support, but in view of what has already been said such findings are not essential to support the judgment and may therefore be disregarded.

[5] It is also unnecessary to consider whether actual manual delivery of a land contract by the grantor to grantee is essential in order to perfect the contract, for there is sufficient evidence as indicated above to warrant the court's conclusions that the transaction between the father and the plaintiff was completed. The relationship between the parties; the evident understanding by all members of the family that Lloyd was not fitted for the work required to successfully manage a farm of that size, and that he was, with his parents' evident approval and consent, occupied in other pursuits; that the father was so situated that he could in a general way supervise the management of this farm, and did arrange to have it conducted by the sons Alfred and George or their respective sons; the hesitancy that would naturally arise between a

son so placed as was the plaintiff on evidently affectionate terms with his father to deal with such parent of whose bounty he was thus a beneficiary on a strictly business basis—all are amply sufficient to justify the conclusion of the trial court that there was no abandonment by Lloyd of the rights that he secured by the transaction of December 23, 1901.

Under the stipulated facts agreed to by the parties to this action it was evident that an accounting would have been an idle ceremony, as it stands conceded that the receipts and proper disbursements in the conduct of this farm balanced.

It follows from what is said that the conclusion of the trial court that the plaintiff is entitled to have it declared that he is the owner of the farm in question can and should be upheld.

Judgment affirmed.

SIEBECKER, C. J. (dissenting). I cannot concur in the decision and opinion of the court. Permitting the plaintiff to testify to transactions with his father concerning the signing and delivery and plaintiff's redelivery of the land contract in December, 1901, as detailed in the statement of the case and the opinion of the court, clearly shows, in my opinion, that the trial court erred in receiving plaintiff's evidence of those transactions, over defendant's objection, under section 4069, Statutes. Nor can I concur that defendants waived this objection by their offer of plaintiff's deposition as adverse party without qualifications before the reception of evidence was closed. To hold that such offer so made after the court had erroneously admitted evidence of the substantial and material parts of such transactions with the deceased was an opening of the door on this subject by defendants seems to me contrary to the intent of the parties. Such offer by defendant of plaintiff's adverse examination was manifestly induced by the court's erroneous ruling in admitting at the trial plaintiff's oral testimony of these transactions with his deceased father. In view of the court's action on this subject, defendant's counsel naturally supposed that all plaintiff had testified to on this point was before the court, and would be considered in deciding the case. It seems plain to me that this court's decision on this phase of the case is a misinterpretation of defendant's purpose in thus finally meeting the trial court's erroneous rulings under the provisions of section 4069, Statutes. A study of the evidence persuades me that the trial court's findings that plaintiff's father conveyed title by contract of the farm in question in December, 1901, are not sustained by the record on which the trial court acted. Furthermore, if the evidence of plaintiff concerning the transaction between him and his deceased father in December, 1901,

be excluded from the case, as I think it should be, because incompetent under section 4060, Statutes, then there is no evidence in the case to sustain the plaintiff's case.

I am of the opinion that the trial court committed prejudicial error in receiving plaintiff's evidence of the transaction with his deceased father, and improperly based its findings on such evidence, and that there is no legal evidence to sustain the judgment, and it should be reversed.

I am authorized to state that Mr. Justice OWEN concurs in this dissent.

BECKER v. GREEN COUNTY.

(Supreme Court of Wisconsin. Oct. 18, 1921.
Dissenting Opinion, Oct. 19, 1921.)

1. Officers $\S$ 94—Cannot recover salary during time ousted from office by erroneous conviction in absence of statute.

A public officer who had been erroneously convicted of a crime which works an ouster from his office cannot, under the common law upon reversal of such erroneous judgment, recover the salary for the time during which he was excluded from the office, but must depend upon a statute for recovery thereof.

2. Officers $\S$ 31—"Infamous crime" within constitutional and statutory provision as to ineligibility of person convicted thereof defined.

An "infamous crime" within Const. art. 13, $\S$ 3, making person convicted thereof ineligible to hold public office, and St. 1917, $\S$ 17.02, providing for vacancy of office upon conviction of officer of an "infamous crime," is a crime punishable by imprisonment in the state prison (citing Words and Phrases, First and Second Series, "Infamous Crime").

3. Judges $\S$ 22(1)—Ousted from office on conviction of Espionage Act held not entitled to salary on reversal of judgment.

County judge convicted under the federal Espionage Act of June 15, 1917, prior to the revision of St. 1917, $\S$ 4935, by Laws 1919, c. 362, $\S$ 12, ousted from office under Const. art. 13, $\S$ 3, and St. 1917, $\S$ 17.02, was not, on reversal of conviction, following stay of sentence, entitled to salary for the period of time he had been so ousted under St. 1917, $\S$ 4935, providing that the office of a public officer who had been convicted and sentenced to state prison shall be deemed vacated from the time of commitment to prison, and that the officer on reversal of judgment shall be restored to office with all its rights and emoluments.

4. Statutes $\S$ 147—"Revision of statutes" may constitute a restatement with material change in substance.

A revision of the statutes is more than a restatement of the substance thereof in different language; but implies a re-examination of them, and may constitute a restatement of the law in a corrected or improved form, in which case the statement may be with or without ma-

terial change, and is substituted for and displaces and repeals the former law as it stood relating to the subjects within its purview.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Revision.]

5. Statutes $\S$ 51—Consolidation of sections held re-enactment, and not a mere continuance of existing law.

Laws 1919, c. 362, $\S$ 14, providing for the consolidation of St. 1917, $\S$ 4935, with other specified sections to constitute section 17.03, subsec. 5, held a re-enactment, and not a mere continuance of existing law.

6. Statutes $\S$ 263—Creating new rights not applicable to past wrongs unless plainly so intended.

Statutes creating new rights are not construed as applying to past wrongs unless plainly so intended, and in case of doubt or ambiguity are construed as prospective only.

7. Judges $\S$ 22(2)—Statute entitling ousted officer to compensation on reversal of conviction not retroactive.

County judge, ousted from office on conviction for violation of the federal Espionage Act, prior to revision of St. 1917, $\S$ 4935, by Laws 1919, c. 362, entitling officer on reversal of judgment to compensation for period during which he was ousted, could not, on reversal of judgment, recover compensation, though Laws 1919, c. 362, took effect prior to such reversal.

8. Officers $\S$ 76—Legislature without power to restore to office ousted by conviction under law in effect at time of conviction.

Laws 1919, c. 362, $\S$ 14, providing for the consolidation of St. 1917, $\S$ 4935, with other sections to constitute section 17.03, subd. 5, and providing for the restoration to office of a convicted public officer on reversal of conviction, held not to entitle officer who has been ousted from office by conviction, under laws existing at time of conviction to restoration of office, the Legislature having no more right to restore ousted officer than to provide for the induction of an officer into office in the first instance.

Eschweiler and Doerfler, JJ., dissenting.

Appeal from Circuit Court, Green County; George Grimm, Judge.

Action by J. M. Becker against Green County. Judgment for defendant, and plaintiff appeals. Affirmed.

Action by plaintiff to recover his salary as county judge of Green county during the time he was suspended from that office by reason of his erroneous conviction under the federal Espionage Act. On the 6th day of August, 1918, the plaintiff was the county judge of Green county for the term ending January 5, 1920. On that date he was convicted in the United States court for the western district of Wisconsin of a violation of the Espionage Act (Act of Congress approved June 15, 1917, 40 Stat. 217) and sentenced to imprisonment for three years. Execution of said sentence

was stayed pending prosecution of a writ of error to the United States Circuit Court of Appeals. In October, 1920, and after the expiration of the term of office for which plaintiff had been elected, the Circuit Court of Appeals reversed the judgment and conviction, holding that as a matter of law the evidence did not justify conviction of plaintiff. Plaintiff was at no time committed to prison under said judgment and conviction. On September 19, 1918, the Governor of the state of Wisconsin appointed a successor to said Becker to fill the vacancy in said office of county judge, caused by the conviction of said plaintiff, as aforesaid. This action is brought to recover his salary as county judge from the time he was ousted from the office until the end of the term. The trial court rendered judgment in favor of the defendant, from which the plaintiff brings this appeal.

Wheeler & Witte, of Milwaukee, for appellant.

H. N. B. Caradine, Dist. Atty., of Monroe, and Olin, Butler, Thomas, Stebbins & Stroud, of Madison, for respondent.

OWEN, J. (after stating the facts as above). No mistake-proof system of administering justice has yet been devised, nor is it likely to be, as long as the element of human judgment enters into the scheme. The innocent will be punished and the guilty will escape. We contemplate this fact with regret, but nevertheless the fact exists. No one is in a position to realize this better than the plaintiff himself, who during many years has occupied an honorable and prominent position in the judicial system of this state. Although he has suffered most grievously by reason of the error committed, he has no doubt faced his misfortune as philosophically as one may be expected to do who smarts under the sense of grievous wrong.

[1] The question now presented is whether the written law of this state provides that a public officer, who has been erroneously convicted of crime which works an ouster from his office may, upon a reversal of such erroneous judgment of conviction, recover the salary during the time he was so excluded therefrom. If such recovery can be had, it must depend upon statutory law, as it is not recoverable under any principle of the common law. This court has held, in harmony with the great weight of judicial authority, that a de jure officer cannot draw from the public treasury a salary attached to the office that has been paid to a de facto officer who wrongfully excluded the de jure officer therefrom. *Clausen v. Fond du Lac County*, 163 Wis. 432, 170 N. W. 287. This is on the theory that the public ought not to be compelled to pay two salaries, and that, as the disbursing officers ought not to be compelled to decide for the municipality which is rightfully entitled thereto, payment by them to the one in possession of the office should be held to dis-

charge the public from further responsibility in the matter.

Upon the oral argument counsel for appellant cited to our attention the cases of *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536, 7 N. E. 787, 55 Am. Rep. 835; *Newberry v. Smith*, 157 Mich. 181, 121 N. W. 746; *Ward v. Marshall*, 96 Cal. 155, 80 Pac. 1113, 31 Am. St. Rep. 198; *McEvers v. Boyle*, 25 Cal. App. 476, 144 Pac. 306, a consideration of which, he thought, disclosed the error of his former assumption that the right of appellant to recover must be referred to statutory law. In the first two cases city police officers were removed, in form, by administrative officers vested with authority to remove police officers under certain circumstances, which pretended removal had been adjudged void. It was held that the police officers were entitled to recover their salaries during the period of their unlawful suspension. In *Ward v. Marshall*, 96 Cal. 155, 30 Pac. 1113, 31 Am. St. Rep. 198, the plaintiff, a justice of the peace, was convicted of willful misconduct in office, and, as a part of the judgment of conviction, was removed from his office, which judgment was reversed upon appeal. It was held that he was entitled to the salary of his office during the time he was suspended from the performance of his duties by the erroneous judgment of the trial court. In *McEvers v. Boyle*, 25 Cal. App. 476, 144 Pac. 308, it was held that one who has been appointed to the office of sealer of weights and measures created by an ordinance of the city of San Francisco was entitled to the salary of the office during a period in which he was prevented from performing the duties thereof to test the constitutionality of the ordinance. We think the present case is clearly distinguishable from those cases. In those cases there never was a lawful removal, while in this case, as will presently appear, the removal was lawful, even though erroneous. The removal in this case being lawful, no reason appears for compelling a double payment of salary from the public treasury by that branch of the law which denies to a de jure officer the salary which has been paid to a de facto officer during the time he has been unlawfully excluded from office. We therefore think that the original impression of counsel to the effect that statutory law must be found to entitle plaintiff to a recovery was in accordance with the law on the subject.

[2] Section 8, art. 13, of the Constitution provides that—

"No person convicted of any infamous crime in any court within the United States * * * shall be eligible to any office of trust, profit or honor in this state."

By section 2, c. 11, Rev. St. 1849, it was provided that—

"Every office shall become vacant on the happening of either of the following events before

the expiration of the term of such office:
 * * * 5. His conviction of any infamous crime, or of any offense involving a violation of his official oath."

This provision has continued in the statutes without change until 1917, and is found as a part of section 17.02 of the revised statutes of that year. The constitutional provision disqualified the plaintiff from further holding the office of county judge, and the statutory provision referred to expressly provided that his office should become vacant upon his conviction of any infamous crime. We have no doubt that the crime of which he was convicted was infamous within the meaning of that term as used in the Constitution, as well as the statute. While there has been much debate as to what constitutes an infamous crime, we think, by the great consensus of authority upon the subject, it is now deemed to mean as here used, a crime punishable by imprisonment in the state prison. 12 Cyc. 135; Words and Phrases, p. 3573 et seq.

[3] While the provision already referred to gave rise to a vacancy in the office of county judge of Green county upon the conviction of plaintiff, no provision is made for restoration to office, or payment of the salary thereof, in case of a reversal of the judgment of conviction. For the accomplishment of that purpose plaintiff relies upon the provisions of section 4935 of the Statutes of 1917, which are as follows:

"Whenever any convict sentenced by any court of this state or of the United States to be punished by imprisonment in the state prison shall, at the time of conviction and sentence, hold any office under the Constitution and laws of this state such office shall be deemed vacated from the time of his commitment to said prison; but if the judgment against said convict shall be reversed on a writ of error he shall be restored to office, with all its rights and emoluments; but if pardoned he shall not by reason thereof be restored to office."

In passing, it may be remarked that this statutory provision was enacted as a part of chapter 477 of the Laws of 1852, entitled, "An act providing more fully for the organization of the state prison," and that its place in the statutes from that time to this has been in the chapter relating to the management of the state prison. Much thought and reflection has not enabled us to divine the reason which prompted the Legislature to provide that an office shall be deemed vacated from the time of the incumbent's commitment to prison when it was already provided not only in the Constitution, but in the enactments of the Legislature that such vacancy should occur upon conviction, and we feel that further speculation will be neither profitable nor satisfying. We have to determine whether this statute entitles plaintiff to his salary for the unexpired portion of his term

of office from which he was excluded by reason of his conviction.

It is plain that, if the judgment against a convict in the state's prison shall be reversed on writ of error, "he shall be restored to his office, with all his rights and emoluments." Does this statute apply to plaintiff's situation? He was never committed to the state prison. This section never operated to oust him from office. He was not within the class of persons therein dealt with. Note that the section contains two features: The first works a forfeiture of office; the second, a restoration. This section did not work a forfeiture of plaintiff's office. Can it be said to work a restoration? It seems plain that the class affected by the restorative provision is identical with the class affected by the forfeiture provision, and that no one who does not fall within the condemnation of the statute is entitled to its privileges. We come quite clearly to the conclusion, therefore, that the plaintiff did not fall within the class dealt with in this statutory provision, and that his right to recover his salary finds no justification therein.

This conclusion renders it unnecessary for us to discuss a further vexing question that would be presented if this provision were held to apply to plaintiff, and that is whether it entitled him to the salary of the office during the time when he did not perform the duties thereof. That such was the legislative intent is far from being clear.

There now remains to be considered another legislative act upon which plaintiff relies for a right of recovery. Chapter 362 of Laws 1919, according to its title, was:

"An act to renumber and revise the sections of chapter 17 of the statutes, relating to resignations, vacancies and removals from office; to assemble therein pertinent local provisions scattered throughout the statutes; to remove inconsistencies and conflicts in and to harmonize sections and provisions of the statutes; to renumber sections and subsections and to amend other sections and subsections therein named from which pertinent local provisions have been removed for consolidation into chapter 17; and generally to consolidate, revise and provide uniform provisions relating to resignations and removals from and vacancies in offices of the state, counties, towns, and of cities, villages and school districts."

By that act, section 17.02, above referred to, was renumbered and made section 17.03, and section 14 of the act provided:

"Subsection (5) of new section 17.03 and sections 4507 and 4985 of the statutes are consolidated as subsection (5) of said new section 17.03 and are revised to read: (17.03) (5) His conviction by a state or United States court of and sentence for treason, felony or other crime of whatsoever nature punishable by imprisonment in any jail or prison for one year or more, or his conviction by any such court of and sentence for any offense involving a vio-

lation of his official oath, in either case whether or not sentenced to imprisonment. A vacancy so created shall in no case be affected by a stay of execution of judgment. Reversal of the judgment against such officer shall forthwith restore him to office, if the term for which he was elected or appointed has not expired, but, in any event, shall entitle him to the emoluments of the office for all the time he would have served therein had he not been so convicted and sentenced; but pardon shall not restore him to office or entitle him to any of the emoluments thereof."

It will be seen that the provisions we have had under consideration were therein brought together, consolidated, and made a part of the chapter relating to resignations, vacancies, and removals from office. If that statute had existed at the time of plaintiff's conviction, it would undoubtedly have entitled him to the salary which he now claims.

[4,5] Upon the argument the writer queried whether this enactment might not be construed as a legislative interpretation of the then existing law, but a consideration of the act seems to negative such a purpose. In the first place, it says that three separate sections of the statutes are consolidated and revised to read. A revision of the statutes is something more than a restatement of the substance thereof in different language:

"Revision of statutes implies a re-examination of them. The word is applied to a restatement of the law in a corrected or improved form. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the Legislature say the same thing in effect as when a particular section is amended by the words 'so as to read as follows.' The revision is a substitute. It displaces and repeals the former law as it stood relating to the subjects within its purview. * * * The purport of the numerous cases cited is that, where a statute is revised, or a series of acts on the same subject are revised and consolidated into one, all parts and provisions of the former act or acts that are omitted from the revised act, are repealed." *Suth. on St. Const. (Lewis' Ed.)* §§ 269, 270; *Pratt Institute v. City of New York*, 183 N. Y. 151, 75 N. E. 1119, Ann. Cas. 198.

Furthermore, that a change in the existing law was intended is manifest from the very first sentence of the section. Original section 17.03 declared a vacancy in the office when the incumbent should be convicted of an infamous crime. As re-enacted, it provides for a vacancy in the office if he shall be convicted of any crime punishable by imprisonment in any jail for one year or more. A crime so punishable is not an infamous crime, as that term is used in the constitutional provision, or in the original section 17.03. Even if it should be held that, within the contemplation of the constitutional, or former statutory, provision under consideration, the sale of watered milk, for which the statute denounces a penalty of

imprisonment in the county jail not more than 30 days, should be regarded as an infamous crime, as was held in *Geary v. Bennett*, 53 Wis. 444, 10 N. W. 602, a slander case, still the re-enactment of subdivision 5 indicates a clear change in the law upon this subject, because it does not provide for forfeiture of office unless the penalty provided is imprisonment in jail for at least a year. So that section 14, c. 362, of the Laws of 1919 must be construed as a re-enactment, and not a mere continuance, of existing law.

[6-8] We now come to the question of whether this law, which became operative June 20, 1920, before the reversal of the judgment of conviction, and after the expiration of plaintiff's term of office, operated to vest in him a right to the salary which he claims. At the time of plaintiff's conviction he was vested with no right of restoration or recovery of salary in the event of the reversal of the judgment of conviction upon appeal. No existing law provided therefor. The wrong which plaintiff sustained was inflicted at the time of his conviction. Statutes creating new rights are not construed as applying to past wrongs unless plainly so intended. *Keeley v. Great Northern Ry. Co.*, 139 Wis. 448, 121 N. W. 167; *Quinn v. Railway Co.*, 141 Wis. 497, 124 N. W. 653. In case of doubt or ambiguity, they are construed as prospective only. *Id.* The revision we are considering is plainly prospective in its terms. It must be construed as applying only to public officers convicted of one of the offenses enumerated therein after its enactment. Furthermore, it was not within the power of the Legislature to make the restorative features of the law applicable to plaintiff. It must be borne in mind that he was effectually divested of any right or title to the office. His status with reference to the office was fixed at the time of his conviction. Thenceforth he was a stranger thereto, as much as any other elector of Green county. A successor was lawfully in possession of the office. The Legislature could no more restore the plaintiff to the office than it could induct therein one who had never held the same. Such offices must be filled either by election or appointment. They cannot be filled by legislative action. The impotency of the Legislature to restore plaintiff to his office is an additional reason for not construing the law so as to vest in him the right to recover the unpaid salary.

We are not insensible to the justice of the law as it now exists. This law, with section 3203a, indicates a purpose of society, speaking through its Legislature, to assume responsibility for its wrongs inflicted upon the individual members thereof somewhat commensurate to the liability imposed upon individuals responsible for wrongs inflicted upon others. It is to be regretted that the Legislature did not act in time to make the law available to plaintiff, although the recog-

nition by society of its duties and responsibilities, as indicated by the act in question, is encouraging and commendable.
Judgment affirmed.

ESCHWEILER, J. (dissenting). The somewhat anomalous position and provisions of section 4935, Stats., as it stood prior to 1919, is commented upon in the majority opinion. I agree with the view that that section, as it stood at the time of plaintiff's conviction, did not of itself work a forfeiture of office, that being effected by then section 17.02, Stats. Therefore said section 4935, Stats., as it stood all those years, must have been intended to refer to persons whose right to office was forfeited under section 3, art. 13, Constitution, and under section 17.02, or else to none at all. To give the reasonable construction to it, and to which such beneficial statute is entitled, it would have to be held that it was intended to benefit those who so forfeited office by conviction rather than by a subsequent commitment; the statute therefore could not, in this essential, be literally followed.

Furthermore, its evident purpose was the giving to such particular class of unfortunate victims of a miscarriage of justice, who had been unlawfully deprived, through the mistaken act of the sovereign, of the right to continue to hold and enjoy an office given under the laws of the sovereign, compensation or damages for such deprivation, and measuring the amount thereof by the rate of the salary fixed for such office.

That the salary was considered as something over and above, or separate and apart from, the office itself is quite manifest, because otherwise the following quoted words from section 4935, Stats., where, after providing for restoration to office, it also says, "with all its rights and emoluments," were rank surplusage; for, plainly, restoration to office would of itself, and without further proviso, carry with it as a matter of right and law the prescribed compensation so long as the office be further occupied and services rendered therein. Such proviso therefore must be given weight and meaning in the construction of the entire statute. Such conclusion is further strengthened by consideration of chapter 362 of the Laws of 1919. That, it is conceded, was a bill proposed by the revisor of statutes, and must be considered in the light of the presumption that arises from the plainly prescribed statutory duties of such revisor (section 43.08, Stats. 1919), which defines his duties as being:

"To formulate and prepare a definite plan for the order, classification, arrangement, printing and binding of the statutes and session laws," and also, after preparation during the intervals of the Legislature, "to present to the judiciary committee of the senate, * * * such consolidation, revision, and other matter relating to the statutes."

His bills as presented therefore should be looked at in view of the statutory purpose so declared; that is of simplifying and clearing up the existing law rather than as proposals to make any material changes in the law. The very heading of this chapter indicates compliance with that duty of effecting the revision and consolidation rather than of making any substantial amendments, changes, or creating new rights. Some of its many provisions, it is true, expressly provide for minor amendments, but by section 14 of that chapter, and which is the one material here, the declared subject-matter thereof is consolidation and revision, and the word "amend" is conspicuously absent. It provides for consolidation of subdivision 5 of the newly thereby created section 17.03 with section 4935, the one here being considered, and also section 4507, which read:

"Any justice of the peace who shall be convicted of bribery, forgery, or other infamous crime shall in the same sentence be removed and expelled from such office."

This latter provision, in substance, has stood in the statutes as long, if not longer, than the other provisions so consolidated. It was originally paragraph 7, art. 1, "an act concerning justices of the peace," on page 321 of the Territorial Statutes of 1839, then section 264 of chapter 88, "Justices' Courts" in the Revised Statutes of 1849 (apparently wrongly quoted in some of the revisions); then again as section 234 of chapter 120 of the revision of 1858; and, after subsequent minor changes in language, it subsequently appeared as section 4507. Through all of its changes, however, it was in accord with the general law covering removals from office, in that it was the conviction, and not a commitment, that worked a forfeiture. By its consolidation with the other provisions under said chapter 362 of 1919, the language of this section disappears altogether, and a justice of the peace is now evidently placed in the same general category with all other office holders of the state. It could hardly be urged that the provisions of this revised chapter either amended or repealed the old section 4507. It was simply carried on and merged into section 17.03 (5), and I think the same view should be adopted and conclusion arrived at as to what was intended to be done by the consolidation of said section 4935. It was condensation and clarification, rather than amendment.

For the foregoing reasons I think the plaintiff came within the reasonable terms of the statute as it stood at the time of his conviction, so as to have been entitled to his present claim for compensation upon the reversal of the judgment of conviction, though there had been no change in the statute.

I am also convinced that plaintiff was within the terms of section 17.03, Stats., as

it stood after the revision of 1919, and as it was in force at the time of the reversal. It is a highly remedial statute, and should receive no harsh or strained construction. It is aimed to make a slight recompense to one who has suffered a grievous wrong done through the instrumentalities of the sovereign, either state or national, by that which is subsequently found to have been a mistake or miscarriage of justice. That the required financial compensation is to be borne by a particular community, rather than by the state at large, ought not to militate against its application.

That the salary is to be considered as merely the measure of compensation is much strengthened from the fact that since 1913, when chapter 189 of the laws of that year created section 3203a, it has been provided that compensation, which under this law is a pure gratuity, should be given by the state to innocent persons who had nevertheless served terms of imprisonment upon conviction of a criminal charge.

Doubtless one who would come within the literal meaning of section 3203a, and who happened to be an office holder at the time of his conviction, and thereby forfeiting his office, would not be entitled to compensation under both the general terms of section 3203a and also under section 17.03(5), and would be confined either by option or construction of law to not more than one such method of relief; but nevertheless the idea of compensation is the basis of the one as much as of the other. It is a gratuitous compensation to be borne by the taxpayers, and whether of the commonwealth at large or of some particular community does not essentially alter the spirit and purpose of the laws.

Such features make a substantial distinction between such a case as the one here or one coming under section 3203a, and the situation where, under the doctrine of public policy as adopted by this court, after a choice from conflicting decisions elsewhere, and as pronounced in *Clausen v. Fond du Lac County*, 168 Wis. 432, 170 N. W. 287, it is held that municipalities, in the absence of specific statute, should not be required to pay the salary of an ousted de jure officer for a period for which it was paying for and receiving the services of a de facto officer.

It is held by the majority opinion that to allow the plaintiff to recover under the statute as it stood after the revision of 1919, and at the time of the reversal of the judgment when the term of his office had expired would be to give it a retroactive effect, citing as a basis for such ruling *Keeley v. G. N. Ry. Co.*, 139 Wis. 448, 454, 121 N. W. 167, and *Quinn v. C. & St. P. Ry. Co.*, 141 Wis. 497, 124 N. W. 653, both of which involved changes in the death recovery statute made after the death for which compensation was sought in

the several actions. But, as it was pointed out in the *Quinn Case*, the right to relief under that statute becomes an inchoate one upon the happening of an injury, and ripens into a cause of action immediately upon the death, and the rights then so fixed at such respective periods cannot be added to or lessened by legislation (*White v. M., St. P. & S. S. M. R. Co.*, 147 Wis. 141, 151, 133 N. W. 148; but to my mind the substantial and important distinction between the two cases is this: There is no right inchoate or complete to any subsequent salary as compensation arising upon the conviction that works, by the Constitution and the statute, an absolute forfeiture of office, and thereby a salary. The right to the salary as a measure of compensation arises out of the reversal, and not from the conviction. The two are separate, distinct, and independent transactions. Plaintiff can base no right upon his conviction, which is, until reversed, absolutely disqualifying, binding, and controlling. When by subsequent proceedings a new result is arrived at, namely, a reversal, then, by and through such new proceedings and new conclusion, then and not until then, do his rights under the statute arise and become fixed. The time of his conviction would therefore be entirely immaterial.

So far as the plaintiff here is concerned, the benefits under section 17.03 (5), Stats., first became applicable to him when the reversal of conviction occurred, for until then he had no shadow or semblance of claim to them, and when that time came he was within all the conditions of the statute entitling him to such relief. Being in the nature of a gratuity, so far, at least, as compensation is made for the time for which he could render no services during the period of conviction, there is no question arising as to whether the statute so giving such gratuity is retroactive or not. There is no more need of considering the question whether there is an express or implied intention to have a retroactive effect, for such intention may be by implication, as well as by express language (*Read v. Madison*, 162 Wis. 94, 100, 155 N. W. 954), as to this statute than in the case of granting relief to persons who had previously suffered personal injury in connection with some state activity of which the laws of each session of the Legislature afford numerous instances. For example, in the session of 1919 there were allowances of \$3,000 and \$2,000 respectively to persons injured by an aeroplane accident at the State Fair in 1910, and another substantial allowance for injuries at the same place in 1917, and another to one whose husband had been killed at one of the state institutions.

The judgment of the lower court, in my mind, should have been reversed.

DOERFLER, J. I concur in the dissent.

DOYLE v. LYTLE INV. CO. et al.
(No. 34209.)

(Supreme Court of Iowa. Oct. 25, 1921.)

1. Judgment ¶252(1)—No personal judgment where none asked and general equitable relief not prayed.

A personal judgment should not be rendered where none is asked in the petition and no general equitable relief prayed.

2. Fixtures ¶9—Assignor of mortgage on houses subsequently moved to mortgagor's lots held entitled to foreclosure against purchaser of lots at least as to houses.

The assignee of a mortgage on two houses subsequently moved to mortgagor's lots to which it was understood, at the time of the execution of the mortgage, they were to be moved, such agreement being recited in the mortgage, was entitled to foreclosure against a subsequent purchaser of the lots, at least as to the houses.

3. Chattel mortgages ¶278—Evidence held sufficient to show purchaser knew of and assumed mortgage.

In an action against a corporate purchaser of mortgaged property and its president to foreclose the mortgage, evidence held sufficient to show that the latter, acting for the corporation, agreed to pay plaintiff's claim, and that defendants, the deed to whom excepted mortgages then on record, which included plaintiff's, had actual as well as constructive notice thereof.

Appeal from District Court, Woodbury County; John W. Anderson, Judge.

Action in equity asking personal judgment against certain of the defendants and the foreclosure of a mortgage. Judgment and decree for plaintiff, and the defendants, other than the Brandts, appeal. Modified and affirmed.

Edwin J. Stason, of Sioux City, for appellants.

McCormick & McCormick, of Sioux City, for appellee.

PRESTON, J. [1, 2] There is no appearance for appellee. The dispute appears to be between plaintiff and C. F. Lytle and the investment company. A personal judgment was rendered against defendants Lytle Investment Co., C. F. Lytle, and Goldie Racer, formerly Brandt, and a decree of foreclosure of the mortgage on lots 35 and 36 in a certain subdivision of Sioux City. The appellants complain that the court should not have rendered a personal judgment against C. F. Lytle, because no personal judgment was asked against him in the petition, and no general equitable relief was prayed. We

think the point is well taken as to such appellant, and the decree is modified to that extent. It is complained that a personal judgment should not have been rendered against the investment company because it did not assume the debt and the mortgage on the property, and that there should not have been a foreclosure, because, as appellants claim, they had no notice, actual or constructive, of the mortgage, and that it was not the intention of the mortgagors to give a mortgage on real estate. The note of \$176 was given by defendants Brandt to one Murphy. Murphy assigned it to plaintiff. The mortgage was given on two small houses at that time situated on lots other than 35 and 36. It was contemplated and understood at the time the mortgage was given that the houses were to be moved from their then location to lots 35 and 36, which lots had been owned by the Brandts, or one of them, for some time prior to June 16th. The mortgage was duly recorded June 14, 1916, and the houses were moved to the lots and became a part thereof before the Brandts conveyed the lots to the investment company, November 20, 1916. We are inclined to think it was the intention that the mortgage should cover the lots as well as the buildings. It may be a debatable question under the record whether plaintiff is entitled to a foreclosure as to the lots. But clearly he is entitled to a foreclosure as to the houses. Mortgagor and the investment company as purchaser could not defeat plaintiff's lien therein. The decree is modified to that extent.

[3] The mortgage, after describing the buildings and their location, recites that they are to be moved to lots 35 and 36. The weight of the evidence is that at and before the execution of two mortgages for about \$1,900 from the Brandts to Lytle or the investment company, October 25, 1916, and the execution of the deed by them to the investment company, they told Lytle of the mortgage in question, and they testify that Lytle assumed and agreed to pay the mortgage in question, with a number of other liens and bills against the properties. Lytle contradicts the two witnesses as to the actual notice and as to the agreement. The weight of the evidence is with plaintiff on those propositions. The two Brandts testify that they told Lytle, both before the execution of the \$1,900 mortgages and the making of the deed, of all the claims and bills against the properties, and that a list was made. Lytle himself testifies that he was trying to find out how much was against the property. Either Lytle or the investment company, the record does not show which, paid off some \$2,000 or more of liens and bills, some for painting, carpenter work, lumber, plumbing,

water connections, and other similar bills for the benefit of the property. It appears that the Brandts, becoming more deeply involved than they anticipated, secured a loan on the two mortgages executed the same day, amounting to about \$1,900, either from Lytle or the investment company. This was October 25, 1918, and a few days afterwards the Brandts concluded they could not proceed, and then agreed to deed the property under the agreement, as the Brandts testified, that the bills should be paid. Many of them were paid, but it does not appear whether they were paid by the investment company or by Lytle personally. Lytle testified as a witness, but does not state whether the bills and liens were paid by him personally or by the investment company. He testifies that he took the title in the name of the investment company. The evidence does not show the value of the properties. The negotiations in regard to all these matters were between the Brandts, on the one side, and Mr. Lytle, on the other, and it is true that no one testifies directly that the investment company expressly agreed to pay the bills, or to assume the mortgage in question, but Lytle was the president of the company, and the company has the title. There is no direct evidence that Lytle was to personally pay the claims, and there is no evidence that he personally has paid the claims which have been paid. In referring to the \$1,900 mortgages, Lytle uses the word "we," saying that out of the proceeds of the loan "we" agreed to advance other money as bills were created up to the completion of the work, and then gives the list paid thereafter. There may be other circumstances bearing on the point, but, without going into the record further, we are satisfied that, from all the circumstances and the entire record, it shows that Lytle was acting for the investment company, and that he, for the company, assumed and agreed to pay plaintiff's claim. The Brandts testified, and we do not understand Lytle to contradict them, that they received no part of the proceeds of the \$1,900 mortgages, but the proceeds were paid on claims by Lytle or the company. It is true that Lytle testifies, and it is appellant's claim now, that it was the agreement that the liens and bills were to be paid out of the proceeds of the mortgages, and appellants say that they cannot be held for more than the \$1,900. But the Brandts both deny that such was the arrangement, and, as said, their evidence is to the effect that bills including plaintiff's, were to be assumed and paid by Lytle. Furthermore, it is shown by the weight of the evidence on the part of plaintiff that a few days after the execution of such mortgages, and when the Brandts found they could not

handle the proposition, they made a deed to the investment company, which was to pay certain claims against the property, including plaintiff's. The payment of these items was the consideration for the conveyance of the property to the investment company. The deed to the investment company recites "lots 35, 36, 37, and 38, etc., except mortgages now on record." Plaintiff's mortgage was on record, and the evidence shows Lytle and the investment company had actual notice thereof. We think the equities are with the plaintiff, and the judgment and decree is affirmed, with the modifications before indicated. No considerable extra cost was occasioned on this appeal thereby, so that the modification will not have the effect of apportioning the costs. The costs of the appeal will be taxed to appellants other than Lytle.

Modified and affirmed.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

DOWNING v. MERCHANTS' NAT. BANK OF GREENE, IOWA. (No. 33607.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Negligence $\S$ 136(26)—When contributory negligence a question of law stated.

If all fair-minded and reasonable men would agree, under the facts disclosed, that plaintiff was guilty of contributory negligence, then the court should so declare as a matter of law.

2. Negligence $\S$ 67—Failing to look at bank floor not negligence as matter of law.

A person about to enter a business building, where the public is invited to enter, is not guilty of negligence as a matter of law in failing to look at the floor of the vestibule or corridor before crossing the threshold of an open door.

3. Negligence $\S$ 44—Bank's duty to provide safe entrance stated.

The owner of a bank owes a duty to all persons who properly come to the bank on business to exercise reasonable care and prudence to provide a safe and suitable entrance, and to have the approaches so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors.

4. Negligence $\S$ 136(2)—Contributory negligence in falling down stairway at bank entrance for jury.

Where plaintiff, on entering the vestibule of defendant's bank, saw the official wanted

(184 N.W.)

through an open door, apparently behind a counter, and on entering the door without looking to the floor stepped down a stairway and fell, he having entered the basement door, instead of the adjoining bank door, which was closed, *held*, that the question of contributory negligence was for the jury.

5. Negligence ¶136(22)—Negligence of bank, maintaining basement door near entrance, for jury.

Where plaintiff, on entering defendant's bank, by mistake entered the basement door, which was near the entrance to the bank, and was injured, *held*, that whether the bank was negligent in maintaining such door was for the jury.

6. Negligence ¶32(2)—Person entering bank on business held more than licensee.

Where plaintiff was injured in falling down a stairway near the entrance to defendant's bank, and it appeared that he went to the bank to transact business with the bank regarding the settlement of a sale, and to see one of the officers in regard to a township matter, such officer being also a township officer, plaintiff was more than a mere licensee.

7. Damages ¶130(1)—Verdict for \$2,750 held not excessive.

A recovery of \$2,750 for somewhat painful and serious injuries sustained in falling down

a stairway at the entrance to defendant bank *held* not so excessive as to show passion or prejudice on the part of the jury.

Appeal from District Court, Butler County; C. H. Kelley, Judge.

Action for personal injuries sustained by the plaintiff in falling down a stairway in the defendant's bank building. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

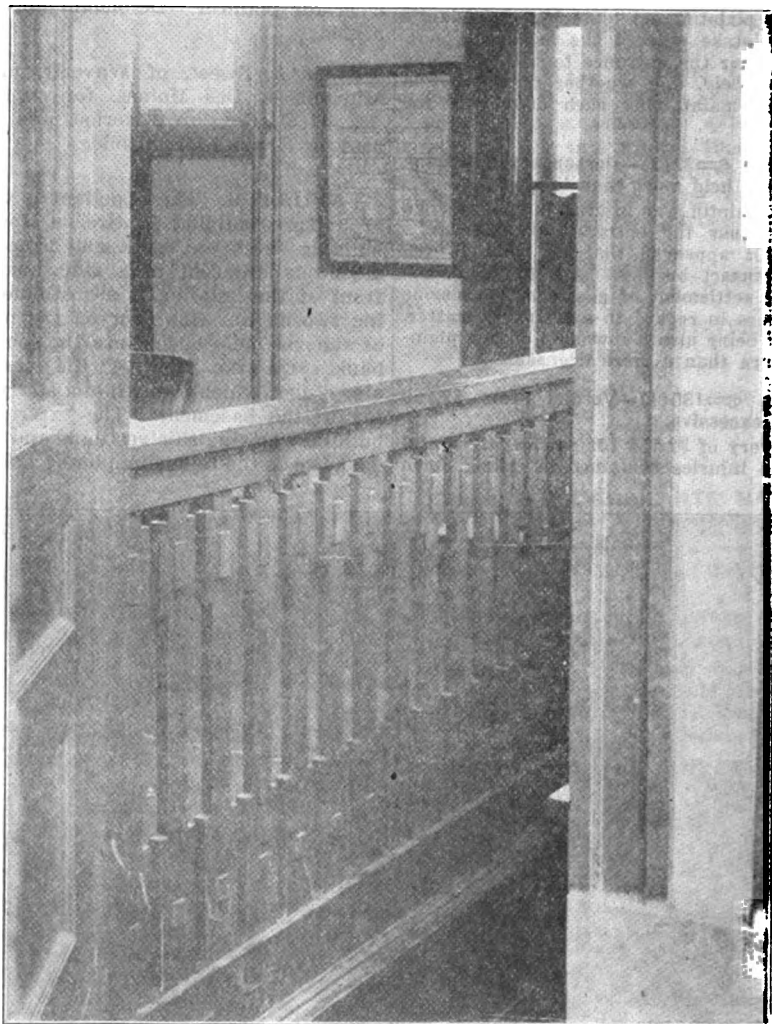
Sager & Sweet, of Waverly, and J. G. Mitchell, of Des Moines, for appellant.

E. H. McCoy, of Waterloo, and M. Hartness, of Greene, for appellee.

FAVILLE, J. The appellant is the owner of a bank building in Greene, Iowa. The building faces the south and is located immediately adjacent to a sidewalk. In the front of the building is a vestibule containing two doors. One door on the north side of the vestibule opens into the lobby of the bank. On the east of the vestibule is also a door which opens into a stairway leading to the basement. The exterior of the building showing this vestibule and the doors is shown in the following photograph:



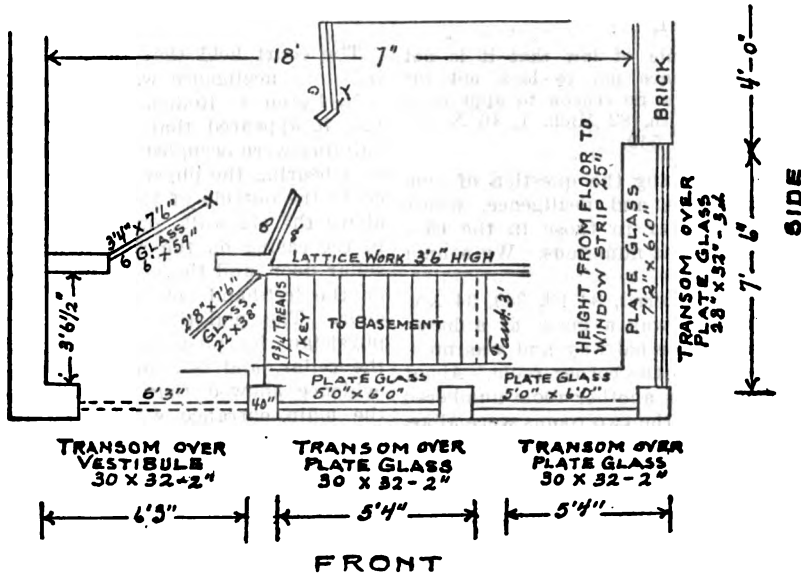
The stairway in question starts immediately from the threshold of the east door. On the inside of the building the stairway is separated from the banking room by a balustrade or railing. This balustrade is the same height as the bank counter and has something of the same general appearance and construction. The base of the bank counter is solid, while the balustrade has an open or lattice work base, and the top of the balustrade is narrower than the top of the bank counter. The following photograph is a view of this balustrade, taken through the open doorway leading from the vestibule to the stairway in controversy:



In front of the bank building there are two large plate glass windows, one of which appears in the first photograph. The following is a plat of a portion of the ground floor of the bank showing the situation:

was guilty of contributory negligence, then the court should so declare, as a matter of law.

It is urged that the appellee must be held to be guilty of contributory negligence be-



About 5 o'clock in the afternoon of April 1, 1916, the appellee, desiring to transact some business with an officer of the bank, entered the vestibule of the bank. It was a bright day and the sun was shining. The appellee had been to the bank once or twice before the day in question. At the time he entered the vestibule, the evidence tends to show that the door leading into the bank lobby or corridor was closed and the curtain drawn, and that the door on the right or east side of the vestibule, leading to the stairway, was open. This door swung into the vestibule, so that, when opened, it partially, at least, obstructed the door leading into the bank. As the appellee entered the vestibule, he claims, the open doorway was in front of him, and he looked through the opening and across the balustrade, above referred to, and saw the officer of the bank for whom he was looking in the banking room. He testified that he believed the balustrade to have been the bank counter and believed that he was walking into the bank proper. He immediately proceeded through the open doorway in the direction of the bank officer, and as soon as he stepped through the doorway, he was precipitated down the stairway and suffered the injuries complained of.

[1] I. It is urged in behalf of the appellant that, under the circumstances surrounding the accident, the appellee was guilty of contributory negligence, and that the court should have so directed the jury and withdrawn the case from its consideration. If all fair-minded and reasonable men would agree, under the facts disclosed, that the appellee

cause of the fact that, under the circumstances disclosed, he passed through the open doorway without looking to see where he was stepping. It must be remembered that this was a building that the public was invited to enter. If the jury believed the appellee's testimony regarding the conditions surrounding him at the time, he believed, and had reason to believe, that he was walking through the open doorway into the bank building to transact business with an officer of the bank, whom he saw, and who was behind what appeared to appellee to be the counter of the bank.

[2] It is strenuously argued that, if he had looked to the floor, he would have seen the open stairway, and that it was his duty so to look, and to observe where he was walking. We are not prepared to hold that, as a matter of law, a person about to enter a bank, store, or other business building, which the public is invited to enter for the transaction of business, is guilty of negligence in failing to look to the floor of the vestibule or corridor of such a place of business before crossing the threshold of an open door.

[3] As a general rule, it may be stated that the defendant owed a duty to all persons who properly came to the bank on business to exercise reasonable care and prudence to provide a safe and suitable entrance to said bank and to have the approaches thereto so constructed and maintained that visitors would not be liable to step into dangerous pitfalls by reason of misleading doors. As bearing on this general proposi-

tion, see *Foren v. Rodick*, 90 Me. 276, 88 Atl. 175; *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846; *Hayward v. Merrill*, 94 Ill. 349, 34 Am. Rep. 229; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Gillvon v. Rellly*, 50 N. J. Law, 26, 11 Atl. 481.

"It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any." *Engel v. Smith*, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549.

The cases discussing the question of contributory negligence and negligence, where the facts are similar to those in the case at bar, are somewhat numerous. We cannot review all of them.

In *Hayward v. Merrill*, 94 Ill. 349, 34 Am. Rep. 229, plaintiff was a guest at a hotel. His room was in the hallway and was numbered "38." It was the corner room. About 2½ feet from it was another room numbered "40." The doors of the two rooms were alike. Gas was burning in the hall, but not very brightly. The plaintiff had recently been a guest at the hotel, and occupied room 38, which was now assigned him. By mistake he opened room No. 40, and fell down an opening, and was injured. It was held that the case was properly for the jury.

In *McRickard v. Flint*, et al., 114 N. Y. 226, 21 N. E. 153, it appeared that the plaintiff was in defendants' building, where he observed a folding door that was usually kept closed during the day. When he approached the folding door, it was partly open, and he opened it farther and entered. It was between 12 and 1 o'clock in the afternoon, and within the room it was light. If the plaintiff had stopped and looked about him when he entered the door, he could evidently have seen the situation. The court held that the question of contributory negligence of the plaintiff was properly for the jury.

In *Clopp v. Mear*, 134 Pa. 203, 19 Atl. 504, it appeared that the defendant's store had two entrances, which presented the same appearance when the outside doors were closed. Between these doors was a display window. The northerly entrance was intended for purchasers. When the doors were closed, as they were at the time of the injury, the entrances were externally alike. Plaintiff and her friend, passing the store, saw in the window an article which one of them wished to purchase. Plaintiff opened the southerly door and plunged into a cellar. It was held that the questions of negligence and contributory negligence was properly for the jury.

Rhodium v. Johnson, 24 Ind. App. 401, 56 N. E. 942, is a case where a woman stepped from a hallway through an open door into an elevator shaft. The evidence shows that, when she opened the door, she walked in without paying any attention to what she was stepping into. The court said:

"The question to be determined from the evidence is whether appellee was proceeding as an ordinarily prudent person would have proceeded under the circumstances. The open doorway, if not an invitation to enter, was certainly not a warning of danger. What is due care must depend upon circumstances."

The court held that the question of contributory negligence was for the jury.

In *Foren v. Rodick*, 90 Me. 276, 88 Atl. 175, it appeared that a set of offices in a building were occupied by a physician, and a sign bearing the physician's name was affixed to the outside of the building a few feet above the sidewalk, one end being fastened to the casing on the right-hand side of the cellar door, and the other end to the casing on the left-hand side of the main entrance door. The plaintiff, desiring to visit the physician, by mistake opened the door to the cellar, and fell and was injured. The evidence showed that the double doors of the main entrance were open, revealing a vestibule or lobby; that the store and sidewalk and, to some extent, the landing at the entrance were lighted by electric lights, and the cellar was well provided with windows. The plaintiff testified that she took no pains to know where she was stepping. The court said:

"She was seeking to enter the building by the implied invitation of the defendants. She had a right to expect reasonable safety and convenience at the approaches. She was not required to use extraordinary precaution, but only such ordinary care and caution as persons of reasonable prudence, care, and discretion usually and ordinarily exercise under such circumstances."

It was held to be a case for the jury.

In *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846, an elevator well in a building opened directly on the street by a doorway separated by a post one foot wide from the entrance to the hallway of the building, which was of about the same construction, and the threshold of which was a continuation of that of the elevator entrance, but not quite of the same width. The entrance to the hallway proper had no door, but the entrance to the elevator could be closed by a door and by hooking a chain across it. Plaintiff, seeking to enter the hallway on a dark evening, stepped into the elevator entrance, which was not closed, and was injured. The plaintiff had passed very many times, and was aware that the two entrances were close to each other. The court held that the case was properly submitted to the jury.

In *Engel v. Smith et al.*, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549, we quote from the syllabus as follows (46 N. W. 21):

"In front of the rear door of their store, and about a foot and a half distant from it, defendants maintained a hatchway opening into the cellar. There was no railing around the

hatchway, and such door was freely used for entrance into the store. Plaintiff, who did business in the store, went out to the knowledge of one of defendants' employees, and in his absence the hatchway was opened. The door was left unlocked, and no one stationed at the opening to give notice thereof. Plaintiff returned through such door, and fell through the hatchway. *Held*, that defendants were negligent.

"Plaintiff was fully acquainted with the location of the hatchway, and knew that it was customary, at the time of day the accident happened, to use it. He did not stop to see whether the trapdoor was open, but it had been customary to keep the door locked when the hatchway was opened. *Held*, that the question of contributory negligence was for the jury."

Appellant relies upon *McNaughton v. Illinois Central R. Co.*, 136 Iowa, 177, 113 N. W. 844, as being controlling in this case. We do not so regard it. In that case a lady entered the women's waiting room of a railway station and immediately opened a door, supposing it to be the door to the toilet room, stepped through, and fell to the bottom of a stairway. The word "Basement" was painted upon the door, although it was obscured by the people gathered about it. The door to the toilet room was properly designated, but this was somewhat obscured from view by its location. The situation is altogether different from that disclosed in the instant case. We held in the *McNaughton* Case that it was not negligence, under the circumstances, for the railway company to maintain this closed door with a knob and catch on it leading to the basement. We said:

"Every precaution had been taken, save that of locking it, against its improper use."

The situation is altogether different from that in the case at bar, where the door in question was so located that when open, as the evidence tends to show it was when the accident happened, it was the apparent way provided for persons having business with the bank to enter for the transaction of such business. The open door, the presence of the man with whom appellee had business, the appearance of the balustrade, and all the attendant circumstances were such that the jury might have found that appellee was not guilty of negligence in failing to look toward the spot where he was about to step as he passed through the open doorway. As bearing on this question, see *Mathews v. City of Cedar Rapids*, 80 Iowa, 450, 45 N. W. 894, 20 Am. St. Rep. 436; *Overton v. City of Waterloo*, 164 Iowa, 332, 145 N. W. 889; *Erickson v. Town of Manson*, 180 Iowa, 378, 160 N. W. 276.

[4] Under all the facts and circumstances disclosed by this record, it was undoubtedly a question for the jury to determine whether or not the appellee was guilty of negligence

in stepping through the doorway under the circumstances disclosed, and it was not error to refuse to direct a verdict on this ground. As bearing somewhat on the general proposition involved, see *Gardner v. Separator Co.*, 134 Iowa, 6, 111 N. W. 316.

[5] Neither was it error on the part of the court to refuse to direct the jury to return a verdict in favor of appellant on the ground that the evidence fails to show that it was guilty of negligence. It must be remembered that this building was one to which the public was invited to come for the purpose of transacting business. It certainly was for the jury to say whether the appellant was guilty of negligence in maintaining this building with the two doors in close proximity opening from this vestibule, one of which the public was invited to, and expected to, enter, and the other of which opened directly into a precipitous stairway. It was for the jury to say whether it was negligence to permit the door leading to this stairway to be open under the circumstances disclosed by the record, if the jury found that it was open, and to leave the same without barrier or guard to protect one who might enter the vestibule. The question of appellant's negligence under all of the facts was clearly one for the jury, and the court did not err in not directing a verdict.

[6] II. It is urged that the appellee was a mere licensee. The evidence of the appellee was to the effect that he went to the bank to transact some business with the bank regarding the settlement of a sale; also to see one of the officers of the bank in regard to a township matter. The bank knew that the officer of the bank was also an officer of the township, and did township business at the bank with the consent of its officers. Under these circumstances the appellee was something more than a mere licensee in going upon the premises to conduct this business, even though it was of a dual character. The instruction complained of on this subject was proper and meets with our approval.

[7] III. It is strenuously urged that the verdict returned by the jury of \$2,750 is excessive, and is the result of passion and prejudice on the part of the jury. The verdict is large for the injury sustained. The appellee's damages are not to be measured by the mere loss of time, but are also for pain and suffering, for which the amount to be awarded is peculiarly within the province of the jury. The plaintiff's injuries were somewhat serious and painful. We cannot say that the amount awarded is so large as to be indicative of passion and prejudice on the part of the jury. We cannot substitute our judgment for that of the jury in a matter of this kind, where the verdict does not appear to be excessive, or to be the result of passion and prejudice. We find no errors urged by the appellant which would justify a reversal of the case.

It therefore follows that the judgment of the district court must be affirmed.

EVANS, C. J., and STEVENS and ARTHUR, JJ., concur.

O'SHONESSY v. CITY OF SIOUX CITY et al. (No. 34301.)

(Supreme Court of Iowa. Oct. 25, 1921.)

Municipal corporations **§446**—City held empowered to extend time for performance of paving contract after expiration of time set, and prevent loss of lien for assessment.

Under a street paving contract requiring complete performance by a certain date "unless otherwise provided in writing, signed by the mayor and approved by the city council," and that if the improvements were not so completed the contractor should pay to the city any expenses incurred by it on account of its requiring additional time, the city's power to extend the time could be exercised after the expiration of the time fixed for performance, time being the essence of the contract, not for the purpose of forfeiture, but for the purpose of imposing penalties in the event of the contractor's failure to perform within such time, and a lien for paving assessments could not be canceled because of such failure, the contractor not being thereby released from its obligation.

Appeal from District Court, Woodbury County; W. G. Sears, Judge.

Suit in equity to set aside certain paving assessments and to cancel the lien thereof against the property of the plaintiff. A demurrer to the petition was sustained, and the plaintiff appeals. Affirmed.

Martin Nellan, of Sioux City, for appellant.
Fred H. Free and E. G. Smith, both of Sioux City, for appellee Sioux City.

Stipp, Perry, Bannister & Starzinger, of Des Moines, for appellee Dayton Const. Co.

O. T. Naglestad and Alfred Pizey, both of Sioux City, for appellee Woodbury County.

EVANS, C. J. The alleged invalidity of the paving assessments under attack is based upon the theory that the paving contract was not performed within the time specified within the original contract and that the city council had no authority to extend the time of performance.

The contract in question was let to the construction company on July 1, 1920, and provided that the performance should be fully completed on or before the 15th day of November, 1920, "unless otherwise provided in writing, signed by the mayor and approved by the city council," subject only to certain other provisions. The construction company did not complete the work on or before November 15, 1920; nor had it upon such date

begun the work. On December 15, 1920, the city council extended the time to July 1, 1921. The contention for plaintiff and appellant is that the city council had no power after November 15, 1920, to extend the time of the performance; that it could only exercise its power of extension on or before the expiration of the original time of performance. This is the one question in the case. It is argued that time was of the essence of the contract, and that the right of the construction company was fully forfeited on the 15th day of November, 1920, and that it could not thereafter be revived by the city council except perhaps by instituting new proceedings. Paragraphs 4 and 5 of the contract were as follows:

"The contractor shall commence work on or before the — day of —, 19—, and regularly and diligently prosecute the same and fully complete the same on or before the 15 day of November, 1920, unless otherwise provided in writing signed by the mayor and approved by the city council of said city, subject only to the provisions made in paragraph nine (9) hereof.

"Should said contractor fail to complete said improvements in strict accordance with the terms and conditions of this contract, and of the plans and specifications for said improvement, promptly within the time hereinbefore specified, then said contractor specifically agrees to pay unto said incorporated city, any expenses incurred by it on account of said contractor requiring such additional time, which expenses shall include the additional cost for engineering, inspection and legal work caused by such delay. * * *

It will be noted from the foregoing that time was made of the essence of the contract, not for the purpose of forfeiture, but for the purpose of imposing certain penalties of additional expense upon the construction company in the event of its failure. The construction company was not released from the obligation of the contract by its mere failure to perform the same within the time specified. The clear implication of the contract is that additional time might be thereafter allowed at the election of the city council and at the expense of the construction company. The city council appears to have elected to enforce the contract and to grant additional time for that purpose. We see nothing in the contract which curtailed the power of the city council in this respect. That such power may be exercised after the expiration of the time of performance fixed in the original contract was held in the case of *Messer v. Marsh*, 183 N. W. 602. The defendants' demurrer to the petition was properly sustained, and the judgment below is accordingly affirmed.

Affirmed.

WEAVER, PRESTON, and DE GRAFF, JJ., concur.

REYNOLDS et al. v. CITY OF ONAWA et al.
(No. 34080.)

(Supreme Court of Iowa. Oct. 25, 1921.)

1. Municipal corporations ⇐373(6)—Rights of assignee of contractor not prior to materialmen and subcontractors.

Where contract with city provided for withholding of contractor's account until he furnished evidence that material bills "filed with the mayor and city council" were paid, and that he should be paid the final estimate after deducting all unpaid bills, an assignee of such contract was not entitled to preference, in payment of the unpaid balance by the city, over claims for labor and materials, on the ground that such claims were filed with the city clerk more than the 30 days, specified by Code, § 3102, after the furnishing of the last item, as the rights of the parties were governed by the contract, not by statute, and filing accounts with the city clerk was substantial compliance with the contract condition that they be filed with the mayor and council.

2. Municipal corporations ⇐373(1) — Rights of assignee of contract by principal held not prior to materialmen and subcontractors.

Where city's contract postponed payment of the contractor until payment of materialmen and subcontractors, the rights of a bank, the assignee of the contract as security for advances, were not rendered superior to those of materialmen and subcontractors by the fact that the principal contract had been so assigned very soon after it was executed and before the claims of subcontractors had accrued.

Appeal from District Court, Monona County; Geo. Jepson, Judge.

The nature of the controversy and the facts material to a consideration of the merits of the case are sufficiently stated in the opinion. Affirmed.

John J. Hess, of Council Bluffs, for appellants.

C. E. Cooper and Geo. E. Allen, both of Onawa, and Samuel P. Davidson, of Tecumseh, Neb., for appellees.

WEAVER, J. On March 11, 1915, the plaintiff C. B. Reynolds entered into a contract with the city of Onawa to construct for said municipality a so-called "sewer outlet and purification plant." This work lingered in its progress from the date named until May, 1917, and being still incomplete, and plaintiff being apparently unable to contend with his difficulties, entered into a written contract with the Intermountain Bridge & Construction Company to finish the job upon the sewer outlet, while the city seems to have taken upon itself the completion of the purification plant, which it accomplished. In the course of the prosecution of the work by Reynolds, and thereafter by the Bridge & Construction Company, numerous claims ac-

crued in behalf of persons furnishing materials and supplies used in making the improvement. It is the claim of the Bridge & Construction Company that for its work under the contract for completing the outlet it became entitled to receive the sum of \$6,926.31. The city's claim for expenditures in completing the purification plant is \$1,111.61. Of the individual claims, other than the two here mentioned, we shall not undertake a detailed statement. For the purposes of this appeal it is sufficient to say that the trial court, after due examination of these miscellaneous items, and after eliminating those not justly chargeable in this accounting, found the gross amount thereof to be \$6,453.18.

An examination of the record satisfies us with the substantial correctness of the trial court's finding in this respect. It also appears that, after allowing the city proper credit for its expenditures, there remains in its hands an unexpended remainder of the contract price to the amount of \$12,605.35. To complete the statement of the general situation, and make clear the dispute over the proper application of this unexpended remainder, it should be added that about the time Reynolds entered upon the performance of his contract with the city he arranged with the City National Bank of Council Bluffs for such credits and advancements as he might from time to time need in the prosecution of the work, and to secure payment of the indebtedness so arising he made to the bank a written assignment of his contract with the city. Under this arrangement the bank did make large advancements to Reynolds, much of which is still unpaid. To enforce its claim under this assignment, the bank intervenes in this action, asserting a prior lien upon the moneys due Reynolds, while the other claimants insist that their rights in the premises are superior to those of the bank. The court found against the bank's claim to priority and adjusted the account on the basis already stated. The plaintiff Reynolds and the intervenor bank alone appeal.

To a proper appreciation of the merits of this inquiry, it should also be said that the original contract between Reynolds and the city provided that parties having unpaid claims for labor or materials furnished for the work could file their claims with the mayor and city council, and that the council should withhold out of any money due the contractor a sufficient amount to pay the claims so filed. The claims of this character allowed by the trial court, or some of them, were filed with the city clerk, and not elsewhere. Some were not verified by affidavit, and most of them were not filed until after the lapse of 30 days from the date when the materials were furnished. Argu-

ments in this court are centered upon the question of priority as between the bank and the creditors who furnished materials used in the performance of the contract. The appellants, Reynolds and the bank, take exception to the ruling of the trial court giving preference to these creditors on the following grounds:

[1] I. It is said that under the statute (Code, § 3102) it was incumbent on subcontractors, desiring to obtain and enforce a lien or preference, to file with the public officer through whom payment is to be made written and verified statements of their several claims within 30 days after the furnishing of the last material for which payment is demanded, and it is objected that this requirement was not observed, in that the filings were made with the city clerk, and not with the city treasurer, and not until after a lapse of more than 30 days. Even if the objection thus raised could under some circumstances be made available to the principal contractor or his assignee, it is sufficient to say that the materialmen whose claims were allowed by the trial court do not base their right to recovery and preference upon the cited statute, but upon the terms of the contract between Reynolds and the city. Neither party has seen fit to include said contract in full in the printed record, but it is made to appear that among its provisions are the following:

"If any bills for material used in the work shall be filed with the mayor and city council before the monthly or final estimates are passed upon, then so much of the contractor's account shall be withheld until evidence of satisfactory settlement is presented and a satisfactory bond shall be filed guaranteeing the payment of such claim or so much thereof as may be determined proper by the court. * * * A final estimate, giving the total contract price for work actually done, will be made at the time of conclusion of the work, and contractor will then file with the engineer receipts in full account for all material; he will submit his receipted pay roll to the engineer for inspection; as soon thereafter as the plant has passed the inspection and the tests provided, the contractor will be paid the full amount of the final estimate, or such as remains thereof after deducting the sum of all unpaid bills and previous estimate from said estimate."

It is by the terms and provisions of this agreement, and not by those of the statute, that the rights of the parties are to be measured. Applying this standard to the conceded or well-proved facts now under consideration, there is no room to doubt the essential correctness of the conclusion reached by the trial court. This question was before us in *Cary v. Boone*, 162 Iowa, 695, 144 N. W. 709. There an assignee of the principal contractor contended for preference over the claim of subcontractors for materials furnished. There, as in this case, the assignee objected to the allowance of the claims of material-

men because they had not been filed and perfected in the manner provided by statute. In overruling such objection we said:

"The appellant says that neither the trial court nor the city required the holders of these claims to perfect them under the provisions of Code, § 3102. * * * But we think the rights of the laborers and materialmen in this case do not depend upon their compliance with that provision, and the city was not required to insist upon compliance with it. * * * In other words, the right is contractual—not statutory. The city in such case is bound only to take care that the debts it thus assumes to pay for the contractor are bona fide claims for labor or material, and, if this be done, other creditors who are thus postponed suffer no wrong."

This same proposition has often been affirmed in other cases. See *District v. Mardis*, 106 Iowa, 295, 76 N. W. 794; *Casualty Co. v. Des Moines C. El. U.*, 184 Iowa, 246, 167 N. W. 695.

The filing of the accounts with the city clerk was a substantial compliance with the contract condition that they be filed with the mayor and council, and affords no ground on which to postpone their payment in favor of the assignee of the contractor. Appellant places considerable reliance on our decision in *School District v. Hall*, 159 Iowa, 607, 140 N. W. 855, where the assignee of a contract was allowed to prevail over materialmen who failed to file their claims within the statutory time. But what is there said must be read in light of the fact that the claims of the materialmen were expressly based upon the statute, and were denied because the claimants failed to bring themselves within its terms. The opinion expressly notes the distinction by pointing out the fact that in the contract in that case—

"the district does not undertake to pay for labor or material furnished by subcontractors where the claims remain unpaid, nor does it reserve the right to withhold payment from the original contractor until such claims are settled or released."

It is manifest that the Hall Case furnishes no support for the appellant's contention.

II. The contract between Reynolds and the Bridge & Construction Company was in writing, and provided that the latter should perform the work to finish the "uncompleted sewer" for a compensation to be computed on a stated per diem basis for the services of certain named persons and for the use of a trench machine and the actual cost of other labor and materials. It is in accordance with these stipulations the trial court computed and allowed the claim of said company at \$6,453.18. The appellants, while admitting the making of this contract, pleaded and offered considerable testimony to the effect that after the contract was signed, but before the work was done, the written agreement was abandoned, and substituted by an

oral agreement to the effect that the Bridge & Construction Company would do the job for the lump sum of \$1,000. This is strongly denied by the company. The testimony offered by the parties upon the issue so raised is in radical conflict, and the trial court found that the burden of proving such abandonment of the agreement had not been sustained. In that finding we concur. Without in any manner impugning the veracity of any of the parties or witnesses in this respect, we think the conceded fact that they did make and execute the written agreement, and that such agreement was not given up or destroyed, and that the alleged abandonment or radical change in its terms is unequivocally denied by the persons acting for the company, it must be said that this defense or objection to the Bridge & Construction Company's claim has not been established.

[2] III. Counsel for appellant seems to argue that, Reynolds' contract with the city having been assigned to the intervener bank very soon after it was executed and before the claims of the subcontractors had accrued, it operates in some way to give the bank a position of greater advantage as relates to the subcontractors than would have been occupied by Reynolds, had the contract never been assigned. The contention is not sound in principle and is inconsistent with our prior holdings. Under its assignment from Reynolds the bank acquired no other or higher right to the compensation provided for in the contract than Reynolds himself had, and this right was by the terms of the writing itself expressly made subject to the right and duty of the city to withhold payment to the contractor—

"until evidence of satisfactory settlement is presented and a bond shall be filed guaranteeing the payment of such claims or so much thereof as may be determined proper by the court."

This duty and obligation, as we have seen, was further emphasized by the provision that when the work is completed the final payment to the contractor shall be only such amount of the final estimate "as remains after deducting the sum of all unpaid bills and previous estimates." What the bank acquired under its assignment was the right to stand in the contractor's shoes, and demand and receive from the city just what the contractor himself could rightfully demand and receive, had he made no assignment and was

now demanding payment according to the terms "nominated in the bond." The application of this rule is in no manner prevented or avoided by the fact that the assignment to the bank was known to the city, nor by the fact that the subcontractors had actual or constructive notice thereof when they furnished the materials for which they demand payment. Such is the rule we applied in *Cary v. Boone*, supra. It was also expressly recognized in an ordinary mechanic's lien case, where the assignee of the contractor asserted rights to which the contractor himself would not have been entitled. *Md. Casualty Co. v. Des Moines C. E. U.*, 184 Iowa, 253, 187 N. W. 695. The stream can rise no higher than its source. The assignment put the bank in position to demand of the city, when the work was done, just what, except for such assignment, Reynolds could rightfully have demanded and no more.

If this controversy were, as appellants seem to think, a mere question of priority of statutory liens, the arguments pressed upon our attention in behalf of Reynolds and the bank would be quite pertinent; but that question is not before us. As we have already said, the appellees are not claiming to have any such lien, nor does the trial court's decree recognize or give force to such claim. The rights set up by the appellees and adjudicated by the decree are contractual, and the assignee of the contract has no standing to insist that the subcontractors' rights thereunder are conditioned upon the observance by them of the lien statute (Code, § 3102). The bank took the assignment as collateral security only for its advancement to Reynolds. It did not assume or pretend to perform the work contracted for, but acquired simply the right to receive the compensation which Reynolds should earn under the terms of the contract. Its rights in that respect are measured by, and cannot exceed, the right of its assignor, and that is the right to receive what remains due to the assignor after deducting payments already made and the sum "of all unpaid bills," the amount of which the city had bound itself to withhold for the benefit of claimants.

Such is the effect of the decree, and its soundness cannot be seriously questioned. The decree of the district court is therefore affirmed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concur.

MOORE v. MOORE. (No. 33770.)

(Supreme Court of Iowa. Oct. 25, 1921.)

1. Divorce $\Leftrightarrow$ 27(6)—Decree for cruel and inhuman treatment properly granted.

Decree held properly granted to wife where evidence showed actual battery, insults, and threats by the husband, that he shot a bullet through the wall of the room where she was confined to bed, and that he had at times locked her in her room.

2. Divorce $\Leftrightarrow$ 298(6)—Custody of two year old girl properly awarded to mother.

Where a decree was granted the wife for cruel and inhuman treatment, an award to her of the custody of the child, a two year old girl, was proper.

3. Divorce $\Leftrightarrow$ 240(3)—Burden on plaintiff to justify alimony claimed.

In a wife's suit for divorce the burden was on her to make a showing that would justify the award of alimony claimed.

4. Divorce $\Leftrightarrow$ 240(5)—Allowance of alimony held excessive.

Where a decree was granted the wife, and it appeared that the parties were young, that the husband earned \$250 a month, and did not possess more than \$5,000 or \$6,000, that the wife had inherited an interest in land worth \$80,000, but had quitclaimed to her mother before marriage, an award of \$150 a month was excessive, and would be reduced to \$75.

Appeal from District Court, Woodbury County; John W. Anderson, Judge.

Suit for divorce on the ground of cruel and inhuman treatment. There was a decree for the plaintiff, and the defendant appeals. Modified and affirmed.

Clark, Byers & Hutchinson and Gregory Brunk, all of Des Moines, for appellant.

Henderson, Fribourg & Hatfield, of Sioux City, for appellee.

EVANS, C. J. [1] The parties were married in June, 1917. This suit was brought two years later. The ground charged by the plaintiff was cruel and inhuman treatment. The record is quite replete with evidence tending to show the same. As to the larger merits of the case the appeal presents to us only the question of fact as to whether the cruel treatment was proved. In view of our agreement with the conclusion of the trial court we see no purpose to be subserved by a discussion of the details of the evidence. The parties are young people, and the plaintiff is frail in physique, weighing only 97 pounds. That she has suffered great indignity and cruelty of conduct at the hands of the defendant is shown beyond fair debate. Such conduct consists of actual battery, of insulting words frequently repeated, of repeated threats, including the brandishing of weapons, and on one occasion of an

actual shooting of a bullet through the wall of the room where the plaintiff was confined to her bed with her new born babe, of a domineering assertion of personal authority over the plaintiff, whereby at times he held her in imprisonment by locking her in her room. Many of the circumstances testified to on behalf of the plaintiff are explained by the defendant. The explanations in the main are labored and unsatisfactory. We are clear upon the record that the plaintiff was legally entitled to the divorce prayed.

[2] II. The trial court awarded the custody of the child to the plaintiff. When it is stated that the child is a little girl less than two years of age at the time of the trial, the propriety of the order of the court is quite self-evident.

III. The trial court ordered the defendant to pay alimony for the support of the plaintiff and her child at the rate of \$150 per month. Complaint is made that the allowance is excessive. The evidence in the record on the question of the financial means of the parties is very meager. The defendant is a young man who is in the employ of his father in the business of selling corporation stock. He receives a salary of \$250 per month. His tangible assets are comparatively few, amounting to not more than \$5,000 or \$6,000. The plaintiff inherited from her father's estate shortly before the marriage about \$80,000 in value in the form of an undivided interest in real estate. Before the marriage she conveyed it by quitclaim deed to her mother. Her brother, who was the other beneficiary of the estate, did likewise. This comprised all her assets. She lives with her mother, and has lived with her mother during her married life. We cannot wholly ignore the relation thus created between her and her mother and her probable expectation as resulting therefrom.

[3] The burden was upon the plaintiff to make a showing that would justify the award of alimony claimed. The defendant was cross-examined on the question of his means, and there is much in his cross-examination that is evasive. Appellee relies largely upon this cross-examination as a sufficient excuse for the absence of testimony. While there is nothing to commend in the attitude of the defendant in such cross-examination, it related in the main to the question whether his cash on hand exceeded \$100. It does not appear that the defendant has ever come into any inheritance or gift, and that he has nothing except what he may have saved from his own earnings within a very few years. His habits do not appear to have been of the saving kind. Making due allowance against him for his conduct upon cross-examination, we do not think that the evidence in its entirety would justify a finding of assets in his hands greater than the amount herein stated.

[4] We reach the conclusion, therefore, that the amount of alimony allowed under all the circumstances was excessive, and that it should be reduced to \$75 per month. To this extent the decree below will be modified; otherwise affirmed, without costs against appellee.

Modified and affirmed.

WEAVER, PRESTON, and DE GRAFF,
JJ., concur.

In re SIOUX CITY BRIDGE CO.

SIOUX CITY BRIDGE CO. v. BOARD OF REVIEW OF SIOUX CITY.

(No. 34094.)

(Supreme Court of Iowa. Oct. 25, 1921.)

1. Taxation $\Rightarrow$ 319(2)—Taxpayer has burden of overcoming presumption that assessments and values fixed by taxing authorities are equitable.

Courts are reluctant to disturb values fixed by taxing authorities which are presumed to be equitable, and a complaining owner has the burden of overcoming such presumption and to establish the injustice or inequity of the assessment.

2. Taxation $\Rightarrow$ 493(7)—Evidence insufficient to show that valuation and assessment of bridge was inequitable.

On appeal to the district court from the board of review in a proceeding by a company owning an interstate bridge to reduce the valuation as fixed by the taxing authorities, evidence held insufficient to sustain burden of showing that the valuation was inequitable and the assessment unjust.

Appeal from District Court, Woodbury County; Geo. Jepson, Judge.

The assessor fixed the actual value of plaintiff's bridge, or that part of it assessable in Iowa and in the taxing district of Sioux City at \$300,000, and the assessable value at \$90,000. The valuation so fixed was as of date January 1, 1919. The assessment so fixed was confirmed by the Board of Review. On appeal to the district court from the action of the Board of Review, the trial court on September 28, 1920, reduced the actual valuation to \$330,000 and the taxable value to \$82,500 for the years 1919 and 1920. Plaintiff, appellant, has appealed from the judgment of the district court, and claims there should have been a further reduction. Affirmed.

Jepson, Struble & Anderson, of Sioux City, for appellant.

T. F. Griffin and O. T. Naglestad, both of Sioux City, for appellee.

PRESTON, J. The objections made by appellant before the board of review and which

were incorporated in the petition in the district court on appeal were that the property of the bridge company had been valued at an excessive amount; and, second, that the valuation placed upon the property was and is inequitable, and not in proportion to the values placed upon real estate and other property in the taxing district. There appears also to be some controversy as to what part of the bridge is assessable in Iowa and what part in Nebraska. Appellant contends that the part taxable in Iowa is 26 per cent., and 74 per cent. in Nebraska, the bridge being across the Missouri river. There is evidence as to soundings made shortly before January 1, 1919, for the purpose of determining the channel. But on this question appellee does not seriously dispute appellant's claim, and we shall not go into any detail on that subject.

[1] It is conceded by appellant that the courts are reluctant to disturb values fixed by taxing authorities, and that there is a presumption that the values so fixed are equitable, and that a complaining owner has the burden of overcoming such presumption, and to establish the injustice or inequity of the assessment. We have so held. *Benson v. Le Claire*, 185 Iowa, 506-508, 170 N. W. 747; *Frost v. Board of Review*, 114 Iowa, 103, 86 N. W. 213; *First National Bank v. City Council*, 136 Iowa, 203-208, 112 N. W. 829; *King v. Parker*, 73 Iowa, 757, 34 N. W. 451. Appellants also state the rule in such cases, quoting from *People ex rel. St. Louis Electric Bridge Co.*, 125 N. W. 280 (as appellant cites it; we assume *People ex rel. v. St. Louis Electric Bridge Co.*, 290 Ill. 307, 125 N. E. 280, is meant), that "the board was required to exercise its judgment in the matter, and a mere difference in judgment will not authorize a court to set aside an assessment." But "there was not only an entire absence of proof to sustain the assessment, but the evidence shows an overvaluation so excessive as to require the conclusion that it did not arise from an error in the exercise of honest judgment, but was arbitrarily and intentionally made, and from such an assessment the courts will give relief," and further, that courts will not give relief against an assessment on account of mere difference of opinion, but where it is manifest that the assessment is grossly excessive, and is a result of the exercise of the will, but not the judgment, relief will be granted. In the case cited the judgment was held to be excessive where a commission of engineers appraised a bridge and fixed its value at \$2,600,000. Thirty per cent. of the bridge was in Illinois, and the taxing authorities fixed the value of that part of the bridge at more than a million and a half, or nearly double what the 30 per cent. of the entire value was. Appellant also cites *Iowa Central Ry. v. Board*, 176 Iowa, 131, 157

N. W. 731. In that case the court said it was shown in the record that neither the assessor or the board of review knew anything of the value of such property, and that it was necessary to take into consideration the facts and data in tables submitted by the railway. It is contended by appellant that in the instant case the valuation was a mere guess by the assessor and the district court, and that the record presents such a glaring error of judgment, and shows such an inequality, that a reduction to the amount contended for by appellant is demanded. We shall see in a moment that from the evidence, unlike the Iowa Central Ry. Case, the authorities did know about such matters, and, as said in the Benson Case supra, that no great inequality has been shown, and there is nothing to indicate that the taxing authorities did not proceed according to their best judgment in fixing the value. In short, there is a conflict in the evidence, and the finding of the district court has substantial support in the evidence. The argument of appellant is based on the assumption that the original cost of the bridge is conclusive as a basis for the assessment, and that there is no evidence in the record to the contrary. But we shall see from the evidence that the court could have found the value substantially as fixed by it. It is difficult sometimes to fix the value with exactness. There are comparatively few bridges of this character, and their values are not of as frequent discussion or consideration as lands, horses, and the like.

1. Appellant summarizes some of the facts which it claims are not in controversy, substantially as follows: The bridge company is incorporated with outstanding stock amounting to \$943,763, and the property owned by it is the bridge in controversy. It is of stone and steel, and was built in 1888 at a cost, including approaches and one mile of track on the Iowa side, of \$1,022,355.28. From the time the bridge was opened for traffic until 1907 the revenue consisted of tolls, and varied, depending upon the amount of traffic, but in one year during that period the tolls amounted to \$230,000. In 1907 the bridge company leased the bridge to the Burlington Railway, and in 1910 a lease was made to the Omaha Railway, and appellant contends that since that time these railroads have been the only users of the bridge, and the only revenue was the rental under the leases, which was an 8 per cent. return upon the original investment, or approximately \$81,000 per annum, of which amount the Omaha Railroad pays approximately five-eighths, and the Burlington company about three-eighths, of said rentals. Mr. Gray, who fixed the valuation of this property January 1, 1919, has been the assessor for fourteen years, and first started to assess this bridge property in 1909, when the assessment was fixed at an amount somewhat lower than in this case. About one mile

of track leading to the Iowa approach of the bridge has been assessed by the state executive council as railroad property at about \$60,000. We do not understand that this last amount was included in the assessment fixed by the trial court, or that appellee claims that it should not be deducted. Going back a moment to the cost of the bridge, it is conceded that there is a variance. The bookkeeper for the Northwestern Railway System and the bridge company says the variance between his books and the engineers' records varies because the cost and improvement of some part of the approaches was charged as operating expenses, while the engineers' department charged it as original cost.

Appellant says in argument that the questions in dispute, and over which there is some controversy in the record, are in regard to the value of the bridge property, and whether the assessment appealed from was equitable and in proportion to the value placed upon other property in the district. Appellant thus concedes, it seems to us, that there is a conflict in the evidence. Without going into too much detail, we shall set out some of the evidence, or enough to show a conflict. Mr. Gray, the assessor, testifying for appellant, says that he considered \$360,000 as the full value of the bridge property in Iowa; would not say that he ever took the full value; fluctuations in real estate make assessed values look unequal; property sells for more than it is worth sometimes; assessments are not made in any district for the true value or the selling price; made a personal investigation of this bridge property viewing it personally on a great many days; thinks he has a better idea as to the value of such property than any one, excepting a civil engineer; used a record he had from the officers of the company as a part basis for his values; during all the years has made an effort to fix the actual value of this property, as compared with other property, and made frequent investigations regarding it; representatives of the company assisted him at different times and he took their figures and statements into consideration; knew the cost of the bridge and considered that, like everything else; fixed the value in proportion to other real estate in the district to the best of his knowledge; made this assessment according to the information he could obtain; during the years he has been assessor has made it a point to ascertain the value of all kinds of property; knew that in prior years the bridge revenue was derived from tolls, and that one year it was \$230,000; the bridge property was not then worth that exorbitant return; the toll rentals fluctuated some; when the assessment in question was made, he had been told that the revenue was a rental revenue from the railroads of about \$81,000 per year; when a thing is in its infancy, and the city and surroundings are sparsely settled, would con-

(184 N.W.)

sider the value less than when it builds up; as a city grows the farms are occupied, and naturally the trade that would go over the bridge or come to the bridge would make it more valuable; during the years up to 1919 there has been constant increase in the population of Sioux City and of the territory tributary thereto; the tonnage carried across this bridge from year to year up to 1919 has been constantly increasing. This witness, called on behalf of appellee, after appellant had introduced its other witnesses, says that he did not include in the assessment in question the track assessed by the executive council; lived in Sioux City 30 years, during which time he has been engaged in the real estate and loan business, and has had occasion to examine, investigate, and study the values of property in Sioux City, both in his private business and as assessor; has talked with Mr. Polleys, tax commissioner of the Omaha Railway, in connection with bridge assessments; is acquainted with his method of fixing valuations, and has claimed to him that his method might be all right, but that it was unjust as to the result obtained many times; many deeds recorded show a consideration far in excess of the actual consideration paid, especially in former years; this is so to a less extent since the stamp act; basing his opinion upon actual knowledge of the true value of property in Sioux City, says the ratio of 53 per cent. fixed by Mr. Polleys is not correct; at the time of this assessment the assessed value was not at any time as low as 53 per cent. of the true value; says it was his effort to assess all real property at its actual value, and considered that his values were the fair and reasonable values of all property at the time, and that he based a value in exactly the same way upon this bridge property. He then gives the total assessed value of property in Sioux City in 1907 and in 1919, showing an increase. He says he increased the valuation of the bridge in 1919 over what it was in 1907; the value of real estate from 1907 to 1919 increased 120 per cent., while he increased the value of the bridge property only about 40 per cent.; has investigated the proportion and amount of transportation over the bridge as between the two railroads using it, and thinks that the tonnage, passenger traffic, etc., carried by the Omaha Road would be 80 to 85 per cent. of the total, and the Burlington about 15 to 20 per cent. He refers to a report of the president and secretary of the bridge company in 1909, which shows, under the caption for general expenditures and recapitulation, total entire line, \$945,800, and the Iowa proportion, \$424,147, and so on. Witness says he used every means at his disposal to ascertain the correct value of the property, and made the assessment carefully and in proportion to the value placed on other real property within his district; did not necessarily stop at the cost of

constructing the bridge; knew what rentals were; does not know what the tolls were; knows the bridge company does not get the tolls. In the earlier years, when he assessed the property at less than the present assessment, it was his first work in assessing, and knew less of values than since and after investigation; considers that, when a community grows, a railway company doing business, or any company that has to do with the development of the community, reaps a benefit by increase of its business, equally with the general increase; prosperity with one means prosperity with the other; and, even though it is the same structure, without additional expenditure it is of more value if it has a larger earning capacity. Witness says in effect and in substance that, the lease being substantially between themselves, he does not consider as binding any agreement they might make with other roads or among themselves; that is, those who own and control the property and the interlocking companies. He says he knows that the railroads are still charging toll for the transportation of freight and passengers across this bridge.

Plaintiff's engineer, Mr. Darrow, describes the bridge, and says it would be more valuable if it was capable of taking care of modern equipment and heavier traffic; that, if constructed according to present day ideas, it would be more valuable than the present bridge ever was. Cost of steel and materials has increased since this bridge was built, but modern processes would probably make the increased cost of the construction of a bridge of this kind now about 25 per cent. over what it cost when first erected.

Mr. Gregg, the general bookkeeper for the Northwestern Railway and the appellant, says the revenue from the bridge property was a great deal more prior to the making of the leases; the Northwestern Railway owns one half the stock of the bridge company, and the Omaha railroad the other half; does not know whether the book records as to original costs are correct; has no reason to believe otherwise; the only income received from the bridge is the rental under the leases; there is nothing to prevent it receiving more if other companies should use the bridge; the revenue from tolls was \$230,000 one year, which was high mark, and the lowest was \$108,000 per annum.

Mr. Polleys lives in Chicago, and is tax commissioner for the Northwestern Railway and the Omaha Company; witness has also had charge of the tax matters for the Sioux City Bridge Company, as one of the subsidiaries of the Northwestern since 1915; made a tabulation of the true value as compared to the assessed value of property in the taxing district of Sioux City before and after January 1, 1919, that date being the center; says opinion evidence may always be resorted to, and there are other methods for

determining values, but thinks the method used by him and other tax commissioners, called the assessment ratio, is the better; this method consists in gathering transfers from recorded instruments, usually confined to real estate deeds; all deeds are not included; a large proportion of the deeds are dollar deeds, but the consideration is indicated by the stamps affixed, plus the amount of stated incumbrance; in making up these tables and estimates, he took the consideration named in the transfers and the amount of stamps attached in fixing the valuation; if the value thus arrived at looks unreasonable when posted against the assessment, they strike it out. The statements give the number of transfers, the consideration, and so on, and he considers that the statement of the assessor that the ratio of value fixed for assessment against personal property is the same as against real estate. He figures that the ratio of all property in the district, real and personal, excluding money, would be practically 53 per cent. of its true value. He then says: Now assume that the true value of the bridge property in question, properly assessed in the taxing district of Sioux City, is 26 per cent. of \$1,022,000 (the original cost of the Sioux City bridge), or \$265,700; deduct from this the one mile of track assessed by the executive council, \$60,000 leaves \$205,700 as the true value of the bridge property in Iowa; applying the ratio of 53 per cent. to this amount would leave the taxable value of the bridge property in Iowa at approximately \$109,000, instead of \$360,000, the amount fixed by the assessor. One-fourth of this would make the assessment, as contended for by appellant, \$27,250, instead of the amount fixed by the trial court, \$82,500.

[2] Mr. Barlow, living in St. Paul, chief engineer of the Omaha Railway Company says he is familiar with this bridge, and knows the cost of it, including approaches and one mile of track, was \$1,022,355.28. In 1918 the value of that portion of the bridge and approach in Nebraska was fixed for assessment purposes at \$700,000. In his opinion there has been no increase in the value of this bridge. There is no other bridge across the river used for railway purposes now between the bridge at Blair, 80 miles south, and the bridge at Chamberlin, S. D. One of appellant's witnesses states that, because the bridge is old, the present steel part of the bridge is practically scrapping value only. But it produces an income of \$81,000 per year or more. The assessment finally fixed by the trial court, \$82,500, just about equals the income. It may be we have gone too much into detail. There may be other circumstances not mentioned. Without attempting to point out the conflict between the different witnesses, it is enough to say that a reading of the testimony shows that there is a con-

flict. We say this because of appellant's contention that there is no dispute in the evidence. The case is triable de novo and is so considered. Without further discussion, we are of opinion that appellant has not met and overcome the burden, and has not sustained the two propositions relied upon by it, as to the value of the property or that the assessment was inequitable.

Affirmed.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

T. C. BOTTOM PRODUCE CO. v. ACME HAY & MILL-FEED CO.
(No. 34155.)

(Supreme Court of Iowa. Oct. 25, 1921.)

Sales ⇨89—Telegram, letter, and conversation held to constitute contract to accept damaged goods at certain price.

A telegram, letter, and telephone conversation held to constitute an agreement on the part of plaintiffs to reduce the price of a carload of apples by reason of their damaged condition and quality, and on the part of defendants to accept delivery at such reduced price, and verdict was properly directed in favor of plaintiff in an action to recover an alleged balance due.

Appeal from District Court, Woodbury County; Geo. Jepson, Judge.

"Not to be officially reported."

Action at law to recover a balance alleged to be due plaintiff, on shipment of a car of apples to the defendant. At the close of all the evidence the trial court sustained plaintiff's motion for a directed verdict, and judgment was rendered against defendant for \$164.39, with interest, and costs. Defendant appeals. **Affirmed.**

O. E. Martin, of Sioux City, for appellant.
Walter & Loepp, of Sioux City, for appellee.

PRESTON, J. The car of apples, consisting of 786 boxes, was shipped to defendant at \$2.55 per box, subject to inspection on arrival. When the car arrived, some of them near the door were frozen, and defendant claimed that the car did not contain the per cent. of a certain kind of apples ordered. There was some correspondence between the parties by wire and letter, and a long distance telephone conversation, and thereafter a letter in confirmation of prior correspondence and the phone conversation. The trial court held that the correspondence constituted a contract for the adjustment of the difference between the parties in regard to the car, at \$2.25 per box, after inspection by defendant. The amount of the verdict

was computed on that basis, and credit given defendant for payments made by it. Plaintiff is doing business at Kansas City, but the apples were shipped from Washington. The defendant had been in business for a good many years, and had experience in matters of this kind. The car arrived in Sioux City November 15, 1919, and on that date defendant wired plaintiff that more than half the boxes in the doorway showed frozen apples, and asking the privilege of getting the car on the wagon track so that adequate examination could be made. The same day plaintiff wired the railroad agent to deliver the car of apples to defendant without bill of lading, and wired defendant that it had sent the telegram to the railroad, and directed defendant to unload the apples and set aside all frozen and broken boxes, and plaintiff would adjust later. November 17th, defendant, by letter, acknowledged receipt of the plaintiff's telegram, and stated that defendant had ordered the railroad company to bring the car to the team track immediately upon receipt of the wire; that the car had not been yet placed that morning, but as soon as the car was placed they would make a careful examination, and if the stuff is all right and not badly frozen, excepting at the door, everything will be O. K. November 18th, three days after the car arrived, and after defendant had made the second examination of the apples, defendant wired plaintiff in substance that the apples were not as they were to be shipped, and that the car was to run 80 per cent. fancy, etc., and that defendant could not use the car at over \$2.25 per box. Thereupon and the same day, plaintiff, by its president Bottom, called up defendant's manager Burgeson, by long distance phone. Burgeson testifies that in that conversation he discussed with Bottom the quality of the apples.

"I told him in substance just exactly what my wire stated to him, and told him I couldn't use the apples at over \$2.25 a box. He said that would show them a loss, and also stated that he had every confidence in us, that we were not trying to take advantage of him; that the apples had not all been removed, and that if the fruit would run as good, or no worse than what I could examine here at the doorway, of the car, we would pay \$2.25 a box for the apples, and he said, 'All right, go ahead and unload the car.'"

Counsel for appellant argue that under the correspondence there was to be a continuing inspection until the apples were all unloaded, or sold out of the car, but Burgeson testifies that it was not to be a continuing inspection. Bottom knew nothing about the condition of the apples as to their being frozen, etc., and relied on defendant's inspection. On the same day, and after the telephone conversation, plaintiff wrote defend-

ant, referring to the conversation, and stated that they would allow the 30 cents per box reduction as per defendant's request, also stating that plaintiff would protect defendant on any damage which defendant had by reason of frost or broken boxes, but that it was understood that defendant would get the railroad agent's notation on the expense bill, showing the number of boxes so damaged, and stating further that plaintiff wanted nothing but what was fair, and that plaintiff had no reason to believe defendant wanted anything else, and, further, that while the car made plaintiff a loss they believed defendant's statement to be correct, and they were accepting it without any ill feeling. This letter was received by defendant about November 19th or 20th, and on the 20th defendant wrote plaintiff in answer that defendant wished to express its appreciation of plaintiff's confidence in defendant in delivering the car without taking up the draft; that defendant was sorry to report that the apples were not running as good as they showed on the first inspection, and that defendant was having difficulty in selling them on the basis of reduced price; that defendant expected the car would run 80 to 85 per cent. fancy, and that some of the apples were small; that defendant hoped to be able to get out of this without loss. On the 22d, in answer to the last letter, plaintiff wrote defendant that it was sorry that the car of apples was not entirely satisfactory, and expressed its hope that they would turn out all right, etc. We have given the substance of the different communications. It appears then, without dispute, that the apples were damaged to some extent; that defendant requested plaintiff to make a reduction to \$2.25 a box; that this proposition was accepted by plaintiff. Defendant knew that the apples were not quite up to the quality it bargained for, and this was known and discussed prior to the final offer and acceptance. No witness for defendant testifies that the apples were of a different quality, or that they were more badly frozen when the car was finally unloaded, or that they were in any different condition then than they were on the second inspection by defendant, about November 18th, nor do we understand that the railroad agent made any notation on the expense bill as requested by plaintiff. Mr. Bottom testifies that in the telephone conversation Burgeson stated that he had made a very thorough inspection, and found the fruit just as he had wired, and that defendant finally agreed to allow him a reduction on the entire car of 30 cents per box, and that on the day of the conversation over the phone, he wrote defendant, confirming the conversation and agreement. As we understand the record, a further credit was al-

lowed defendant of \$17.50 and some broken boxes, and for some frozen apples, and one empty box. Though it appears that defendant feared they would not get out entirely whole, at the reduced price, and may not have been entirely satisfied with the contract it had made, we are satisfied that the record shows without dispute that the parties agreed that plaintiff would accept, and that defendant would pay, for the car of apples at the rate of \$2.25 per box. This being so, the trial court properly directed a verdict for plaintiff at that price. If there is any dispute at all in the record, it is as to the telephone conversation, but even this is slight, and refers more to the manner of the parties participating therein in expressing themselves. As to the essential facts, there is no dispute, and the telephone conversation is in harmony with the correspondence.

The judgment is affirmed.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

ANDERSON v. RUBENSTEIN. (No. 33881.)

(Supreme Court of Iowa. Oct. 25, 1921.)

Appeal and error ⇨ 1009(3)—Decree of trial court on controversy of fact not disturbed.

In a suit to foreclose a mechanic's lien, where the controversy was one of fact, and depended largely on the credibility of the parties and their witnesses, and the evidence was conflicting, the decree of the trial court will not be disturbed.

Appeal from District Court, Polk County; Lawrence De Graff, Judge.

Action in equity to foreclose mechanic's lien. Decree for plaintiff, and defendant appeals. Affirmed.

Nourse & Nourse, of Des Moines, for appellant.

Guy A. Miller and Fred A. Utterback, both of Des Moines, for appellee.

PER CURIAM. Under date of June 25, 1918, the parties entered into a written agreement by which the plaintiff undertook to furnish the necessary labor and material for the construction of a building in the city of Des Moines. The agreed price for such construction to be done according to furnished plan and specifications was \$10,700. During the progress of the work numerous changes were made in the plans, and extra work and materials furnished at the direction or request of the defendant, who acted as his own architect. Plaintiff having, as he claims, completed the job in accordance with the original

contract and the changes therein, demanded payment of the agreed price plus the alleged cost of the extra work, increased by a commission or margin of 10 per cent., which he alleges was the oral agreement under which the extra material and extra work were furnished. The parties being unable to agree, plaintiff filed a mechanic's lien upon the property, and later began this action for its foreclosure.

The defendant denies these claims, denies that the work was done according to contract, and denies the alleged amount and cost of the extras furnished by the plaintiff. He further alleges in substance that the parties entered into an agreement to arbitrate their differences and that, such arbitration being had, it was found that defendant was indebted to plaintiff in the sum of \$950, and, while protesting he is not so indebted to plaintiff, he offers and tenders payment of said sum so alleged to have been found against him.

Replying to this answer, plaintiff admits that an arbitration was agreed upon, but denies that it was ever carried into effect. Of the attempt to arbitrate it is quite clear from the record that it was abandoned without ever reaching a trial or award, although certain witnesses who were proposed as arbitrators, after a somewhat cursory examination of the work made estimates thereof and testified as witnesses on the trial. There was a radical conflict in the evidence, and the items in controversy are altogether too numerous to permit us to discuss them in detail. The plaintiff's bill of particulars and his testimony as a witness tends to show that the cost of extras was \$4,188.48, to which sum he adds his alleged margin of 10 per cent., and deducts admitted payments and credits, leaving the net amount of \$3,222.50, for which he demands a recovery.

As a witness defendant denies that he agreed to pay plaintiff a margin of 10 per cent. on the cost of the extras, but the preponderance of the testimony seems to be against him on that question. He also claims that certain parts of the work done by plaintiff were defective and not according to the agreement. The proposed arbitrators, or some of them, as witnesses, estimated the value and cost of the extra work at a figure considerably less than is indicated by the plaintiff and other witnesses; but their cross-examinations developed that in making their estimate they had left out of consideration many items which on plaintiff's theory would detract from the weight of their evidence. The trial court found from the evidence that the balance of indebtedness due plaintiff from defendant was \$1,870.26 and entered decree foreclosing the lien for that sum.

As will be seen, the controversy is reduced to one of fact. It is a case in which the tip-

pling of the scale depends very largely upon the credibility of the parties and their witnesses, a situation where we are inclined to place much reliance upon the action of the trial court, which had the advantage of seeing and hearing all the parties concerned. We see no reason for interfering with the decree appealed from, and it is affirmed.

EVANS, C. J., and WEAVER, PRESTON,
and ARTHUR, J.J., concur.

DE GRAFF, J., taking no part.

POTIER v. WINIFRED COAL CO.

(No. 33687.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Appeal and error $\S$ 1064(4)—Transposition of terms in an inapplicable instruction rendering it a nullity is harmless.

Inadvertent transposition of "employer" for "employé" in an instruction plainly discoverable by the jury, that reduces the instruction to a nullity, and which if in proper form might have properly been omitted, being without support under the issues and evidence, is not prejudicial.

2. Master and servant $\S$ 296(3)—Instruction held not to recognize contributory negligence as a qualified or partial defense.

An instruction that contributory negligence, if any, on the part of the employé, that is, negligence on the part of the employé that combined with negligence on the part of the employer to cause the injury, would be no defense, but if the employé's injury, if any, was caused wholly by his negligence, or his failure to exercise reasonable care, and if the employer was not guilty of any negligence that was the proximate cause of the injury, the employé cannot recover, does not recognize contributory negligence as a qualified or partial defense.

3. Appeal and error $\S$ 1068(4)—Verdict for defendant cures error in instructions on mitigation of damages for contributory negligence.

Where a verdict is for defendant, any possible error from instructions relating to mitigation of damages for contributory negligence is cured by the verdict.

4. Negligence $\S$ 141(12)—Instruction recognizing employé's contributory negligence as mitigation held in accord with statute.

An instruction, recognizing contributory negligence as a ground in mitigation of damages, is in accord with Code Supplemental Supp. 1915, $\S$ 3593a, providing in actions by an employé against his employer contributory negligence may be pleaded in mitigation.

5. Master and servant $\S$ 348—Statute providing for mitigation of damages for contributory negligence not in contravention of Compensation Act.

Code Supplemental Supp. 1915, $\S$ 3593a, providing in effect that the employer's liability

shall be confined to the comparative consequences of his own negligence and shall not extend to the consequences of the negligence of the employé, is not in contravention of prior Workmen's Compensation Act, providing that if an employer elect to reject the terms thereof he shall not "escape liability" for injury sustained by the employé on the ground of contributory negligence.

6. Master and servant $\S$ 204(1)—Statute abolishing assumption of risk not repealed by Workmen's Compensation Act.

Code Supp. 1913, $\S$ 4999a3, abolishing assumption of risk by an employé except when in the usual course of his employment it is the duty of the employé to make repairs and remedy defects, is not inconsistent with or repealed by subsequent Workmen's Compensation Act, providing that the employer shall not escape liability if employé is injured in the ordinary course of his employment.

7. Master and servant $\S$ 204(1)—Under statute miner remedying entry roof outside regular course of employment assumes risk.

Where a miner undertakes work of a dangerous character outside the regular course of his employment, such as "brushing" the roof of an entryway to the mine and is injured, if he is an independent contractor he is outside the provisions of the Workmen's Compensation Act, but if claiming under the act as an employé he is within the exception of Code Supp. 1913, $\S$ 4999a3, abolishing assumption of risk except "when in the usual and ordinary course of his employment it is the duty of employé to make repairs and remedy defects."

Appeal from District Court, Appanoose County; Seneca Cornell, Judge.

Action for damages for personal injuries sustained by plaintiff while at work in defendant's coal mine. There was a verdict for the defendant and judgment was entered thereon, from which the plaintiff has appealed. Affirmed.

John Clarkson and Fred C. Huebner, both of Albia, for appellant.

Howell, Elgin & Howell, of Centerville, for appellee.

ARTHUR, J. The petition averred and the evidence disclosed that the defendant had rejected the provisions of the Compensation Act (Code Supp. 1913, $\S\S$ 2477m to 2477m51), and had elected to assume liability for damages under the common-law statutes of this state.

The answer of the defendant denied negligence on its part, and pleaded affirmatively that it was not guilty of any negligence which was the proximate cause of plaintiff's injury, and pleaded further that the plaintiff's own negligence was the sole proximate cause of such injury. The salient facts which the evidence tended to prove, stated briefly, are that the plaintiff was a miner in the employ of the defendant, and engaged in the work of

mining coal; that between the plaintiff's place of work and the "switch" at which he delivered his coal was an entryway through which the plaintiff wheeled his coal; that the roof of such entryway became dangerous at a point about 50 feet from plaintiff's place of work; that the plaintiff discovered such dangerous condition and at once notified the superintendent and mine foreman; that at the same time he at once ceased the work of mining, and refused to further wheel his coal under such dangerous roof, and so notified the superintendent and foreman, who fully coincided with the plaintiff in his judgment of the dangerous character of the roof; that it became thereupon the duty of the defendant company to "brush" said roof by causing the taking down of all the loose rock therein; that the company had in its employment regular men whose duty it was to do such work upon delegation thereto; that under the custom of the mine it was the privilege of the miner who used such entryway to demand the right of doing such job, for which a liberal scale of compensation was provided independently of the compensation for mining coal; that pursuant to this custom the plaintiff agreed with the superintendent and foreman to do the job for the stated compensation, and entered upon such work; that he was experienced and competent for the purpose, and was under no supervision as to the time or method of doing the work or as to the tools to be used; that while he was engaged in such work, and after he had taken down a considerable quantity of loose slate, he was injured by a further falling of slate.

The errors relied on by appellant for reversal relate wholly to certain instructions given by the trial court. Instructions Nos. 4, 7, 8, 9, 10, 11, and 16 were as follows:

"IV. Before the plaintiff can recover he must establish by the greater weight or preponderance of the evidence:

"First. That he was injured while in the employ of the defendant.

"Second. That such injury arose out of and was received in the usual course of such employment.

"If the plaintiff has so shown, then he would be entitled to recover, unless the defendant has established by the greater weight or preponderance of the evidence that the defendant was not guilty of any negligence that was the proximate cause of the injury to plaintiff.

"VII. The law of this state provides that in cases of this kind the employer shall not escape liability for personal injury sustained by an employé of such employer when the injury sustained arises out of and in the usual course of the employment, because:

"(1) The employé assumes the risk inherent in or incidental to or arising out of his employment, or the risk arising from the failure of the employer to furnish and maintain a reasonably safe place to work, or because the employer exercised reasonable care in selecting reasonably competent employés in the business.

"(2) That the employer was negligent unless and except it shall appear that such negligence was willful and with intent to cause the injury.

"VIII. Where an employé in such a case as this sustains an injury arising out of and in the usual course of his employment the law presumes that such injury was the direct result and growing out of the negligence of the employer, and that such negligence was the proximate cause of the injury, and, in such case, the burden of proof rests upon the employer to rebut such presumption.

"IX. Contributory negligence, if any, on the part of the plaintiff, that is, negligence on the part of the plaintiff that combined with negligence on the part of the defendant to cause the injury, would be no defense, but if you find by the greater weight or preponderance of the evidence that the plaintiff's injury, if any, was caused wholly or altogether by the plaintiff's own negligence, or his failure to exercise ordinary and reasonable care for his own safety, and that the defendant was not guilty of any negligence, that was the proximate cause of such injury, then plaintiff cannot recover.

"X. If you find by the greater weight or preponderance of the evidence that the plaintiff was injured while in the employ of the defendant, and that such injury arose out of and was received in the usual course of such employment, then the plaintiff would be entitled to recover, unless you find by the greater weight or preponderance of the evidence that the defendant was not guilty of any negligence that was the proximate cause of the injury; but if you so find that the defendant was not guilty of any negligence, or if negligent that such negligence was not the proximate cause of defendant's injury, then the plaintiff cannot recover.

"XVI. If you find from a preponderance of the evidence that on the morning of the accident the plaintiff discovered a loose rock in the entry where the injury occurred, and that he regarded the rock as dangerous, and if you further so find that he told the superintendent and the pit boss about said loose rock, and that the superintendent and pit boss went to the place indicated by the plaintiff and inspected said alleged loose rock, and found that the same was loose and dangerous, and if you further so find that the plaintiff contracted with the superintendent of the defendant to take down said rock, and that in taking down said loose rock the same fell on the plaintiff and caused the injury complained of by him, then the plaintiff cannot recover."

Appellant concedes that instructions 4, 8, and 10 present a correct statement of the law. Complaint is directed by appellant against the other instructions above set forth, largely on the ground that they are inconsistent with and contradictory to the first named instructions. For the purpose of this discussion we shall accept appellant's concession and deem the law of the case to be correctly set forth in instructions 4, 8, and 10.

[1] I. It will be noted that in paragraph 2 of instruction 7 the court used the word "employer" instead of the word "employé." This was manifestly a slip of the pen. Appellant complains of it, however, on the ground that

it would necessarily mislead the jury as to the law. We may assume it true that if the mistake was fairly calculated to mislead the jury the error could not be ignored merely because it was an inadvertence. A careful analysis of the instruction satisfies us that it cannot be fairly said that the jury was misled by it, for the following reasons: (1) The inadvertence was so manifest that it was fairly discoverable by the jury. (2) The paragraph as actually written reduces itself to a nullity. The result was the same as though the paragraph had been omitted entirely. (3) The paragraph if in proper form might properly have been omitted altogether. There was neither issue nor evidence in the case of willful negligence. Inadvertences of this kind have been frequently presented to us as grounds of reversal. These include the transposition of the names of the parties, such as using the word "plaintiff" for the "defendant" and vice versa; a mistake in the Christian name of one of the defendants; the use of "his" for "her" in a case where a husband and wife were on trial. We have held such inadvertences to be nonprejudicial. *Willis v. Schertz*, 188 Iowa, 712, 175 N. W. 323; *McBride v. McBride*, 142 Iowa, 176, 120 N. W. 709; *Reupke v. Stuhr*, 126 Iowa, 632, 102 N. W. 509; *State v. Steen*, 125 Iowa, 312, 101 N. W. 96. It is our conclusion in the case at bar that no prejudice could have resulted to the appellant from the inadvertence pointed out.

[2] II. Appellant complains of instruction 9. The argument is that it is wholly inconsistent with instructions 4, 8, and 10, in that it recognizes contributory negligence as a qualified or partial defense. We are unable to so read the instruction under attack. The burden was on the defendant to prove its own freedom from negligence as a proximate cause of the injury. It was under no burden to prove affirmatively what was the proximate cause of the injury. Nevertheless it was material and competent to introduce evidence tending to show such proximate cause to be something other than its own negligence. Evidence tending to show that plaintiff's negligence was the sole proximate cause of the injury was competent as tending likewise to show that the proximate cause was not the defendant's negligence. If plaintiff's negligence were the sole proximate cause of the injury, this would not be contributory negligence. The Compensation Act permits the defendant to show its own freedom from negligence. Theoretically the defendant might be able to show its freedom from negligence without disclosing, or being able to disclose, what the real proximate cause of the injury was. Nevertheless its proof could be aided by a showing which would fix the sole responsibility for the proximate cause either upon the plaintiff or upon any other person. We see therefore no inconsistency as between instruction 9 and

those instructions which are conceded to be correct.

[3] III. Complaint is made of instruction 11 because contributory negligence was therein recognized as a ground for the mitigation of damages. There are two or three manifest reasons why this complaint cannot be sustained:

(1) The verdict awarded to the plaintiff no damages. This instruction therefore cut no figure in the result in a legal sense. Its incidental practical effect upon the jury would have been favorable, rather than unfavorable, to the plaintiff. It offered the jury a middle ground in which some amount might have been allowed to the plaintiff.

[4] (2) This instruction is in strict accord with section 3593a of the Supplemental Supplement of the Code.

[5] It will be noted that this statute was no part of the original Compensation Act, but was enacted by a subsequent Legislature. It is argued by appellant that it is in contravention of the Compensation Act. If that were so it would have to be sustained as being the later legislation. However, we do not find that there is any necessary inconsistency between the two acts. The Compensation Act provided (section 2477m) that if an employer elected to reject the terms thereof he "shall not escape liability for personal injury sustained by an employé" on the ground of contributory negligence of the employé "unless," etc. Section 3593a does not permit such employer to "escape liability." It does provide in effect that his liability shall be confined to the comparative consequences of his own negligence, and shall not extend to the consequences of the negligence of the employé.

(3) Plaintiff saved no exceptions to this instruction. This last remark is applicable also in instruction 9.

[6, 7] IV. Plaintiff complains of instruction 16. The particular complaint now presented to us is that this instruction amounts to holding that the plaintiff upon the hypothesis stated in the instruction assumed all the risks of his employment. The plaintiff is confronted with the fact that the only specific exception saved by him to this instruction was that it ignored the presumptive negligence of the defendant, and that the following qualification should have been added thereto:

"And that the defendant was not guilty of any negligence that was the proximate cause of such injury."

Clearly the instruction is not vulnerable to the exception saved by plaintiff in the trial court, nor does the plaintiff now assume to support the point made in such exception.

If we were to treat the exception as sufficient to present the point now made before us, our holding must still be adverse to the plaintiff. The evidence is undisputed that

the defect in the roof of the entry was at a place where it was the duty of the defendant company to remedy it by causing the loose slate to be taken down. It was 50 feet distant from the place of work of the plaintiff as a miner. As a miner engaged in the work of mining coal he had no duty to perform with reference to the "brushing" of said roof. He had discovered the danger, and had ceased his mining and had notified the defendant. The evidence is abundant, and all but undisputed that by special arrangement with the superintendent of the mine the plaintiff undertook the job of "brushing" said roof and rendering it safe. By such undertaking he assumed a duty which he had not been under prior thereto. His relation to the defendant and to such undertaking was in no wise different from that of any other man to whom the company might have delegated such work. In doing such work the plaintiff must be regarded either as an independent contractor or else as an employer. The defendant contends that he was an independent contractor; the plaintiff contends that he was still an employé. We do not deem it material to decide in which character he was clothed. If he was an independent contractor for the time being, then the instruction was clearly correct. If he was an employé, what were his duties under the agreement between him and the superintendent? Surely it was not to mine coal at the place at which he had formerly worked. On the contrary, it was that he should do the very thing to render such roof safe that the defendant was under duty to do when it delegated him. If the plaintiff for the time being was an independent contractor, the injury resulting to him would not come within the Compensation Act. Even if he should be deemed an employé, his injury would not come within the Compensation Act, unless it occurred in the usual and ordinary course of his employment. In order to come within the Compensation Act at all, therefore, it is necessary for the plaintiff to take the position that his work in remedying the entry roof from which his injury resulted was in the usual and ordinary course of his employment. Section 4999a3, Code Supplement, which abolishes the assumption of risk, excepts from its operation an employé "when in the usual and ordinary course of his employment it is the duty of such employé to make the repairs or remedy the defects." Section 4999a3 is not a part of the Compensation Act. It was enacted prior thereto. Considerable argument is devoted by the respective parties to the question whether the Compensation Act had the effect to repeal it by implication. We see no reason for saying such implication could arise only to the extent that inconsistency or conflict should appear between the two enactments. We see no conflict at this point.

Inasmuch as it is conceded that the plaintiff was at the place of danger pursuant to his agreement with the superintendent and for the very purpose of removing the danger and of remedying the defect, and that his injury resulted in the course of such employment, and inasmuch as the plaintiff has brought himself within the Compensation Act by the declaration that his injury resulted in the usual and ordinary course of his employment, he necessarily comes within the specific exception of section 4999a3. We reach the conclusion that the trial court did not err in giving instruction 16.

No other grounds of reversal than the foregoing are presented. The judgment below must accordingly be affirmed.

Affirmed.

EVANS, C. J., and STEVENS and FAVILLE, JJ., concur.

HESS v. DICKS et al. (No. 33893.)

(Supreme Court of Iowa. Oct. 25, 1921.)

1. Appeal and error $\S$ 928(1)—Instructions assumed appropriate and applicable to issues and theories where not before court.

The Supreme Court, in the absence of the instructions, will assume that they were appropriate and applicable to the issues and theories of the parties.

2. Landlord and tenant $\S$ 233(3)—Whether mortgagee consented to mortgagor's transfer of mortgaged horses in settlement for rent held for the jury.

In action for rent in which tenant claimed a settlement by transfer to landlord of certain personal property, including a mortgaged team of horses, whether mortgagee had consented to transfer and agreed to release mortgage held, under the evidence, for the jury, as against contention that the settlement was void by reason of mortgage.

3. Landlord and tenant $\S$ 233(3)—Delivery of personal property transferred to landlord in settlement for rent held for the jury.

In action for rent in which tenant claimed to have made a settlement by the transfer to landlord of certain personal property, including a team of horses on other farm at time of agreement, the question whether there was a delivery of such personal property at time of alleged settlement held, in view of the evidence, for the jury.

4. Appeal and error $\S$ 994(2)—Weight of testimony for jury notwithstanding impeachment by contradictory testimony given at former trial.

The weight of testimony, notwithstanding impeachment of witness by contradictory testimony given at a former trial is for the jury.

Appeal from District Court, Woodbury County; W. G. Sears, Judge.

Action at law to recover \$840 rent for plaintiff's farm. The defense was a plea of settlement by sale of personal property by defendants to the landlord for the full amount of the rent, and that the property so conveyed was more than plaintiff's claim. Defendants asked to recover on their counterclaim for the difference. Trial to a jury. Verdict and judgment for defendants for \$23.10 on their counterclaim. The plaintiff appeals. Affirmed.

Hess & Hess, of Sioux City, J. A. Prichard, of Onawa, and Milchrist, Scott & Pitkin, of Sioux City, for appellant.

H. B. Walling, of Anthon, and Griffin, Griffin & Griffin, of Sioux City, for appellee.

PRESTON, J. [1] The case has been here before. *Hess v. Dicks*, 181 Iowa, 342, 164 N. W. 639. The general facts are there stated, and will not be now repeated. The case was tried on a somewhat different theory at the last trial. Defendant amended his answer, after the reversal, and alleged, and now claims that there were not two contracts between the parties, but that it was one entire transaction, including the team of horses. The instructions given by the trial court are not before us on this appeal. We assume that they were appropriate and applicable to the issues and the theories of the parties. It appears that a part of the property which defendants say they sold to plaintiff in settlement of the rent account—the team of horses—was mortgaged. Appellant contends that defendants had no authority to sell the team. On the other hand, appellees contend that they had the consent of the mortgagee to sell the team, and turn it over to plaintiff, and that the mortgage was to be released, and that plaintiff knew of the mortgage, and was to get the team of horses later. The errors assigned are that the court erred in overruling plaintiff's motion for a directed verdict in his favor, and in overruling his motion for new trial. The propositions in the brief points are that where two or more parties negotiate for the purchase of several items of personal property as an entirety, and it turns out that a portion of the property is incumbered by a mortgage, so that the seller cannot deliver, the proposed purchaser is at liberty to withdraw his proposition; that a sale is not complete if anything is yet to be done by either party before delivery; that the statute prohibits the sale of mortgaged property.

It is said by appellant in argument that the errors resolve themselves into a single question, which is, in substance: Conceding the defendant's contention, that he and plaintiff orally agreed upon a settlement of the rent by plaintiff purchasing the several items of personal property mentioned, was plain-

tiff bound to the agreement so that he could not withdraw, when it transpired that a material portion of the property was mortgaged; that it was an unaccepted proposition; that Dicks could not sell the team lawfully at the time, etc. Appellant discussed the evidence at some length, and the conflict or variance between the evidence of Dicks given on the trial of this case and his evidence on a former trial. And it seems to us that counsel treat it more as a question of fact. There is a conflict in the evidence as to the terms of the alleged contract of settlement, and other matters. The several items, other than the team, which defendants claim they sold to plaintiff, to apply on the rent, were baled hay, oats, corn in the field, loose hay, etc., in the total amount of \$663.10, as claimed by defendants. As we understand the record, there was a delivery of these items to the plaintiff, and acceptance by him, and he exercised control thereof, though the hay was not all baled, and the amount of another item was not determined. Under the agreement, as the jury could have found from the evidence, these details were to be ascertained later. Plaintiff assumed control of, and gave directions in regard to, baling the hay. As we understand it, there is no dispute about the foregoing items. Defendants testified that plaintiff got them all, and it seems that plaintiff did not withdraw, or seek to withdraw, from the arrangement as to these items. It appears that the parties discussed the matter two or three times prior to January 17, 1916, which was the last conversation between them. It appears that a son of one of the defendants, which defendant conducted the negotiations, was seriously sick, so that such defendant had to take his son away at once, and defendants' evidence tends to show that this was at the suggestion of the plaintiff as well as others. Defendant was gone about eight days. In the meantime plaintiff brought suit for the full amount, and caused to be issued a landlord's attachment.

[2, 3] The controversy, then, is in regard to the team of horses, and whether defendant had a right to sell the team and apply the agreed price of \$200 on the rent, which, with the items before referred to, would equal or exceed plaintiff's claim. The property before described was on the premises owned by plaintiff and rented by him to the defendants. The team was on the Hiller farm, some four miles distant, and which farm was being conducted by defendant F. R. Dicks. It is conceded that there was a mortgage on the team, which, at the date of the alleged settlement, had not been released of record. Defendant's evidence is to the effect that he informed plaintiff of the mortgage, and that it would have to be adjusted, and that plaintiff agreed to get the team later, when that detail, and some of the details as to the oth-

er property, were determined. Defendants' evidence tends to show that plaintiff assented to this, and agreed to account to defendants, if, when the hay, oats, etc., were measured up and the amounts were determined, it should be found that the property amounted to more than plaintiff's claim. It is contended by appellees that they had a right to sell the team, and that the sale was legal because the mortgagee gave Dicks permission to sell the team to plaintiff, and consented to such sale, and that the mortgagee would thereafter release the mortgage. It is not claimed that such permission or consent was in writing. We do not understand the bank (mortgagee) to be making any claim to the team, or that it ever has done so since the alleged agreement of settlement. A brief summary of the testimony of some of the witnesses, in regard to the team, and defendants' right to sell it, though mortgaged, will be stated. F. R. Dicks testifies that when he made the final arrangement, plaintiff, and Creek, who was talking of renting plaintiff's farm, under an arrangement between Creek and plaintiff, in regard to plaintiff assisting Creek in the purchase of apparatus to carry on the farm, came to the Hiller place about the middle of January, and plaintiff said he would like to have the rent fixed up. They then discussed the other property; the team of horses was standing in the barn, and Dicks told plaintiff he could have the horses for \$200, and plaintiff asked Creek if that suited him, and Creek said it was satisfactory; Creek said something about Dicks' furnishing a better pair of halters than those on the horses; Dicks told them that he had to make an adjustment with the Anthon bank, which he would do before they got the hay baled; Dicks says he did make the adjustment with the bank; says he was ready to deliver the team to plaintiff; defendant says he told plaintiff that plaintiff could have the whole business—the corn, the hay, the stock, and the team, so Dicks could get out, and he would give possession of the farm and the team of horses; told plaintiff what he would take for the corn, etc.; that Dicks told plaintiff that he would have to make an adjustment in regard to the team; that the bank had a mortgage on them, but the bank told Dicks it would release it, and Dicks told plaintiff that we had to get the hay baled, and he would then have the mortgage released; that plaintiff then said, "All right, you go ahead and make the adjustments, and we will get them any time after that." Dicks says the arrangement was made at his home where he lived, on the Hiller place.

"Q. Now, at the time you had not got permission of the bank, who had the mortgage on the horses, to sell? A. He said he would release, but it had not been released at that time. The president of the bank told me he would release it; I had not secured any signature in writing. I just had the consent of the banker,

or his word, that he would release if I did sell it; I had a conversation with the banker before my conversation with Mr. Hess, about releasing that team."

[4] Then follow questions on cross-examination as to testimony given by Dicks at the former trial, which we understand appellant to claim was somewhat at variance at some points with his testimony on the last trial. But we have held that the testimony on the last trial was the testimony, and the other simply impeaching. The weight of his testimony, notwithstanding the alleged impeachment, was for the jury. *State v. Carpenter*, 124 Iowa, 5-11, 98 N. W. 775. Dicks further testifies on recall:

Creek came down about 9 o'clock in the morning. After I talked with Creek I saw the president of the bank, Mr. Heidelberg, regarding the release of the mortgage. Then Mr. Hess came out to close the deal; I went to Heidelberg's bank, and told him I thought I had a chance to settle with Hess by selling him the crop and team. Mr. Heidelberg or his bank had a mortgage on the team, and I asked, in case I did sell, if he would release, and he said he would.

Creek testifies:

I am acquainted with Hess; had a talk with him in regard to renting his farm where Ralph Dicks lived; talked to him in regard to this deal with Dicks, regarding the purchase of his corn, hay, and horses; "we were going halvers on the stuff and buying it from Dicks; I went down to Dicks to look at the team found he wanted \$200, went back and told Hess, and he agreed with me; said we better go down and cinch this team; we went down and looked at the team."

He then testified in regard to different halters, and that Dicks said he would have to make an adjustment, Dicks said there was a little against them, and he would have to release them, and when the hay and corn was measured up we could take the stuff altogether. I did not afterwards carry out the deal of renting the farm. Heidelberg testifies:

About the middle of January, 1916, Mr. Dicks came to me and asked if I would release a couple of horses we had a mortgage on. He thought he wanted to dispose of them to Mr. Hess. I told him I would; I think I did after that, but I did not at that time, but I gave him permission to dispose of the horses.

We have not attempted to give the details of all the evidence. Other witnesses give testimony having a bearing, but perhaps not so directly. No witnesses testified in behalf of plaintiff, except the plaintiff himself, who testified in chief. His testimony is very brief; he testifies only to the making of the lease, and that he was only paid \$9 on the rent by two loads of straw received from de-

pendant; that he had not received any other payment, except the straw, and that the remainder was unpaid. He does not deny the evidence given by Dicks and the other witnesses as to the conversations. It is conceded by appellees that the contract of settlement was evidently the result of several conversations, but they insist it was all one transaction, containing one subject-matter, that is, the sale by F. R. Dicks of the personal property to plaintiff to apply the same on the rent, and the overplus to be returned to Dicks. Under the pleadings and evidence as now presented, we think the jury could have properly so found. Appellees cite the opinion on the former appeal to the proposition that actual, physical possession of property is not always necessary to constitute full delivery, and *Kletzing v. Armstrong*, 119 Iowa, 506, 93 N. W. 500, to the proposition that under the statute, written consent of the mortgagee to sell mortgaged property is not always necessary, even in criminal cases. They also cite *Thompson v. Frakes*, 112 Iowa, 585, 84 N. W. 703, to the point that the question of intent is important in determining whether an agreement was in fact entered into between the parties. Other cases are cited as holding that the existence and terms of an oral contract are questions of fact for the jury, where the evidence is conflicting. It is further contended by defendants that a purchaser of chattels cannot escape the terms of his contract, on the ground that the chattels were mortgaged, when it appears that the mortgagee consented to a sale of the mortgaged property by the mortgagor, and gave him permission to sell the same, and in such case the mortgagee is held to waive his lien, and the purchaser takes title free from the mortgage. They cite on this point *Hoyt v. Clemans*, 187 Iowa, 330, 149 N. W. 442, *L. R. A. 1915C, 166*; *Bank v. Swan*, 156 Iowa, 715, 137 N. W. 1032; *Farmer v. Bank*, 130 Iowa, 469, 107 N. W. 170. Also *Livingston v. Heck*, 122 Iowa, 74, 94 N. W. 1098, and *Livingston v. Stevens*, 122 Iowa, 62, 94 N. W. 925, to the point that the waiver of the lien by the mortgagee is in the nature of an estoppel, in favor of the purchaser. As before stated, the bank made no further claim to the team under its mortgage after they gave Dicks permission to sell it to plaintiff, and consented to such sale. We have no means of knowing what the trial court instructed the jury in regard to the question of the mortgagee's consent, and the effect of it, and the question of delivery, and the other matters discussed, but we think, under the evidence, these matters in so far as the facts are concerned were for the determination of the jury.

The judgment is affirmed.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

ELZY v. WATERLOO, C. F. & N. RY. CO.
et al. (No. 32835.)

(Supreme Court of Iowa. Oct. 25, 1921.)

Appeal and error ~~from~~ 194(1)—Sufficiency of defense cannot be first raised on appeal.

Where the sufficiency of a defense pleaded has not been challenged in the trial court, the question cannot be raised for the first time on appeal.

Appeal from District Court, Benton County; B. T. Cummings, Judge.

On petition for rehearing. Petition overruled.

For former opinion, see 183 N. W. 378.

Nichols & Nichols, of Vinton, and Edwards, Longley, Ransier & Harris, of Waterloo, for appellants.

F. E. Northup, of Marshalltown, and Tobin, Tobin & Tobin, of Vinton, for appellee.

PER CURIAM. In their petition for rehearing the appellants, among other things, complain that in the opinion heretofore filed affirming the judgment below this court failed to notice or discuss certain counterclaims, numbered 2 and 3, pleaded by the defendants and on which the trial court directed a verdict in plaintiff's favor. It is to be admitted that this omission was made. The counter claims mentioned include three items for payments alleged to have been made by defendants for materials and supplies furnished by third persons to subcontractors and for which the principal contractor, Elzy, was liable. These payments were as follows: To the Ellis Lumber Company, \$300; to J. F. Meyocks \$125.10; and to St. Clair & Rawson \$126.04. Answering these counterclaims, the plaintiff, among other defenses thereto, alleged that the several claimants named brought suit on their several demands in the district court of Benton county making said Elzy and the appellants parties defendant therein and demanding recovery upon said several items of material and supplies, and that it was there determined and adjudicated upon demurrer that neither said Elzy nor his estate was liable on said accounts. This answer was not challenged by demurrer or motion, and upon the trial the truth of the said allegations was conceded by stipulation as to the claims on account of payments made to Meyocks and to St. Clair & Rawson. Under this record, in so far as relates to payments made to Meyocks and to St. Clair & Rawson, there was no error in directing a verdict for plaintiff. The sufficiency of the defense pleaded thereto not having been challenged in the trial court, it is not open to the defendants to raise the question for the first time in this court; and

proof or concession of the facts so pleaded is sufficient to sustain the defense, even though had it been challenged in time the court must have held it insufficient. See *Benjamin v. Vieth*, 80 Iowa, 149, 45 N. W. 731; *Lundean v. Hamilton*, 184 Iowa, 929, 169 N. W. 208; *Helman v. Felder*, 178 Iowa, 740, 160 N. W. 234; *Bank v. Zelms*, 93 Iowa, 140, 61 N. W. 483; *Ormsby v. Graham*, 123 Iowa, 211, 98 N. W. 724. The same kind of plea was made to the *Ellis Lumber Company* item, but we find in the record no testimony or concession to support it, and, as it is admitted that this item was in fact paid by the defendants, we are disposed to hold that they should have had credit therefor. That this item did not have attention in writing the original opinion is due to the fact that the contest in the court below and upon submission in this court was centered almost exclusively upon the question whether the contract in suit provided for liquidated damages, and these items of counterclaim received only slight and incidental notice at the hands of counsel on either side.

Subject to the modification here suggested, we find nothing in the petition for rehearing to justify us in reopening the case to further consideration. It is therefore ordered that the amount of the verdict directed in favor of the plaintiff and judgment entered thereon be reduced by the sum of \$300, with interest at 6 per cent. from January 20, 1915, to the date of the entry of said judgment. As thus modified, the opinion heretofore filed will stand. The costs of this court are taxed to the appellant, except the sum of \$25 to be paid by the appellee.

Petition for rehearing overruled.

MOSES v. NATIONAL UNION COAL MINING CO. et al. (No. 34200.)

(Supreme Court of Iowa. Oct. 19, 1921.)

1. Master and servant §385(14)—"Loss of use" of foot equivalent to "loss" of foot, within Compensation Act.

No rate of compensation being provided for the "loss of use" of a member, *Workmen's Compensation Act*, § 2477m9, subd. (j), providing, for injuries not named in the schedule, "the rate of compensation shall bear such relation to the amount stated in the schedule as such disability bears to those produced by the injuries named in the schedule," the "loss of use" of a foot from ankylosis should be considered as of a "loss" of the foot, and compensation awarded as of disability partial in character but permanent in quality.

2. Master and servant §385(1)—"Disability," in Compensation Act, means impairment of earning capacity.

"Disability," as used in *Workmen's Compensation Act*, means impairment or lessening

of earning capacity, and not the loss of a member or the permanent loss of the use thereof.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Disability*.

3. Master and servant §387—Compensation for loss of a member precludes compensation for disability.

An award under *Workmen's Compensation Act*, § 2477m9, subd. (j), for loss of use of a member, being "for disability partial in character and permanent in quality," precludes compensation under subdivision (h) "for injury producing temporary disability."

Appeal from District Court, Monroe County; D. M. Anderson, Judge.

Both parties appeal from an award by the court below in a proceeding under the *Workmen's Compensation Act*. Affirmed on appellant's appeal; reversed on cross-appeal.

Clarkson & Huebner, of Albia, for appellant.

J. F. Dammann, Jr., of Chicago, Ill., and D. W. Bates, of Albia, for appellees.

STEVENS, J. Both parties have appealed from the judgment of the court below in a proceeding under the *Workmen's Compensation Act* (Code Supp. 1913, c. 8a). As the claimant first gave notice, he will be designated as the appellant. The subject of compensation is alone involved.

Appellant, a coal miner employed by the *National Union Coal Mining Company of Albia*, on or about July 21, 1917, was injured by slate falling from the roof of his working place in the mine, and striking him on the right shoulder and right leg. His injuries consisted of a fracture of the shoulder blade and a compound fracture of the tibia at its lowermost extremity. The injury to the shoulder completely healed without resulting disability, and is not involved herein. On August 7, 1918, appellant entered into a stipulation with appellee, as employer, and the *Maryland Casualty Company*, as insurer, by the terms of which appellee agreed to pay him \$623 in full of compensation for the disability incurred—that is, at the rate of \$6.23 per week for 100 weeks. This stipulation was duly filed in the office of the *Industrial Commissioner*. The last payment was due and paid August 27, 1919, when a final receipt and release was executed to the company by appellant.

On July 18, 1919, appellant filed a petition, under the provisions of section 2477m34 of the 1913 Supplement, with the *Industrial Commission* asking that the settlement be reopened and the case reviewed. A hearing was had before the *Commissioner* resulting the settlement being set aside and an award of compensation for a period of 125

weeks at \$6.23 per week, with provision for credit of payments previously made.

Upon appeal to the district court, the finding of the Commissioner was set aside and an award made by the court of \$6.23 per week for the entire period of disability, not, however, exceeding 300 weeks. Both parties concede that the allowance made by the Commissioner for 125 weeks was proper, and should have been sustained. Appellant, however, further contends that he is entitled to compensation under paragraph 14, subd. (j), of section 2477m9, and also under subdivision (h) thereof. The injury to appellant's leg resulted in complete and permanent ankylosis, or stiffening of the ankle. There is also a sinus above each malleolus from which a thin pus is discharged. This discharge is caused by a decayed condition of the bone. The physicians who testified before the Industrial Commissioner gave it as their opinion that the sinuses will ultimately completely heal.

[1] Subdivision (h) of section 2477m9, as amended by chapter 270 of the Thirty-Seventh General Assembly, is as follows:

"For injury producing temporary disability, fifty per cent. of the average weekly wages received at the time of injury, subject to a maximum compensation of fifteen dollars and a minimum of six dollars per week; provided, that if at the time of injury the employé receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks."

Subdivision (j), as amended by chapter 270 of the Thirty-Seventh General Assembly, and paragraph 14 thereof, is as follows:

"For disability partial in character and permanent in quality, the compensation shall be as follows: * * * (14) For the loss of a foot, fifty per cent. of daily wages during one hundred twenty-five weeks."

No specific provision is to be found in the Workmen's Compensation Act for disability resulting from the loss of the use of a foot. Paragraph 18 (section 19 under chapter 270, Acts of the Thirty-Seventh General Assembly) of subdivision (j), § 2477m9, is as follows:

"In all other cases in this, clause (j), the compensation shall bear such relation to the amount stated in the above schedule as the disability bears to those produced by the injuries named in the schedule. Should the employé and employer be unable to agree upon the amount of compensation to be paid in cases not specifically covered by the schedule, the amount of compensation shall be settled according to provisions of this act as in other cases of disagreement."

The Commissioner found that the disability resulting from the injury to appellant's ankle was partial in character and permanent in quality, and, as compensation for the permanent loss of the use of a foot is not other-

wise provided by statute, he classified the disability as one coming under the provisions of paragraph 18, and allowed compensation for the same number of weeks as is provided in paragraph 14 for the loss of a foot. That is, he found that the relation the compensation for the disability shown bore to the disability resulting from the loss of a foot was 100 per cent. The statutes of several of the states specifically provide that "loss of the use" of a member shall be equivalent to the "loss" of the member, and in a few cases the disability has been so treated in the absence of statute. *Clark v. Kennebec Journal Co.* (Me.) 113 Atl. 51; *Kramer v. Sargent & Co.*, 98 Conn. 26, 104 Atl. 490; *McLean's Case*, 119 Me. 322, 111 Atl. 383; *Bristow Cotton Oil Co. v. State Industrial Commission*, 77 Okl. 316, 188 Pac. 658; *Choctaw Portland Cement Co. v. Lamb*, 79 Okl. 109, 189 Pac. 750; *Ballou v. Industrial Commission*, 298 Ill. 434, 129 N. E. 755; *Mark Mfg. Co. v. Industrial Commission*, 286 Ill. 620, 122 N. E. 84; *Spring Canyon Coal Co. v. Industrial Commission* (Utah) 193 Pac. 821; *Chicago Home for the Friendless v. Ind. Com.*, 297 Ill. 286, 130 N. E. 756.

It was the opinion of some, at least, of the medical witnesses that the disability resulting from the ankylosis of the ankle was in reality greater than would have resulted from the amputation of the foot after an artificial member had been provided. It seems to us that the classification adopted by the Commissioner and the method of computation is correct, and that the compensation awarded by him for 125 weeks should have been sustained by the court below. Upon this point the parties are agreed, at least as to the amount allowed.

[2] II. It is, however, contended by counsel for appellant that the injury was also compensable under subdivision (h). This contention presents a more difficult question for decision. The act nowhere provides that, in case of the loss of a member, compensation shall be allowed therefor, and also for the loss of earning capacity under subdivision (h), nor does it specifically deny compensation for both. The compensation provided in the several paragraphs under subdivision (j) is for "disability." The whole theory and purpose of our Workmen's Compensation Act is to provide partial compensation to an injured employé during the period of disability resulting from such injury, not, however, in excess of a designated number of weeks. The word "disability" as here used certainly means impairment or lessening of earning capacity, and not the loss of a member or the permanent loss of the use thereof. *Marhoffer v. Marhoffer*, 220 N. Y. 543, 116 N. E. 879; *Lamron v. Blair*, 181 Mich. 76, 147 N. W. 546. The statute does not create a claim for damages, but provides for compensation based upon a certain

per cent. of the wages being earned. This construction is to some extent sustained by the provisions of subdivision (g) of section 2477m9, which provides that—

"No compensation shall be paid for an injury which does not incapacitate the employee for a period of at least two weeks from earning full wages, but if incapacity extends beyond a period of two weeks, compensation shall begin on the fifteenth day after the injury."

Subdivision (g) was amended by chapter 270, Acts of the Thirty-Seventh General Assembly so as to allow compensation in case of the severance of a member at once.

Appellant relies particularly upon *Nitram Co. v. Court of Common Pleas, Essex County*, 84 N. J. Law, 243, 86 Atl. 435, to sustain his claim to compensation under both paragraph 14 and subdivision (h). In the *Nitram Company Case*, the ends of the index, middle and ring fingers of his right hand were crushed and slightly deformed. The end of the index finger of his left hand was also crushed, but did not interfere with its use. The middle and ring fingers of his left hand were so badly crushed that amputation of the first and part of the second phalange of each of these fingers was necessary. These injuries produced a temporary disability due in part to an infection of the left hand. The court in its opinion treated the injury to the hands and the injury resulting from the infection as two separate injuries, wholly different in character. Just what significance was given to this fact does not clearly appear, but it is important that the New Jersey court construes the word "disability" resulting from the severance of a member as having reference to the loss of the member or the function thereof, rather than to the impairment of earning power. *De Zeng Standard Co. v. Pressey*, 86 N. J. Law, 469, 92 Atl. 278; *Marhoffer v. Marhoffer*, supra.

[3] As already indicated, the word "disability," as used in the Workmen's Compensation Act of this state, refers to the impairment or loss of earning capacity, and not to the loss of the member or of the use thereof. Appellant suffered but a single injury to the ankle. The ankylosis and sinuses, with resulting suppuration, are due to this injury alone. As the right to compensation is based upon disability producing impairment or loss of earning capacity, the schedule specifically fixing the amount to be paid on account of disability resulting from a single injury must be construed as exclusive of all other provisions of the act. The

compensation fixed and allowed under subdivision (h) is "for injury producing temporary disability," and that allowed for the loss of a member, or of the use thereof, is "for disability partial in character and permanent in quality," and compensation under one clause precludes compensation under the other. As bearing upon this question and tending to support this conclusion, see *Spring Canyon Coal Co. v. Industrial Commission*, supra; *Kramer v. Sargent & Co.*, supra; *Marhoffer v. Marhoffer*, supra; *Chicago Home for the Friendless*, 297 Ill. 286, 130 N. E. 757; *International Coal & Mining Co. v. Ind. Com'n*, 293 Ill. 524, 127 N. E. 703, 10 A. L. R. 1010.

Appellant is entitled to compensation either under paragraph 18 of subdivision (j) or under subdivision (h). In no event is he entitled to compensation under both. The statute contemplates but one compensation for the severance of, or the loss of the use of, a single member. The theory of the Workmen's Compensation Act adopted by the New Jersey court and ably urged by counsel for appellant is not applicable to the provisions of our statute. The injury to appellant's ankle is permanent in quality, but his disability is partial only. It may be that the compensation awarded by the Commissioner will not compensate appellant for the full period of his disability, but this, regrettable as it may be, is without controlling importance. Compensation is limited in all cases, and it is easily conceivable that the disability in a given case, although not permanent in quality, may continue much longer than the limit fixed by the statute, during which the employer must make compensation.

It is our conclusion, and we hold, that appellant was entitled to compensation as found by the Commissioner for 125 weeks at the rate fixed by him only, and that the allowance by the court of compensation under subdivision (h) during the period of his disability, not exceeding 300 weeks, is erroneous, and should be set aside. The judgment of the court below is therefore affirmed on appellant's appeal, and reversed upon the cross-appeal, and the cause remanded for further necessary proceedings under the provisions of the statute in conformity with this opinion.

Affirmed on appellant's appeal; reversed on cross-appeal.

EVANS, C. J., and ARTHUR and FAVILLE, JJ., concur.

In re McCLELLAN'S ESTATE.

HART v. McCLELLAN.

(No. 33782.)

(Supreme Court of Iowa. Oct. 25, 1921.)

Executors and administrators $\S$ 109(1)—Administrator held entitled to charge insurance premiums on estate's automobile.

Insurance premiums during the time an administratrix held an automobile as the property of the estate, before it was awarded to her as exempt property, held properly allowed as a charge against the estate.

Appeal from District Court, Polk County; L. L. Thompson, Judge.

On petition for rehearing. Modified, and rehearing denied.

For former opinion, see 183 N. W. 398.

C. J. Lynch, of Mechanicsville, for appellant.

Miller, Kelly, Shuttleworth & Seeburger, of Des Moines, for appellee.

EVANS, C. J. The record in this case, has become somewhat complicated and liable to confusion because of the inadvertent failure to enter of record a petition for rehearing filed by the appellee on January 25, 1921, and directed to the first division of our opinion filed on November 26, 1920, and reported in 179 N. W. 939. Upon proper showing made we have reinstated appellee's petition for rehearing and ordered it to be entered on the record nunc pro tunc. The result is that the appellee is now before us with two petitions for rehearing, the first thereof being directed against the first division of our opinion of November 26, 1920, and the second thereof being directed against both divisions of our opinion of June 25, 1921, reported in 183 N. W. 398. Turning to the first petition, it challenges our holding whereby we charge the appellee with the items of insurance and storage, being \$29.02 and \$46, respectively. It is urged that at least \$7.02 of the item of insurance was incurred while the administratrix held the automobile in question as the property of the estate and before the district court had awarded the same to the administratrix widow as exempt property. These items bear no dates in the report of the administratrix. There is no evidence in the record pertaining thereto except the written concession of the administratrix whereby she conceded that the item of insurance was incurred while she held the automobile under claim of individual ownership thereof except the sum of \$7.02. There was no attempt to

prove liability beyond this concession, and the administratrix is doubtless entitled to stand upon it and to claim the benefit of \$7.02 as a proper charge for insurance, and her claim to that extent will be accordingly allowed.

II. As to the item of \$46 for storage it is contended by appellee that this covers a period from November 15th to December 30th for which the estate, and not she individually, was liable for the storage cost. This contention is based upon the theory that the opinion filed by this court on November 15, 1919, holding the automobile to be nonexempt property, had the effect to restore to the estate the title to the automobile, and that the estate thereafter became liable for the storage, which continued until December 30th following, when the automobile was sold by the administratrix. This contention cannot be sustained. We have held in our last opinion filed and still hold that this litigation is essentially one affecting the private interests of the widow and of the heir rather than the interest of the estate as such; that inasmuch as the widow, while acting as administratrix, took the fruits of the finding in her favor by the district court which awarded the automobile to her, and inasmuch as in the very nature of the case such taking of the fruit was irrevocable in that the use of the automobile necessarily absorbed its value to a substantial degree, the only practical remedy left to the appellant was to charge the administratrix with the appraised value of the automobile. We adhere to this view as correct. This being the measure of remedy awarded to the appellant, she had no further interest in the preservation of the automobile by the administratrix. It was to the interest of the administratrix to protect the value of the automobile by storage or otherwise in her own interest in order that she might realize therefrom as large a sum as possible. Her liability to account for the appraised value would not be affected by the degree of her care of the automobile after November 15, 1919. The statement in the opinion that the administratrix sold the automobile under advice of her counsel is challenged as not being sustained by the record. The statement is not a very material one. It is enough, however, to say that it is based upon a letter written by counsel for appellee to counsel for appellant and put in evidence by the appellee.

The net result of the present consideration of both petitions for rehearing by appellee is that the appellee is allowed the claimed item of \$7.02. In all other respects both her petitions for rehearing are overruled.

E. H. EMERY & CO. v. AMERICAN REFRIGERATOR TRANSIT CO. (CHICAGO, B. & Q. R. CO., Garnishee). (No. 33486.)

(Supreme Court of Iowa. Oct. 18, 1921.)

1. Carriers $\S$ 110—Duty of carrier to carry a shipment safely with due regard to its character.

The duty of a carrier is to carry a shipment safely with due regard to its perishable character.

2. Principal and agent $\S$ 159(2)—Agents liable to third person for their own tortious acts.

An agent is liable to third persons for his own tortious acts.

3. Principal and agent $\S$ 159(2)—Shipper has right of action against a refrigerator company for misfeasance in the performance of its contract with the railroad company.

A shipper has a right of action against a refrigerator company for misfeasance in performing its contract with a railroad company to load and superintend the loading of fruit on cars.

4. Principal and agent $\S$ 160—Where a refrigerator company contracts to load cars, it cannot escape liability for misfeasance by calling itself an intermediate agent.

Where a refrigerator company contracts to load and superintend the loading of cars, it cannot escape liability by shifting the burden of its negligence to subordinates.

5. Principal and agent $\S$ 193—Evidence of misfeasance held sufficient to go to the jury.

In action against refrigerator for misfeasance in performing its contract with railroad company to load and superintend the loading of fruit on cars, evidence in support of the claim that improper loading and icing of cars resulted in damage held sufficient for jury.

6. Evidence $\S$ 577 $\frac{1}{2}$ —Reporter's notes of evidence or transcript thereof may be used in retrial of a "case."

Reading in evidence from the transcript of the testimony of witnesses at a former trial, of a cause dismissed as to one of the defendants, and dismissed without prejudice under Code, $\S$ 3502, as to the defendant in the trial of the present action, the issues being the same and practically a retrial of the former "case," comes within Code Supp. 1913, $\S$ 245a, providing for the use of a transcript of the reporter's notes at a retrial of the case; the word "case" in the statute not being used in its narrow, strictly legal nor technical sense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Case.]

7. Depositions $\S$ 98—Deposition taken for use in former trial may be used in retrial of same issue between same parties.

The rule that a deposition taken for use in one trial cannot be used in another without being duly filed or leave obtained to use it before the trial began has no application when the

deposition is used in a retrial of the same case with the same parties and issues.

Appeal from District Court, Wapello County; D. M. Anderson, Judge.

Action at law to recover damages claimed to have been sustained in the shipment of nineteen carloads of peaches. Judgment was rendered in behalf of the plaintiff, and the defendant appeals. The garnishee also appeals, and the plaintiff files a cross-appeal, conditioned on a reversal on defendant's appeal. Affirmed.

W. D. Eaton, of Burlington, for garnishee and appellant.

Brammer, SeEVERS & Hurlburt, of Des Moines, Fred W. Lehmann, Jr., of Kansas City, Mo., and McNett & McNett, of Ottumwa, for appellant:

Chester W. Whitmore, of Ottumwa, for appellee.

FAVILLE, J. The appellee is a copartner-ship engaged in conducting a wholesale fruit business in the city of Ottumwa. The appellant is a corporation engaged in owning and operating certain refrigerator cars, which said cars are transported on various lines of railway throughout the country. The Missouri, Kansas & Texas Railway Company is a corporation operating a line of railway in the state of Texas and other states.

In the year 1912 the appellee entered into a contract with one Gidcumb, a fruit grower at Chatterton, Tex., to purchase from the said Gidcumb his entire output of peaches. The Gidcumb orchard is situated on the lines of the Missouri, Kansas & Texas Railway about a mile from a station known as "Orchard Park." The record discloses that early in June, 1912, the appellee wrote to officers of the appellant regarding the securing of equipment for the transportation of fruit, and received a reply that appellant would furnish the necessary refrigerator equipment for handling the peach shipment, and that orders for cars should be placed by the appellee with the agent of the Missouri, Kansas & Texas Railway at Chatterton, Tex., and also stating that the cars would be iced at Shreveport and re-iced at Chatterton. The appellee also received a letter from officials of the Missouri, Kansas & Texas Railway Company, advising appellee that said railway had made arrangements with the appellant to furnish cars for the handling of all fruit and vegetables moving under refrigeration. In pursuance of this arrangement, the appellee ordered cars from the said Railway Company, as required for the shipment of the peaches in question from Chatterton, Tex. Cars were delivered and loaded with peaches and shipped to the appellee. This action was brought against the appellant charging it

with negligence in the manner in which it loaded the peaches in the said refrigerator cars, and also in the failure to properly ice said cars.

The record shows that the Missouri, Kansas & Texas Railway Company had entered into an agreement with the appellant regarding the furnishing of refrigerator cars by the appellant and the transportation of the same by the said Railway Company. In said agreement the appellant herein is referred to as the "Refrigerator Company" and the Missouri, Kansas & Texas Railway Company is referred to as the "Katy Company," and the said parties are so designated throughout this case, and will be so referred to by us. By said agreement, appellant herein agreed to handle the fruit, melon, and vegetable shipments originating on the line of the Katy Company. The agreement provided that the Katy Company should pay to the Refrigerator Company 12½ per cent. of the Katy freight revenue, exclusive of switching, bridge tolls, and other terminal charges. The agreement provided that the Refrigerator Company should furnish to the Katy Company sufficient suitable cars, up to 600 in number, and as many more as it was able to furnish for transportation of fruit as needed. The contract provided that the Refrigerator Company (appellant) should ice cars containing perishable commodities in shipments originating on the lines of the Katy Company. Also by its terms the Refrigerator Company undertook the responsibility of loading all such cars, and was allowed a supervision charge therefor.

This cause involves a shipment of 19 cars. The appellee claims that the peaches in said cars were damaged because the appellant, as agent of the said Katy Company under said contract with it, undertook to load, brace, stow, and ice said cars, and did the same in such a careless, negligent, and unskillful manner that a large amount of the peaches was lost and destroyed, and appellee was put to additional expense to care for and market the remainder. The appellee's cause of action was pleaded in six different counts or on six different "theories." The only one, however, submitted to the jury was upon the theory of the alleged misfeasance of the appellant, as agent of the Katy Company under said contract; the particular misfeasance charged being in regard to the manner of loading and icing the cars in question.

I. It is to be noticed at the outset that appellee's action is not brought against the Railway Company as initial carrier, nor is recovery sought under and by virtue of the so-called "Carmack Amendment," or otherwise as against the shipper. This action is against the Refrigerator Company to recover damages claimed to have been suffered by the appellee because of the negligent and careless manner in which the appellant, Refrigerator

Company, performed its work of loading and icing the cars in question under its contract with the carrier, the Katy Company. There is no contention that there was any privity of contract between the appellant and the appellee. The action sounds in tort, if it can be maintained at all.

The question for our determination at this point is whether or not the appellee can maintain an action for damages against the appellant, Refrigerator Company, as the agent of the Railway Company, for its negligence in performing its contract with the latter. It is to be observed that appellant was not a common carrier, under the circumstances disclosed in this case, and is not liable to appellee, if at all, in any such capacity. *Ellis v. Interstate Oom. Com.*, 237 U. S. 434, 35 Sup. Ct. 645, 59 L. Ed. 1036.

[1] Appellee's contract was with the initial carrier, the Katy Company. The duty of the latter company to appellee was to carry the shipment safely and with due regard to its perishable character. *Beard v. Ill. Central Ry. Co.*, 79 Iowa, 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381.

Under the contract between the Refrigerator Company (appellant) and the Katy Company, the former became the agent of the latter company, and undertook, as its agent, to perform certain things required of said Railway Company under the contract of shipment between it and appellee.

The contention of the appellant is that the appellee has no cause of action whatever against the appellant, and that the trial court should have directed a verdict in appellant's behalf. If the question were one between the appellee and the Refrigerator Company, growing out of a contract between them, or were one between the Refrigerator Company and the Railway Company whereby the latter was suing for failure to properly perform the contract between them, we would have an entirely different question than the one presented here. Assuming that there was sufficient evidence to carry the case to the jury on the question of the negligent manner in which the cars in question were loaded and iced, the pertinent question still remains: Can the appellee recover from the Refrigerator Company for such negligence?

[2] The question of the liability of an agent to a third person for negligence has been frequently before the courts, and there is much confusion and lack of uniformity in the authorities. Cases have frequently arisen where the duty which the agent owed to the public, rather than to an individual, was involved, and liability determined because of such duty. In a general way it may be said that an agent is liable to third parties for his own tortious acts, the same as any other person. The fact of the agency neither increases nor diminishes such liability. *Bannigan v. Woodbury*, 158 Mich. 206, 122 N. W.

581, 183 Am. St. Rep. 371; *Humphreys Tunnel Co. v. Frank*, 46 Colo. 524, 105 Pac. 1093; *Berghoff v. McDonald*, 87 Ind. 549; 2 *Corpus Juris*, 824, § 498.

In determining the liability of an agent to third parties for tortious acts directly connected with and growing out of the agency, the courts have recognized a distinction between malfeasance, misfeasance, and nonfeasance, but the line of demarcation has frequently been lost sight of, and reconciliation of the authorities is utterly impossible.

In *Bell v. Josselyn*, 3 Gray (Mass.) 309, 63 Am. Dec. 741, the Supreme Court of Massachusetts says:

"Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all."

In *Williams v. Dean*, 134 Iowa, 216, 111 N. W. 931, 11 L. R. A. (N. S.) 410, we said:

"Nonfeasance is the nonperformance of some act which ought to be performed and misfeasance is the performance of an act in an improper manner, whereby some one receives an injury."

Applying these definitions to the instant case, we can eliminate at once the question of "malfeasance," for there was here no doing of an act which ought not to have been done at all.

As early as 1701, in *Lane v. Cotton*, 1 *Ld. Raym.* 646, a distinction was recognized between the liability of an agent to third parties for nonfeasance and liability for misfeasance. The distinction was made by Chief Justice Holt in a dissenting opinion in that case, but it has been made the basis of a differentiation which has been preserved with more or less consistency by text-writers and courts since that time. Some of the later cases, however, have apparently eliminated the distinction entirely. The courts, recognizing this distinction, hold as a general rule that the agent is liable to his principal for nonfeasance, that is, for an entire failure to perform his contract with his principal, but that for such nonfeasance a third party cannot recover from the agent. This line of authorities also holds that where the agent has undertaken the performance of his contract and performs the same in a careless and negligent manner, and injury results to a third party, the latter may recover from the agent because of his misfeasance. To state the proposition in another way: The agent is liable to his principal for nonfeasance, and may be liable to third parties for misfeasance. As bearing on these propositions, see *Brown Paper Co. v. Dean*, 123 Mass. 267; *Murray v. Usher*, 117 N. Y. 542, 23 N. E. 564; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911; 2 *Corpus Juris*, 824, § 499.

Williams v. Dean, *supra*, was an action wherein suit was brought against the officers of an agricultural society, charging them with negligence in the erection of a wire screen on the grounds of the society. The plaintiff, a spectator at a ball game, was injured by a ball that was thrown or batted through the screen. In considering the case, the court, speaking by Mr. Justice Deemer, said:

" * * * The action sounds in tort, and is manifestly for trespass or perhaps trespass on the case. Defendants were, of course, agents of the society. They were not the society itself; but were acting purely in a representative character. If liable at all, it is because of what they did. If they were guilty of some misfeasance or trespass as distinguished from mere nonfeasance, then they were and are liable, and they cannot shield themselves by saying that they were acting as agents for the society. And in this connection it is entirely immaterial whether their acts were ultra vires or within the scope of their authority. No one is permitted to say in an action against him for trespass or for misfeasance that he was acting as an agent in doing the matters complained of, and is therefore not liable. Nor is his liability to be measured by the extent of the authority conferred upon him. On the other hand, no agent is liable to a stranger simply for nonfeasance; that is to say, for failure to do some act which his principal commits to his care. He may be liable for breach of contract to his principal, but not to a stranger for a tort. These views are stated with great force and perspicuity in *Murray v. Usher*, 117 N. Y. 542 (23 N. E. 564), and *Cincinnati Railway Co. v. Robertson*, 115 Ky. 858 (74 S. W. 161). That the same rule applies to officers and directors of corporations, see 3 *Thompson on Corporations*, sections 4090, 4091, 4096, et seq.; *Bruff v. Mah*, 86 N. Y. 200; *Salmon v. Richardson*, 30 Conn. 360 (79 Am. Dec. 255). Nonfeasance is the nonperformance of some act which ought to be performed and misfeasance is the performance of an act in an improper manner, whereby some one receives an injury. *Illinois Cent. R. R. v. Foulks*, 191 Ill. 57 (60 N. E. 800). So that, as defendants may only be held liable for misfeasance, and can only be held liable for the negligent performance of some act which they undertook to perform, it must be shown, before they can be held liable, that such ones as are sought to be charged did something in a negligent or improper manner."

In the instant case there is no question of nonfeasance before us, because it is conceded on all hands that appellee undertook the performance of its contract with the Refrigerator Company.

Is *Williams v. Dean* correct in principle, or should it be overruled? Can appellant be held liable to the appellee for misfeasance in performing its contract with its principal?

In *Murray v. Usher*, 117 N. Y. 542, 23 N. E. 564, cited by us in *Williams v. Dean*, it is said:

" * * * But the agent or servant is himself liable, as well as the master, where the act

producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and nonfeasance. For the former the servant is, in general, liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity and to perform the duties committed to him. An omission to perform them may subject third persons to harm, and the master to damages. But the breach of the contract of service is a matter between the master and servant alone, and nonfeasance of the servant causing injury to third persons is not, in general, at least, a ground for a civil action against the servant in their favor."

In *Baird v. Shipman*, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504, it is said:

"It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable."

In this case the agent of the owner had control and management of the premises, and was held liable for failure to make repairs resulting in injury to the third party.

In *Campbell v. Portland Sugar Co.*, 62 Me. 532, 16 Am. Rep. 503, the plaintiff was a driver of a wagon, and his duties took him to a certain wharf. He stepped into a hole and was injured. The Sugar Company owned the wharf, and the other defendants were its general agents, and had the management of its business and charge of the wharf. The court said:

"The other defendants, who were the general agents of the corporation, and had the care of this wharf, and who, through their senior partnership, had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal.

"It is the actual personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation, and when their acts or neglects result in injury to third parties they are equally responsible with their principals."

In *Horner v. Lawrence*, 37 N. J. Law, 46, an agent or employee hauling wood for his employer failed to close a certain fence in consequence of which hogs escaped from a pasture to a railroad and were killed. It was held that the servant was liable to the owner of the hogs. The court said:

"It was his own misfeasance, for which, as servant, he cannot, in any respect, claim exemption against the party injured."

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In *Lottman v. Barnett*, 62 Mo. 159, the architect of a building, who superintended its construction, failed to place sufficient girders or columns in the building, and injury resulted to a third person. The court said:

"For negligence he is responsible, not merely to his employer, but to persons injured by reason of his acts."

In *Bickford v. Richards*, 154 Mass. 163, 27 N. E. 1014, 28 Am. St. Rep. 224, the parties negligently injured buildings in removing them, and were held liable, the court saying:

"Whether servants or contractors, they were liable for the damage caused to the plaintiff's property by their tortious acts or misfeasance."

In *Harriman v. Stowe*, 57 Mo. 93, the defendant as agent for his wife made a trap-door on her premises. A third party was injured. The court said:

"The present case seems to be one, not of mere nonfeasance or omission, but of strict negligence or wrong."

Lough v. Davis & Co., 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802, 94 Am. St. Rep. 848, was an action against an agent who was authorized to rent and repair a tenement house. The claim was made that the agent permitted the house to become unsafe for want of repairs which caused the injury complained of. There is a very full discussion and review of the authorities. The court said:

"* * * There can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility, there should be none in legal responsibility. Of course, if the omission of the act or the nonfeasance does not involve a nonperformance of duty, then the responsibility would not attach. If it does involve a nonperformance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages."

It was held that a cause of action was properly pleaded.

In *Ellis v. McNaughton*, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308, plaintiff was injured on a defective sidewalk. The question in the case was whether the defendant, as agent of the owner of the premises, could be held liable. The court said:

"Irrespective of his relation to his principal, he was bound while doing the work to so use the premises, including this sidewalk, as not to injure others. Misfeasance may involve to

some extent the idea of not doing; as where an agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances; as, for instance, when he does not exercise that care which a due regard for the rights of others would require."

In *Stiwell v. Borman*, 63 Ark. 39, 37 S. W. 406, plaintiff sued for injuries in a coal mine by reason of negligence of an agent in allowing gas to accumulate. It was held that the agent was liable. The court said:

"* * * The liability of the agent rests upon his failure to discharge a duty as in misfeasance. Having complete control and management of the business, with the power and authority to do what is reasonably necessary to protect third persons against injuries resulting from omissions or commissions in the conduct of the same, he stands in the relation to others which his principal occupies. He is under obligation to so use that which he controls as not to injure another. For a failure to discharge this duty he is liable in damages to the party injured. This is a reasonable rule."

To like effect are *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Ward v. Pullman Car Corp.*, 131 Ky. 142, 114 S. W. 754, 25 L. R. A. (N. S.) 343, and *Tipppecanoe Loan & Trust Co. v. Jester*, 180 Ind. 357, 101 N. E. 915, L. R. A. 1915E, 721.

Some of the cases go farther, and indicate that the agent is liable for nonfeasance as well as misfeasance.

In *Ellis v. So. Ry. Co.*, 72 S. C. 465, 52 S. E. 228, 2 L. R. A. (N. S.) 378, the court reviewed the authorities somewhat and held:

"The true rule deducible from the authorities is that the servant is personally liable to third persons when his wrongful act is the direct and proximate cause of the injury, whether such wrongful act be one of nonfeasance or misfeasance."

There is another line of cases a little nearer to the exact proposition involved in this case, and this is the class of cases where an agent or servant undertakes to perform a particular work for the principal or master, and has full charge and control thereof. These cases hold the agent is liable for an act of negligence in said work resulting in injury to a third person, whether it be an act of omission or commission. In such cases an omission of duty imposed upon him is deemed to be a misfeasance.

In *Orcutt v. Century Building Co.*, 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929, the agent undertook the management of a building for his principal, and entered into the performance of the work. It was held that he was liable for injuries to a third party caused by his misfeasance.

In *Carson v. Quinn*, 127 Mo. App. 525, 105 S. W. 1088, an agent who had the exclusive control and supervision of premises used for tenement purposes was held personally liable

for injury received by a tenant who fell into a hole in the passageway.

Likewise, in *Bannigan v. Woodbury*, 158 Mich. 206, 122 N. W. 531, 133 Am. St. Rep. 371, an agent in full charge and control of a building was held liable for injuries caused by the fall of a pane of glass which was negligently allowed to remain in an unsafe condition.

In *Atkins v. Field*, 89 Me. 231, 36 Atl. 375, 56 Am. St. Rep. 424, the court said:

"If the defendant had not undertaken to rig and set up the derrick, or in so doing had simply executed the will of a lawful superior as to details of mode and material, there might be said to be mere nonfeasance on his part. But he did undertake the work, and practically exercised his own discretion as to mode and material. He was then bound to act carefully in every respect, and his carelessness in any respect was a misfeasance."

A leading case announcing the contrary rule is *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456. In this action a child was injured by the falling of a gallery of a house. The agents of the owner, who were bound to keep the building in good order, were sued for the injury. The court said:

"Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men."

"An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, as agent, be subject to any obligations towards third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to perform them. In failing to do so he wrongs no one but his principal, who alone can hold him responsible."

In *Feltus v. Swan*, 62 Miss. 415, an agent was sued for negligence in failing to open a drain, because of which lands adjacent to the plantation of which he had charge were injured. It was held that there was no liability, although it was charged that the act was malicious.

See, also, *Galbraith v. Ill. Steel Co.*, 133 Fed. 485, 66 C. C. A. 359, 2 L. R. A. (N. S.) 799; *Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829.

[3] We are confident that the rule announced by us in *Williams v. Dean* is sustained by the great weight of authority, and is sound in principle. We, therefore, hold that for misfeasance in the performance of its

contract with its principal, which misfeasance caused injury to appellee's property, the latter had a right of action in tort against appellant. *Boston Insurance Co. v. O., R. I. & P. R. R. Co.*, 118 Iowa, 423, 92 N. W. 88, 59 L. R. A. 796; *Dillon v. Iowa Cent. R. R. Co.*, 118 Iowa, 645, 92 N. W. 865, and *Cramblitt v. Percival-Porter Co.*, 176 Iowa, 733, 158 N. W. 541, L. R. A. 1917C, 77, cited by appellant are not inconsistent with this holding.

[4] II. Appellant contends that the rule which exonerates an intermediate servant where an injury has been committed by a subordinate one under circumstances which make the immediate actor and the ultimate principal liable should be applied. See *Williams v. Dean*, supra. We fail to see how the rule contended for has any application to the facts of the instant case. Appellant under its contract undertook the work of loading and icing the car and had full control as to how the work should be done.

III. It is contended that the Railway Company accepted the work of loading and icing, and that this absolves the appellant from liability. There is no evidence from which the jury could have found that the Railway Company knowingly accepted and approved the work of the appellant in loading and icing the cars even if the rule contended for should be approved.

[5] IV. It is contended by appellant that the evidence does not disclose that the alleged acts of negligence of appellant caused the damages complained of. It is unnecessary to review the evidence on this question. It was fairly before the jury and properly submitted to it. There was sufficient evidence to go to the jury to support the claim of improper loading and icing, and that the same resulted in damages to appellee. It was essentially a jury question, and, finding sufficient evidence in the record to sustain the verdict, we cannot interfere.

V. It is contended the appellee was guilty of contributory negligence, and for that reason cannot recover. This was a question for the determination of the jury, and was properly submitted by the court.

[6] VI. Errors are urged in the admission of evidence. The first error urged on this ground that demands our attention is with respect to a transcript of testimony which was admitted under section 245a of the Supplement of 1913. From the record it appears that the appellee herein originally instituted suit in Wapello county against the appellant and the Chicago, Milwaukee & St. Paul Railway Company, on February 13, 1914. Said action involved the identical shipment and cars under consideration in this action. The cause was submitted to the district court of Wapello county and tried without the intervention of a jury in October, 1915. Subsequently the court entered a finding that the Railway Company could not be held liable

because of failure on the part of the appellee to comply with the requirements of the bill of lading in respect to the giving of notices, but that the Refrigerator Company was liable. Upon the motion of the appellant herein, under section 3502 of the Code, the action was dismissed, the order reciting:

"Such dismissal is without prejudice to the merits of the action as between plaintiff and said defendant."

Immediately thereafter the present suit was instituted, embracing the identical matters included in the previous suit. This action was aided by attachment. Upon the trial of this cause, the appellee read in evidence from the transcript of testimony of certain witnesses given upon the former trial before the district court. Was this evidence properly admissible under the provisions of section 245a of the Supplement to the Code of 1913? The section of the statute provides that—

Any transcript of an official court reporter, "when material and competent, shall be admissible in evidence on any retrial of the case or proceeding in which the same were taken."

We do not think that the Legislature intended to use the word "case" in the statute in a narrow and strictly legal and technical sense. The evident purpose was to obviate the necessity of producing witnesses who had once been before the court and had testified respecting the matter in controversy between the parties. Under the provisions of the statute itself, if we should now reverse the case and send it back for a new trial, the transcript of the evidence on the last trial, which would include the transcript of the evidence of the first trial, would be admissible. Such an incongruous condition was never contemplated by the Legislature. The proper course to have pursued would have been to have served notice of intention to use the transcript or obtained an order of court so to do, or secured a stipulation providing for its use. The situation here presented can and should be easily obviated.

In *Re Will of Wiltsey*, 135 Iowa, 430, 109 N. W. 776, we held, under a somewhat similar situation, that where no new issues were involved and the evidence taken on the former trial was in respect to the very matters determined in the subsequent trial, the transcript was properly admitted in evidence.

Nothing in *Spiers v. Hendershott*, 142 Iowa, 446, 120 N. W. 1058, is inconsistent with this holding. In that case it affirmatively appeared that the transcript was offered in a case which was not a retrial of a former case, but that the actions were entirely distinct, and involved two separate and distinct wills, and that the action in which the evidence contained in the transcript was received had gone to final judgment. It is to be observed that the original case herein did not

go to final judgment. It was dismissed as to the appellant under the provisions of section 3502 of the Code. The order of court recited:

"Such dismissal is without prejudice to the merits of the action as between plaintiff and said defendant. The court finds and adjudges that the failure of plaintiff to prevail herein as against the said defendant is not because of any negligence in its prosecution."

Under the record, we think this transcript was admissible under this section of the statute. The parties were the same; the issues were the same; it was, to all intents and purposes, a retrial of the identical "case" in which the evidence in the transcript had been taken.

[7] In this connection, error is also predicated upon the action of the lower court in permitting the appellee to offer in evidence the deposition of a witness which was taken at the former trial above referred to. No question is raised that the deposition was not properly taken and filed upon the previous trial. It also appears that the deposition was taken upon notice, and that the appellant herein appeared and cross-examined the witness. It is urged, however, that the deposition was not duly filed in the instant case nor was leave obtained to use it before the trial was begun. We are cited to *Searle v. Richardson*, 87 Iowa, 170, 25 N. W. 113. Therein we said:

"But we are very clear that under our practice a party should not be permitted to use depositions on the trial of one cause which have been taken in another, without having filed them in the cause in which he proposes to use them, or obtaining leave before the commencement of the trial to so use them."

The rule so declared is undoubtedly correct, and a party should not be allowed to transport depositions from one cause to another without duly filing the same in the cause in which he proposes to use them or obtaining leave of court to so use them before the commencement of the trial. The reason for this rule is obvious. The evidence of a witness taken in one cause may be in a large measure material in some other cause between the same parties, but a portion of the evidence may be material in one case and wholly inadmissible in the other. But the rule can have no application where the deposition is used in a retrial of the same identical case with the same parties and the same issues. Furthermore, it appears that the deposition now in question was offered in evidence in the former trial of the case, and the shorthand notes of the official court reporter so show. Certainly no prejudice could result to the appellant by the reading of the original deposition, rather than by having the shorthand reporter read the same from his shorthand notes to the jury. We think the

court did not err upon this record in admitting the deposition in evidence.

VII. Error is predicated upon the giving of certain instructions to the jury and the refusal to give instructions that were requested. The matters complained of largely include the same subject-matter heretofore discussed in this opinion, and it is unnecessary to discuss the matter further. We find no error in the instructions that were given or in the refusal to give the instructions that were requested by the appellant. The case seems to have been fairly submitted to the jury, and the judgment appealed from must be affirmed.

In view of this conclusion, no further consideration need be given to the appellee's cross-appeal.

Affirmed.

EVANS, C. J., and STEVENS, WEAVER, and ARTHUR, JJ., concur.

ARTIFICIAL ICE CO. v. RECIPROCAL EXCHANGE. (No. 34236.)

(Supreme Court of Iowa. Oct. 25, 1921.)

1. Appeal and error $\S$ 842(2), 1010(1)—Findings of court may be set aside if without substantial support in the evidence; conclusions of law from facts found reviewable.

Findings of fact by the trial court in an action at law, in so far as they have any substantial support in the evidence, are to be given the effect of a jury verdict; but, like a jury verdict, such findings are not immune against review on appeal, if it appear that they are without substantial support in the testimony, nor does the rule exclude inquiry into the question whether, conceding the truth of a finding of fact, it justifies the conclusions of law drawn therefrom by the trial court.

2. Insurance $\S$ 235—Burden of establishing effective cancellation on insurer.

The issuance of a fire policy being admitted and loss occurring within the term covered by the contract, the burden of establishing an effective cancellation before the loss is upon the insurer.

3. Insurance $\S$ 226—Right to effect cancellation of policy without consent must be provided in statute or contract.

Except as such right is provided for by statute or reserved in the contract, neither the insurer nor the insured can declare or effect a cancellation of a fire policy without the consent of the other, and such cancellation at the demand of one without the consent of the other can be effected only by strict compliance with terms and conditions provided.

4. Insurance $\S$ 229(2)—Threat to cancel not notice of cancellation of fire policy.

Letters of insurance company addressed to insured in fire policy, threatening a cancellation

unless improvements were made to decrease the fire hazard, did not constitute a notice of cancellation.

5. Insurance §229(2)—Notice of cancellation of fire policy insufficient.

Where policy of fire insurance provided for five days' notice of cancellation, a notice simply stating "This is notice of the cancellation of the following policies, according to their terms and this notice: Policy No. —," etc., was not in proper form.

6. Insurance §229(1) — Insured may waive provision for five days' notice of cancellation.

Insured in a fire policy may waive his right to a five days' notice of cancellation by consent to immediate cancellation, and a consent or agreement of that kind, once fairly made and acted upon, will effectually terminate all contract relations and liabilities, save perhaps the obligation of the insurer to return unearned premium; but such agreement, consent, or waiver of such valuable right without any apparent consideration is not to be lightly inferred from circumstances equally consistent with the absence of such consent.

7. Insurance §668(1)—Securing of other insurance not waiver of right to notice of cancellation as matter of law.

It cannot be said, as a matter of law, that by procuring new insurance upon receipt of notice of cancellation of fire policy insured waived his right to full five days' notice of cancellation provided for in policy, where the policy encouraged rather than discouraged the carrying of insurance in other companies.

8. Insurance §235 — Evidence held not to show consent of insured to immediate cancellation of fire policy.

In an action on a fire policy which defendant claimed was canceled before a loss, evidence held not to show that plaintiff consented to a cancellation of the policy without observance of a condition therein that it could only be cancelled on five days' notice.

9. Insurance §615—Recovery by insured under policy held not to amount to double recovery.

Where plaintiff carried contracts of insurance in a number of companies at the time of a fire, and together with all the insurers, except defendant insurer, assumed the relation of coinsurers, each being bound to share pro rata in the entire loss, it being contemplated that plaintiff should sue defendant and reimburse the coinsurers if he recovered, defendant cannot contend that plaintiff collected the full amount of its loss from the other insurers and that a judgment in favor of plaintiff would amount to a double recovery upon a single demand; the coinsurers being entitled to reimbursement, and the action being brought in part for their benefit.

10. Insurance §229(2) — Notice of cancellation must provide for repayment of unearned premiums.

Where a policy of fire insurance provided that it could be cancelled by insurer upon five days' written notice with or without tender of

the unused deposit, "which unused paid deposit, if not tendered, shall, when ascertained, be refunded on demand. Notice of cancellation shall state that said unused paid deposit, if not tendered, will, when ascertained, be refunded on demand"—a notice of cancellation which failed to state that the unused paid deposit, if not tendered, would, when ascertained, be refunded on demand, was wholly void.

Appeal from District Court, Woodbury County; C. C. Hamilton, Judge.

Action at law to recover upon policies of insurance. There was a trial to the court without a jury. Judgment for the defendant, and plaintiff appeals. Reversed.

Sears, Snyder & Gleysteen, Vail E. Purdy, and H. C. Harper, all of Sioux City, for appellant.

D. V. Howell, of Kansas City, Mo., and Henderson, Fribourg & Hatfield, of Sioux City, for appellee.

WEAVER, J. The plaintiff is the owner of an extensive ice plant at Sioux City, Iowa. The Reciprocal Exchange, named as defendant herein, is a voluntary association of insurers organized under the terms of chapter 180, Laws of the 37th G. A. of Iowa. On June 30th defendant issued its policy of insurance to the plaintiff on said ice plant and property for the sum of \$11,000 for the term of one year from said date. Later, on July 31, 1918, defendant issued to plaintiff another policy of like character upon the same property for \$13,000 for the term of one year from that date. Each policy contained a provision reading as follows:

"In consideration of the acceptance by the insured of a reduction in premiums from the established rate of — per cent. to 1.1222 per cent., it is agreed that the insured shall maintain insurance during the life of this policy upon the property insured to the extent of at least 90 per cent. of the actual cash value thereof at the time of the loss; and that, failing to do so, the insured shall be a coinsurer to the extent of such deficit."

Each policy also contained another clause, as follows:

"Cancellation of Policy.—This policy shall be canceled at any time at the request of the insured, in which case one-fourth of the deposit may be retained by the attorney for the expense of making this contract, and the unused portion of the paid deposit, when ascertained, shall, upon demand and the surrender of this policy, or last renewal, be returned to the insured. This policy may be canceled at any time by the attorney by giving to the insured a five days' written notice of cancellation with or without tender of the unused paid deposit, which unused paid deposit, if not tendered, shall, when ascertained, be refunded on demand. Notice of cancellation shall state that said unused paid deposit (if not tendered) will, when ascertained, be refunded on demand."

In addition to this insurance, plaintiff was carrying policies in several other companies. A fire occurred on October 17, 1918, injuring or destroying the insured property to the extent of \$30,443.77, and this action was begun by plaintiff to recover the amount or proportion of such loss or damage which is alleged to be properly chargeable to defendant. Defendant does not deny the issuance of the policies, but rests its defense upon the proposition that such insurance had been canceled before the loss occurred. In support of its plea of cancellation of the policies the defendant produced evidence substantially as follows:

After the issuance of these policies and prior to September 11, 1918, a representative of the defendant company visited Sioux City, and after inspection of the insured property advised or recommended certain changes or improvements to decrease the fire hazard, and upon his report defendant requested or demanded that the specified improvements be made. This not meeting with a satisfactory response, the following correspondence ensued. Under date last named, defendant wrote plaintiff, as follows:

"Artificial Ice Company, Sioux City, Iowa—Gentlemen: We are still holding our files open for reply to our letter regarding the fire-extinguishing facilities in your plant. Kindly let us have a reply on the bottom of this sheet, and oblige. Yours very truly, Bruce Dodson, Manager."

On September 30, 1918, plaintiff returned said letter to the defendant, writing or indorsing thereon its answer, as follows:

"We have decided to add no equipment or changes to our plant at the present time. Artificial Ice Co. Signed. J. E. Hathaway, Pres. If this does not meet your approval let us know so we can replace our insurance."

Thereafter, under date of October 8, 1918, defendant addressed a letter to the plaintiff as follows:

"Artificial Ice Company, Sioux City, Iowa—Gentlemen: This is notice of the cancellation of the following policies, according to their terms and this notice; Policy No. 73932, covering \$11,000, written to expire June 30th. Policy No. 74292, covering \$13,000, written to expire July 31st. We regret the necessity of this action, but inasmuch as your plant was not found in satisfactory physical condition, and you decline to make necessary improvements, our action as indicated above becomes imperative. Very truly yours, Bruce Dodson, Manager."

While this letter is dated October 8, 1918, it is shown quite conclusively, and the trial court finds, that it was not mailed until October 15th and was received by plaintiff on October 16, 1918. On October 15th defendant wrote another letter as follows:

"Artificial Ice Company, Sioux City, Iowa—Gentlemen: In order that there may be no

misunderstanding, we beg to confirm our letter of October 8th that policy No. 73932, for \$11,000 insurance, written to expire June 30, 1919, and policy No. 74292, for \$13,000, written to expire July 31, 1919, are now canceled and void, in accordance with their terms and notice given. Kindly see that the canceled policies are returned to us. Very truly yours, Bruce Dodson, Manager."

The foregoing communication was not received by plaintiff until October 17, 1918, the date upon which the loss occurred. On October 16th, after the receipt of the letter purporting to have been written on October 8th, the plaintiff's president phoned a message to their insurance agents in Sioux City ordering insurance upon the ice plant to the amount of \$24,000, and received answer that the policies therefor would be issued. At the same time the agents, in accordance with the admitted custom or usual manner of transacting such business, issued so-called "binders," or "binding slips," by virtue of which plaintiff obtained temporary insurance for the amount named to cover the period required for preparation of the policies. At the fire occurred on the following day, the policies thus ordered do not appear to have been delivered before the loss was suffered, but, so far as appears, none of said companies contested their liability to contribute to the indemnity. At the date of the loss plaintiff held (including those issued by defendant) 13 policies or binders issued by 12 different insurers, aggregating a total of \$60,500 of insurance; or (excluding the defendant's policies) the undisputed insurance was \$36,500. The value of the property immediately before the fire, as adjusted with the insurers, other than the defendant, was \$47,294.29, and the loss by the fire was \$30,443.77. Within a very short time after the fire representatives of the insurers, 11 in number, not including the defendant, met in Sioux City, and, after negotiating with plaintiff and having estimated the loss as above stated, undertook the preparation of a schedule of apportionment of such loss to the several companies. The defendant, insisting that its policies had been duly canceled before the fire, denied all liability for the loss and took no part in the conferences or negotiations between the plaintiff and the other insurers. The first schedule prepared included the policies issued by defendant, estimating the contribution due from that company upon its two policies at \$12,076.85. To this the plaintiff's president objected because, in view of defendant's action in giving notice of a cancellation and denying all liability, plaintiff was uncertain as to its rights, and if it should finally be determined that defendant was not liable, the proposed schedule would throw upon plaintiff a loss in excess of its proper proportion as a co-insurer. This question was finally settled between the conferees as follows: A schedule

(184 N.W.)

was made apportioning the loss between the 11 insurers and plaintiff, as a coinsurer, and in consideration thereof plaintiff executed a written agreement with each of said insurers to the effect that, if the plaintiff should succeed in enforcing his claim against the defendant, he would pay to each of said insurers a sum representing the difference between the amount of the apportioned liability to such insurer without contribution by defendant and the proper amount of such apportionment on the basis of the validity of the disputed policies. Under the adjustment thus made, the damage or loss sustained by the plaintiff was taken at \$30,443.77, of which plaintiff, as a coinsurer, bore \$4,105.01, while the other insurers (not including defendant) contributed \$26,338.76. By an amendment to his petition plaintiff sets out said adjustment and alleges that he is suing in this case in the interest of his co-insurers as well as his own.

In pleading and in argument the appellee rests its defense, not only upon the right of cancellation reserved in the insurance contract—a right which it claims to have exercised—but insists also that, as the plaintiff had acted upon the notice of cancellation and at once procured other insurance upon the property, its action constitutes a waiver of its right to the contract or statutory period of five days and a consent to immediate cancellation. It also pleads a tender made to the plaintiff one year after this action was begun of the sum of \$243.30 as the unearned premium upon the policies it claims to have canceled.

[1] On hearing the evidence, the trial court made its findings of fact and conclusions of law in favor of defendant, making the result to turn upon the proposition that plaintiff obtained the new insurance on October 16, 1918, as a replacement for defendant's policies, and that by such action he waived the time he would otherwise have been entitled to and consented to the immediate cancellation of the insurance. As the action is at law, the findings of fact by the trial court, in so far as they have any substantial support in the evidence, are to be given the effect of a jury verdict. But, like a jury verdict, such findings are not immune against review on appeal, if it appear that they are without substantial support in testimony, nor does the rule exclude inquiry into the question whether, conceding the truth of a finding of fact, it justifies the conclusions of law drawn therefrom by the trial court. Bearing these propositions in mind, we come now to a consideration of the two phases of the defense which were held sufficient to defeat the plaintiff's action.

[2, 3] I. The issuance of the policies being admitted, and the loss occurring within the term covered by the contract, the burden of establishing an effective cancellation before

the loss is upon the defendant. Except as such right is provided for by statute or reserved in the contract, neither the insurer nor the insured can declare or effect a cancellation without the consent of the other. Such right is quite generally provided for upon prescribed terms and conditions in practically all insurance contracts, but the rule is quite universal that such cancellation at the will or demand of one of the parties without the consent of the other can be effected only by strict compliance with such terms and conditions. As said by Marshall, J., in *Davis v. Insurance Co.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131:

"The right of cancellation does not exist at all except by contract, and a clause in that regard is in the nature of a condition precedent, which must be strictly complied with in order to make an effort to cancel effective to accomplish its purpose."

See, also, *Van Valkenburgh v. Insurance Co.*, 51 N. Y. 465; *Quong Tue Sing v. Insurance Co.*, 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144; *Bennett v. Insurance Co.*, 115 Mass. 241; *German Union v. Clarke*, 116 Md. 622, 82 Atl. 974, 39 L. R. A. (N. S.) 829, Ann. Cas. 1917D, 488; *Barbour v. Insurance Co.*, 101 Wash. 46, 171 Pac. 1030; *Bragg v. Insurance Co.*, 115 Me. 196, 98 Atl. 632.

[4, 5] In the case before us the contract provides in explicit terms for the manner in which the insurer can cancel the insurance and relieve itself from further liability under its policy—

"by giving to the insured five days' written notice of cancellation, with or without tender of the unused paid deposit, which unused paid deposit, if not tendered, shall, when ascertained, be refunded on demand. *Notice of cancellation shall state that said unused deposit, if not tendered, will, when ascertained, be refunded on demand.*" (The italics are ours.)

Without the notice thus prescribed it was not within the power or right of defendant to cancel the policy except by agreement with the insured. No such notice was given. The defendant's letters addressed to the plaintiff threatening a cancellation were not a notice within the terms of the contract. That contract provided for cancellation only upon five days' notice, and admittedly it was not given. The so-called notice did not provide for five days' time, or any length of time whatever, and was not, in fact, given until within two days before the loss. Moreover, the cancellation clause of the policy stipulated that the notice, if given, should "state that the unused paid deposit, if not tendered, will, when ascertained, be refunded on demand." The so-called notice neither tendered a return of the unearned deposit or premium nor promised to refund it on demand. It follows, of necessity and as a matter of law, that there was no cancellation of the policy by virtue of the alleged notice.

[8, 7] II. Indeed, while not expressly conceding the insufficiency of the notice to effect a compulsory cancellation of the policies, we do not understand appellee to seriously contest the conclusion above stated, but rather to place principal reliance upon the proposition that plaintiff waived defendant's compliance with the conditions of the contract and consented to the immediate cancellation of the insurance. It may readily be conceded that, notwithstanding the conditions attached to the insurer's right to cancel for the plaintiff's protection against sudden and arbitrary withdrawal of the insurance for which it had paid, it was still competent for the insured to waive the benefit of its contract and consent to an immediate cancellation of the policies; and a consent or agreement of that kind, once fairly made and acted upon, would, of course, effectually terminate all contract relations and liabilities between them, save perhaps the obligation of the insurer to return the unearned premium. Such agreement, consent, or waiver of a valuable right without any apparent consideration is not to be lightly inferred from circumstances equally consistent with the absence of such consent, but, once fairly established, the insured is bound thereby. There is no evidence whatever of any express agreement or consent by plaintiff to waive the conditions attached to the insurer's right to cancel his policies. From the time of the receipt of defendant's letters, dated October 8th and October 15th, until after the loss occurred, there was no meeting of the parties or of their agents, and no communication of any kind, direct or indirect, passed between them until after the property had been destroyed by fire. It is insisted by counsel for appellee, and was apparently so held by the trial court, that, plaintiff having on receipt of the defendant's letter of October 8th (received October 16th) at once procured new insurance to a like amount, it follows, as a matter of law, that it thereby consented to the immediate cancellation of the policies in suit. The language of the court in its finding of fact and conclusion of law pertinent to the point thus made is as follows:

"It appears to the court that there is only one question in the case, and that is whether or not when this additional insurance was taken out after the notice of cancellation had been received, whether or not this insurance was additional insurance, or whether it was taken out to replace or as a substitute for the insurance of the defendant company. This is a question of fact I think is determining in this case."

After an outline of the evidence the court then adds:

"Now there is just the question of fact as to where the preponderance of evidence lies as to whether or not this was new and additional insurance to replace the insurance issued by the defendant company. * * * It

seems to me the preponderance of the evidence shows this insurance was taken out to replace or substitute the insurance of the defendant company, and there will be a judgment in favor of defendant."

In so far as said finding involves any material controverted allegation of fact, it may be accepted as conclusive upon this appeal, but with the conclusion of law which the court below and counsel for appellee in this court draw therefrom we cannot concur. To fairly estimate the effect of plaintiff's action in taking out new or other insurance it is necessary for us to get a clear view of the situation in which plaintiff was placed. The policies in suit are not of the more familiar or ordinary kind. They not only contain no provision by which the property owner may not take out additional insurance without the company's consent, or by which the taking of additional insurance will work a forfeiture of such policies, but, on the contrary, they are so drawn as to encourage the carrying of other insurance, and to that end the owner is made a coinsurer if he does not keep the total of his insurance up to "at least" 90 per cent. of the value of the property. Had the defendant's threat of cancellation never been made, and plaintiff on October 16, 1918, had concluded to and did take out new and additional insurance to the amount of \$24,000, and a loss had occurred on the following day, as it did occur, it would have in no manner affected the liability of the defendant under its policies, except to reduce the proportion or share which it could be called upon to contribute to the indemnity. If this be so, and it cannot well be disputed, on what principle shall it be said that when threatened with a cancellation of the policies issued by defendant, a threat which plaintiff knew could be carried into effect on five days' notice, if the defendant should so elect, it proceeded promptly to protect itself against the effect of such action by taking out other insurance? Could it not, in perfect good faith and within the scope of its legal rights, take out an equivalent amount or other amount of insurance in other companies with the thought in mind that it could better afford to carry the increased insurance for a few days than to take any chance of a loss in the interval against which it might not be fully protected? The situation in which the plaintiff was placed is fairly illustrated in the testimony given by Mr. Hathaway, its president and manager. While some correspondence had taken place between the parties concerning the fire-extinguishing facilities with which the property was furnished, and plaintiff as early as September 30th had declined to make the requested changes, no further word had been received from the defendant until the afternoon of October 16th. The paper bore date of October 8th, and contained a peremptory notice

of the "cancellation of the following policies [describing them by number] according to their terms and this notice." On receipt of this notice, Mr. Hathaway pencilled a memorandum on its margin of the names of the local insurance agents with whom he had dealings and opposite their names the amounts of new insurance for which he telephoned to the agents named. The aggregate of these sums was \$24,000. Explaining this act, he says:

"The occasion of making this memorandum was the receipt on the 16th of this notice dated October 8th, and I did not know where we stood on this insurance and therefore called up the agents and placed some insurance with them. I was on the fence. I did not know what to think or do; the date of that being so far back from the time we received it. I did not take out the policies shown in the memorandum with intent to waive any time that I might have as to when the Reciprocal policies should terminate. I could not determine for myself whether the Reciprocal policies were still in force or not. * * * I never returned or attempted to return defendant's policies."

It will be remembered that in writing to defendant on September 30th Mr. Hathaway had declined to make any change in the ice plant and added:

"If this does not meet your approval let us know so we can replace our insurance."

Referring to this fact in cross-examination, he says:

"I meant by that to give us due time to recover the insurance in other companies. I intended the insurance company should notify me whether they would continue the policies, so if they told me they would not I could replace the insurance elsewhere. It was my intention to replace it if they canceled the policies. Immediately after getting the letter October 16th, advising us the policies were canceled, we telephoned and took more insurance in the same amount. I did not know where we were in regard to these policies, and therefore, as we were figuring on taking more insurance anyway to make us up to 100 per cent., I telephoned friends in the insurance business and took out the same amount."

His statement that plaintiff had been contemplating an increase of its insurance is corroborated by two witnesses in the insurance business, who tell of prior conferences with Hathaway on the subject. If the situation was such that plaintiff could not consistently with its insurance contract with defendant acquire other valid insurance without releasing the defendant, then, of course, the taking out of the new policies after receiving the alleged notice of cancellation might, perhaps, tend to show an acceptance of such cancellation and waiver of objection to the sufficiency of the notice; but, having the right to obtain other insurance without the consent of the defendant, there seems to be no ground for holding, as a conclusion of

law, that such act evidences either a consent or waiver. Nor is there any apparent good reason for so holding, even if it be conceded that the new insurance was taken out to serve as a replacement or substitute for the insurance of which a cancellation was being threatened or attempted. That such is not the law we think is quite demonstrable, both upon principle and precedent, as indicated by the authorities to which we shall refer. First, however, we note our own decisions upon which appellees largely relies in support of the judgment below. They are: *Hopkins v. Insurance Co.*, 78 Iowa, 344, 43 N. W. 197; *Warren v. Ins. Co.*, 161 Iowa, 440, 143 N. W. 554, L. R. A. 1918E, 477; *Parsons v. Ins. Co.*, 138 Iowa, 532, 110 N. W. 907. These cases are in their essential facts easily distinguished from the instant case.

In the *Hopkins Case* the plaintiff was held to be estopped to deny the sufficiency of the attempted cancellation of his policy because—"the evidence shows that the cancellation was recognized by both the agent of defendant and the assured and neither party regarded the policy thereafter to be of force."

Surely, says the court:

"It would be most unequitable for the assured to so speak and act as to induce defendant's agent to believe that plaintiffs regarded the policy as canceled, and, thus leading them into a feeling of security, induce them not to make formal tender of the unearned premium, and demand the policy, with proper writing of cancellation indorsed thereon. They are now estopped to set up the nonpayment of the unearned premium, after having induced the belief of defendant's agent that cancellation was recognized by them without such payment."

By no amount of ingenuity can anything be found in the present record calling for an application of the principles of estoppel against the plaintiff.

In the *Parsons Case* the insured had voluntarily surrendered and returned his policy to the company and requested its cancellation, and, of course, it was held that he could not recover insurance under such circumstances.

In the *Warren Case* the loss of the insured property was admitted and the real contest was between two insurance companies, the *Franklin Fire* and the *Pennsylvania Fire*, as to which was liable therefor. The insured person, *Warren*, had experienced some trouble in maintaining insurance on his stock of merchandise, and employed or authorized one *O'Hara* to act for or protect him in that regard. A policy in a third company having been canceled, *O'Hara* procured a policy for *Warren* in the *Pennsylvania Company*. Shortly afterward that company telegraphed its agent to cancel the insurance. Acting upon this notice, *O'Hara* obtained a policy from the agent of the *Franklin Company* and mailed it to the insured, and while it was still in course of transmission to *Warren* the loss

occurred. The holding of the court was, in brief, that the delivery of the Franklin policy to O'Hara, the authorized agent of Warren, was, in legal effect, a delivery to Warren, and the contract of insurance with that company was thereby made complete before the loss occurred. It was further held that, while Warren was not directly informed of the act of the Pennsylvania Company in ordering a cancellation of its policy or of the reinsurance in the Franklin Company, yet the previous authority he had given O'Hara to reinsure in another company was, in legal effect, authority to waive the time condition, and that upon such reinsurance being procured the cancellation became effective. O'Hara was acting in the double capacity of agent for both Warren and the Pennsylvania Company under circumstances where the service he performed for the one party was not inconsistent with his duties to the other. He did just what it was understood in advance he would do; he accepted the cancellation for Warren as final and at the same time protected Warren by procuring him other insurance. There is no suggestion that Warren's insurance in the Pennsylvania Company was of that exceptional class in which the insured is at liberty to take out additional insurance without consent of the first insurer, or that his contract with the Pennsylvania was of a nature which would enable him to insist on the coexisting validity of both contracts. On the contrary, while he brought suit against both companies in order to avoid any appearance of waiving any legal rights he might have against either, he very properly disclaimed any right to recover upon both. Here, however, in the absence of an effective cancellation of the policies in suit, there affirmatively appears to be no legal obstacle to the insistence by plaintiff upon the validity of all its policies or the assertion of the right to compel contribution from all of its insurers.

Appellee's argument mistakenly interprets the case of *Scheel v. Ins. Co.*, 228 Pa. 44, 76 Atl. 507, decided by the Pennsylvania court, as holding that, if on insufficient notice of cancellation the policy holder at once takes out other insurance as a substitute for the policy sought to be canceled, "then defendant is relieved of liability on its policy." We do not so read the decision. On the contrary, the cited case, which is a near parallel of our own, clearly and quite emphatically negatives that proposition. The material facts in that case are that the plaintiff held two policies, of \$2,500 each, on certain property. On November 7, 1908, the defendant insurance company, which had issued one of these policies for \$2,500, gave plaintiff written notice of its intention to cancel the policy and that at the end of five days all liability of the company under said policy would cease. Immediately upon such notice being given plaintiff took out other insurance in the Hartford

Company for like amount, thereby increasing its insurance (if the policy in question be counted) to a total of \$7,500. On November 11, 1908, there was a total destruction of the property by fire; the loss so sustained being \$5,508.51. As in this case also, the Hartford Company had issued its binder on November 10th for \$2,500, and the plaintiff collected from it its pro rata share of the loss. The defendant company refusing to contribute, was sued upon its policy, and the defense pleaded to the demand was practically identical with the main defense here relied upon. The answer or affidavit of defense alleged the giving of the notice of cancellation, and that after giving of such notice and before the loss plaintiff took out the Hartford policy "with the intention that it should be a substitute for the defendant's policy, and was not for the purpose of increasing his insurance beyond \$5,000, and as a result of such action defendant's policy thereby became canceled and the risk at an end." This is precisely the defense the decisive character of which the appellee here affirms. The court there says:

"The position of the defendant company, as stated in its brief, is that, when the plaintiff received notice of the intended cancellation of the policy and promptly applied for and obtained a policy in the same amount in the Hartford Company, his purpose was not to increase his line of insurance from \$5,000 to \$7,500 but to accept the cancellation, waive the full time limit of five days, and substitute in place of the defendant's policy the Hartford Company's policy as a reinsurance, and that when he subsequently collected from the Hartford Company its pro rata of the loss by fire, which occurred within the five days, he could not, while thus accepting and receiving the benefit of that policy, hold the defendant company, for whose policy the Hartford Company's policy was a substitute, also liable. We think the affidavit of defense is insufficient, and that the court below erred in not entering judgment against the defendant. A policy of fire insurance is a contract of indemnity, and unless it is canceled by mutual consent, or the policy provides that it may be terminated on the option of the parties and is so terminated, it will continue in force for the term for which it was written. If the right to terminate is reserved in the policy, the conditions upon which it is to be exercised must be strictly complied with; and if a certain number of days is required to intervene before the notice to cancel is to take effect, the policy will still be in force, and cancellation will not become effective until the expiration of the time named in the notice. If the insurance company allege as a defense in an action on its policy that the assured has waived the five days' notice, or that he has replaced the policy by another policy and thereby relieved the company from liability, it is incumbent upon the company to aver in its affidavit of defense and prove on the trial, not only that such was the intention of the assured, but that his intention was carried out with his consent, and by his agreement with the company. In oth-

er words, the mere procurement of another policy on the same property and for the same amount after the notice and within the five-day limit does not disclose an intention on the part of the assured to cancel the earlier policy or to relieve the company from liability thereon; and, in order that it may have such effect, the company must aver and prove that the assured consented and agreed to the cancellation and the substitution of the later for the earlier policy.

"The policy on which this suit was brought, as noted above, gave either party the right to cancel it on five days' notice. Such notice was given by the company, and it specifically declared 'that all liability of said insurance company under said policy will absolutely cease on the expiration of this notice unless surrender thereof to said company be sooner made.' The policy, therefore, remained in force until the expiration of the five days unless it was sooner surrendered to the company. It is not averred in the affidavit that the policy was surrendered to the company within the five days, nor that the defendant had any knowledge prior to the fire or to the expiration of the five days that the plaintiff had procured insurance in the Hartford Company, nor that there was any written or oral agreement between the parties that the policy was or should be canceled or the company was or should be relieved from liability thereunder, nor that the company had any knowledge of the purpose or intention of the plaintiff in procuring the Hartford policy to cancel defendant's policy or to substitute the Hartford policy for it. There is no provision in the policy that it should be canceled if insurance for a like amount was taken out in another company, nor that such insurance should be a substitute for the defendant's policy, and relieve the defendant from liability thereon. The liability on the policy, therefore, continued until the expiration of the term for which it was written, unless the policy was canceled in pursuance of the five days' written notice or by the mutual consent of the parties. As the defense rests solely upon the allegation that the policy was canceled by the substitution of the Hartford Company policy for a like sum, the defendant must aver and show, not only that the assured intended to, but did, procure from the Hartford Company a policy, substitute it for the defendant's policy, and consent or agree that the substituted policy should take the place of the defendant's policy and thereby relieve the defendant from liability on its policy. Conceding that it was the intention of the plaintiff to limit his insurance on the property to \$5,000 and that he had so instructed his agent, the fact that the latter procured \$2,500 in the Hartford Company, which, in addition to the two other policies on the property aggregating \$5,000, carried the plaintiff beyond the limit of \$5,000, did not cancel or avoid the defendant's policy. Before it could have that effect, the intention to substitute must become effective by the plaintiff's agreement with the defendant company."

The length of the foregoing quotation would be quite unpardonable were it not so directly in point and the law applicable thereto so aptly and clearly stated. The case of *Wicks v. Ins. Co.*, 107 Wis. 606, 88 N. W.

781, though dissimilar in facts, involves principles applicable here. In that case one McBean, agent for plaintiff, procured the issuance of a policy from the defendant through the agency of the Rogers-Ruger Company. Shortly after the policy was issued the defendant telegraphed to its agents to cancel the policy as undesirable, and this instruction was telephoned by the agents to Rogers-Ruger Company, who in turn wrote McBean of the demand for cancellation and asked him to send them the policy, saying they would try to get other insurance. McBean then sent them the policy, saying that if insurance could not be procured he did not think it right that the matter should be left in that way. The letter inclosing the policy was received by Rogers-Ruger Company, and on the same day the property was destroyed by fire. The defendant insisted that the act of McBean in returning the policy to the agents through whom it was procured was a waiver of time and operated as a consent to immediate cancellation. The court refused to so hold, saying that the order of defendant to its agents to cancel the policy contained no suggestion of a cancellation in any other way or manner than was provided for in the contract, and that the act of McBean in returning the policy was entirely consistent with an expectation on his part that the cancellation would be made, if at all, in the regular way, and a judgment for the plaintiff was affirmed.

In *Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373, the notice of cancellation was not received by the insured until one day before the loss, and it was held that receipt of such notice would not work a cancellation but was "nugatory and void."

In *Ins. Co. v. Clarke*, 116 Md. 622, 82 Atl. 974, 39 L. R. A. (N. S.) 829, Ann. Cas. 1917D, 488, this ruling was followed where but three days' instead of five days' notice was given. As to the effect of notice for less than the contract period of time, see cases in note to *Ins. Co. v. Clarke*, 116 Md. 622, 82 Atl. 974, 39 L. R. A. (N. S.) 829.

Fairly in point, too, is *Bradshaw v. Ins. Co.*, 89 Minn. 334, 94 N. W. 866. There plaintiff, having notice or knowledge that the insurer contemplated a cancellation of his policy, placed it in the hands of Shove & Co., the agents through whom he procured it, and gave them authority to surrender it for cancellation in case such surrender and cancellation should be demanded by defendant pursuant to the terms of the policy. The defendant gave no written notice of cancellation for the time provided by the policy, but one of its agents orally asked Shove & Co. if they would accept service of notice, which they promised to do; but such service or written acceptance was not procured. Ten days later Shove & Co. delivered the policy to the defendant and collected the unearned premium.

This premium they credited to plaintiff upon their books, but did not inform him what they had done with reference to the cancellation until after a fire occurred destroying the insured property. As in this case, the suit on the policy was tried to the court without a jury and judgment rendered for defendant. On appeal the judgment was reversed. Says the court:

"A policy of insurance can only be canceled by one of the parties thereto by strict compliance with its terms as to cancellation, unless such compliance is waived by the other party. * * * Now the plaintiff never agreed, or authorized its agents to agree for it, to accept a cancellation * * * unless it was made pursuant to the terms of the policy."

Further reference to the authorities at this point is unnecessary. We hold to the rule which finds expression in the *Scheel Case*, supra, and the many other cases of that general character, as being both reasonable and just and in accordance with established principles of law. It appearing without substantial dispute that there was no cancellation of the policies pursuant to their terms, the burden was upon appellee to establish such alleged cancellation by agreement or consent of the parties. To effect such an agreement or consent there must be shown a meeting of the minds of the parties upon the proposition that the policies should be canceled, without reference to the terms of the insurance contract. To quote from *Marshall, J., in Davis Lumber Co. v. Ins. Co.*, supra:

"To effect such a cancellation, the minds of the parties must meet, the same as in respect to any other contract."

[8] There is in this record no testimony, direct or indirect, that the cancellation of the policies, without observance of the conditions therein prescribed, was ever the subject of any treaty or negotiation or understanding had between those parties. It is true that plaintiff knew that defendant was threatening to cancel if certain changes in the ice plant were not made. It is true also that defendant had refused to accede to that demand and had said to defendant, "If this does not meet your approval let us know so we can replace our insurance." But by no reasonable construction or interpretation can this correspondence be distorted into an agreement or consent or request by plaintiff that the cancellation might be effected without conforming to the conditions which the contract placed upon the exercise of that right. Plaintiff knew, of course, that the right of cancellation was reserved in the policies, and that it was within the power of the defendant to exercise it at any time upon conforming to the conditions—the service of a five days' notice in writing, which must also either tender a return of the unearned premium or expressly promise such return

when the amount was ascertained. Upon such notice being given, it would become effective at the end of the stated period, but the protection afforded by the policies would continue in full force and effect until the last hour of the fifth day. This advantage plaintiff could, of course, forego, and by express agreement or voluntary waiver accept as final a cancellation declared to take effect immediately without written notice, without days of grace, and without return or promise to return the unearned premium; but to establish such extraordinary departure from the contract of insurance, such unnecessary, not to say unreasonable and unbusinesslike, relinquishment of a valuable right without consideration, the agreement or waiver must have some substantial support in the record. This, as we have said, is wholly wanting. The plaintiff not only denies any purpose or intent to consent to a cancellation not authorized by the contract, but its every action disclosed in the record or found as a fact by the trial court is perfectly consistent with the truth of such denial. The argument against this conclusion, which appellee seeks to draw from the fact that, in making up the proofs of loss upon plaintiff's claim against the other 11 insurance companies, plaintiff, in stating the "total amount of all insurance upon the property destroyed," did not include the policies in suit, has little force. Each of the 11 insurers mentioned was represented in the settlement or adjustment made of the pro rata distribution of the losses. The plaintiff, by Mr. Hathaway, disclosed to them and all of them the fact that it held these policies, and the further fact that on the day before the fire defendant had given it notice of cancellation and was refusing to acknowledge any liability for the loss which had been sustained; and it was made a matter of mutual agreement between them that he should include in his proofs to them only the undisputed and admittedly effective policies, and if he should thereafter succeed in recovering upon the policies issued by defendant, he would account to the 11 companies for their respective shares of the contribution so collected. We fail to see in what respect the omission of mention of these policies in the proofs of loss made to the other coinsurers serves to detract from the strength of the plaintiff's case.

[9] III. If we correctly apprehend the position taken by appellee, it is further suggested that plaintiff has collected the full amount of its loss from the other insurers, and as it can have but one satisfaction for the loss sustained, a verdict and judgment in its favor would amount to a double recovery upon a single demand. The rule thus invoked has no application to the instant case. Under the contracts of insurance in force at the time of the fire, the several com-

panies issuing the policies, together with plaintiff itself, assumed the relation of co-insurers; each being bound to share pro rata in any loss which might occur. The defendant having denied liability and refused to contribute, the other companies apportioned the loss between themselves and the plaintiff, under an agreement by which plaintiff should undertake to enforce the claim for contribution from defendant for the benefit of himself and his co-insurers who had been charged with payment of the indemnity. For that purpose this action was brought. If the defendant's policies were not canceled, it was legally liable for payment of its proportionate part of the loss. It refused such payment and thereby increased the burden borne by its co-insurers. To the extent of such increase the co-insurers are entitled to reimbursement. Such reimbursement is not a double satisfaction of the same demand. A judgment as demanded by plaintiff does no more than to effect a proportionate distribution of the loss among all those who insured against the loss.

[10] IV. We do not discuss the questions raised whether payment or tender back of the unearned premium is in this case essential to an effective cancellation. Were it necessary to a decision of this appeal, it is very likely that, under the terms of the policy, it would not be held a fatal objection. But the policy does provide for what may be called a substitute for such payment or tender, in that in express terms it declares that—

"The notice shall state that said unused paid deposit, if not tendered, will, when ascertained, be refunded on demand."

This statement is made an essential part of the notice, and in the absence of waiver or consent a notice lacking such essential is wholly void.

Without further extending this opinion, perhaps already unduly prolonged, we hold that the trial court erred in ruling that the act of the plaintiff in taking out new insurance after receiving the defendant's notice October 16, 1918, evidenced a waiver of the conditions upon which the reserved right of cancellation could be exercised, and further erred in holding that the taking of new insurance as a replacement or substitute for the insurance sought to be canceled by the defendant operated as a consent to immediate cancellation, without regard to the conditions of the insurance contract. For reasons above stated, the judgment below is reversed, and cause remanded for judgment in harmony with this opinion.

Reversed.

EVANS, C. J., and PRESTON and DE GRAFF, JJ., concur.

CURRY v. HENDRY et al. (No. 33987.)

(Supreme Court of Iowa. Oct. 25, 1921.)

1. Deeds $\Leftrightarrow$ 206—Mortgages $\Leftrightarrow$ 38(2)—Deed regular in form set aside or held a mortgage only where there is a fairly clear preponderance of evidence.

To set aside a deed of conveyance regular in form, or to give such instrument the effect of a mortgage, requires a fairly clear preponderance of the evidence.

2. Mortgages $\Leftrightarrow$ 38(1)—Evidence insufficient to prove deed regular in form a mortgage.

Evidence held insufficient to prove that a deed regular in form was intended as a mortgage to secure grantor's indebtedness to the grantee.

Appeal from District Court, Union County; Homer A. Fuller, Judge.

Suit in equity to establish plaintiff's claim to be the equitable owner of certain lands and to have certain deeds of conveyance to J. G. Hendry in his lifetime held and construed as mortgages. There was a decree for the defendants dismissing the petition, and plaintiff appeals. Affirmed.

D. W. Higbee, of Creston, and Clark, Byers & Hutchinson, of Des Moines, for appellant.

Thomas L. Maxwell, of Creston, A. Ray Maxwell, of Corning, and Chas. T. Launder, of Fontanelle, for appellees.

PER CURIAM. [1] There is little or no contention between the parties as to the law applicable to cases of this character, and the appeal is submitted solely upon the fact issue whether the alleged oral agreement that the conveyances in question were made and delivered as mortgages to secure the indebtedness of the plaintiff to J. G. Hendry, since deceased, has been established by the evidence. Findings and decisions upon issues of fact are ordinarily of little value as precedents. Cases of somewhat similar nature often arise, yet, practically speaking, no two are entirely parallel in respect to the evidence offered or in the weight to be accorded to the testimony of the various witnesses. The result in each case must depend to a great degree upon its own peculiar circumstances. To set aside a deed of conveyance regular in form, or to give to such instrument the effect of a mortgage, requires, to say the least, a fairly clear preponderance of the evidence; the burden of such showing being upon the complaining party.

[2] In the case before us the trial court, having heard all the evidence, found that this burden had not been sustained by the plaintiff and denied him the relief demanded; and after careful consideration of the

record we are not prepared to say that the decision should have been otherwise. Stated in brief outline, it appears without material dispute that in the year 1908 plaintiff, who had been conducting a retail merchandise business for several years, found himself in debt to his local bank for borrowed money or upon his overdraft to the amount of \$9,500, and owing outstanding bills for an additional amount. The bank declining or being unable to enlarge his credit, he arranged with another bank, of which J. G. Hendry was proprietor, for the needed accommodation. In so doing, Hendry took care of plaintiff's overdraft at the other bank, taking his note for \$9,500, and began giving him credit in carrying on his mercantile business. This situation continued for several years; plaintiff's overdraft in Hendry's bank gradually increasing until in the year 1913 it amounted to about \$8,000. Meantime plaintiff had secured his debt in part at least by a mortgage to Hendry upon his homestead and chattel mortgage on his stock. He was also indebted in a considerable amount to the wholesale houses which he patronized. In 1913 the parties entered into the arrangement which has become the subject of this litigation. Plaintiff, apparently losing hope of being able to meet his debt to Hendry from the profits of merchandising, arranged to exchange his stock and his homestead property to one Whisler for 160 acres of land in Union county, Iowa, and 163 acres in Missouri, the Iowa land being valued at \$25,600, subject to a mortgage of \$13,500, and the Missouri land at \$9,780, subject to a mortgage of \$4,000. It appears that these deeds were made to plaintiff and deposited in the bank to be delivered on completion of invoice and conveyance of the homestead to Whisler.

It is the plaintiff's claim that as between him and Hendry it was at first understood that the stock and the homestead were to be delivered to Whisler free from incumbrance, and that Hendry would accept a mortgage on the property taken from Whisler to secure payment of plaintiff's indebtedness. Instead of this adjustment, however, plaintiff and wife deeded both tracts of land to Hendry, who assumed payment of the outstanding mortgage indebtedness thereon and canceled the chattel mortgage on the merchandise. Upon the books of the Hendry

bank plaintiff was credited with the margin of value in the two pieces of land computed at the price at which plaintiff had taken them. Without stopping to go into the items it appears that these credits were insufficient to wipe out the plaintiff's overdraft, and for the book balance of his indebtedness \$2,615.25 plaintiff several months later gave Hendry his promissory note, which is still outstanding, and secured the same by turning over book accounts against various persons. The deeds made to Hendry were in ordinary warranty form without any expressed condition or provision for defeasance, but it is the claim of plaintiff that they were made and delivered as security for and not as payment of his indebtedness. The deeds were made in April, 1913. Hendry died in February, 1919. During all this interim, Hendry was exercising dominion over the property, renting the same, collecting the rents and paying the taxes thereon. He also paid the prior mortgages thereon, principal and interest. He included the property in the disposition of his estate by will. So far as appears he did not, after receiving these conveyances, assert any claim or demand upon plaintiff except as to the debt represented by the note given by the plaintiff for the apparent remainder after the deeds were delivered. It does fairly appear, however, that there was some sort of agreement between these men by which, if plaintiff should find or produce a satisfactory purchaser for the land at a price in excess of Hendry's investment therein, such excess should belong to the plaintiff, though the exact details and terms of such agreement are by no means clear, but such agreement, if made, affords insufficient ground for giving the deeds the effect of a mortgage. No such sale was ever made, and no such purchaser was ever procured or produced. The evidence tends to show that the credit given plaintiff for the land was not materially less than the value of the property in 1913 when the transaction was consummated.

The foregoing does not include all the facts and circumstances developed on the trial, but we think it sufficiently full and comprehensive to indicate the correctness of the conclusion reached by the court.

The decree appealed from is affirmed.

EVANS, C. J., and PRESTON, WEAVER, and DE GRAFF, JJ., concurring.

CUNNIEN v. SUPERIOR IRON WORKS CO. et al.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Municipal corporations §705(1)—Automobile driver must keep reasonably careful lookout.

It is the duty of the driver of an automobile to keep a reasonably careful lookout that he may be able to avoid collision.

2. Municipal corporations §706(6)—Whether automobile driver has kept lookout held question for jury.

Whether the driver of an automobile has kept reasonably careful lookout in regard to watching for pedestrians is usually a question for the jury.

3. Municipal corporations §706(6)—Whether care was exercised by automobile driver held for the jury.

Where defendant was driving his automobile along a street 40 feet wide and on which there was not much traffic, and plaintiff was ahead of him in a horse-drawn dray on the right-hand side of the road, and the dray stopped, and plaintiff while dismounting on the left-hand side and with one foot in the street was struck by defendant overtaking and passing, the question whether defendant was negligent in passing so closely to the dray and as to whether he kept careful lookout or should have sounded warning was for the jury.

4. Municipal corporations §706(7)—Whether plaintiff, struck by automobile while descending from dray, was negligent held for the jury.

Whether plaintiff was contributorily negligent in descending from a dray on the side not next to the curbing and stepping one foot down into the street without looking for automobiles held a question for the jury.

5. Damages §59—Amounts received by injured party through the Federal Vocational Rehabilitation Act should not be deducted.

No deduction should be made from damages awarded by jury for personal injury because of compensation received by the plaintiff during a portion of the time he was disabled under the Federal Vocational Rehabilitation Act (U. S. Comp. St. Ann. Supp. 1919, §§ 3078½a-3078½gg, 3078½h, 3078½i).

Appeal from Circuit Court, Douglas County; W. R. Foley, Judge.

Action by Edward J. Cunnién against the Superior Iron Works Company and others. Judgment in favor of plaintiff, and both parties appeal. Modified and affirmed.

Ogden avenue is a paved street in the city of Superior, extending north and south, and at the point of the accident is 40 feet wide from curb to curb, and is intersected by Belknap street at right angles, there being on said last-named street a line of street cars.

The plaintiff at the time of the trial, in

September, 1920, was 22 years of age, and had been a railroad car seat upholsterer from the time he was 17 years of age until he arrived at the age of 20 years, when he enlisted in the United States navy, in the month of April, 1917. On July 19, 1919, while on a furlough, he came to Superior and aided in assisting a drayman by the name of Young in the moving of his mother's furniture from her former home in the city of Superior to the freight depot. Immediately prior to the happening of the injury, the dray on which the plaintiff and the driver, Young, were seated was returning from the freight yards empty, the dray being driven south on the west side of Ogden avenue, the horse going at a slow trot or walking, up to the point where it stopped, about 10 feet north of the north crossing at the intersection of Belknap street, in order to permit the plaintiff to alight from the wagon. The dray box had sides to it, about 2 feet high, and the seat was elevated about 5½ feet from the street. The driver sat on the right-hand side of the seat, while the plaintiff sat on the left-hand side.

There is very little dispute in the evidence as to the actual facts in the case. The defendant Hayes, who was the president of the defendant company, immediately preceding the accident, was driving a single seated six-cylinder Saxon car, used in the business of the defendant Superior Iron Works Company, south on Ogden avenue, from the Y. M. C. A. building, and when he caught up with the dray, which had stopped as stated, within a distance of about 10 feet from the north crossing of Ogden avenue and Belknap street, turned to the left in order to pass the dray, and thereafter proceeded on his course. Immediately after the dray had been stopped, the plaintiff started to alight therefrom, and in doing so faced the west, and stepped down backwards, first stepping on the tongue of the wagon with one foot, then with the other foot on the hub, and then down onto the pavement. He still clung with his hands to the dray at the time of the accident, and it appears from the evidence that he had alighted on the pavement with only one foot, such foot being a distance of about a foot east of the wagon wheel, the other foot being still on the hub of wheel. While the plaintiff was so alighting, the defendant Hayes was passing around the dray towards the east, and in proceeding along the highway came so close to the dray that his automobile struck the plaintiff, causing him to be thrown upon the pavement, and to sustain the injuries complained of.

It also appears quite conclusively that immediately prior to the happening of the accident the automobile was driven at a rate of speed between seven and eight miles an hour, and that no horn or signal was blown

or sounded to attract the attention of the plaintiff or to warn him of the approach of the machine.

The testimony also shows that the plaintiff, prior to the time he attempted to alight from the dray, did not look towards the north in order to discover the approach of an automobile.

After the collision, the automobile of the defendant Hayes swerved off to the left, across Ogden avenue, and stopped close to the east curb. There were no automobiles, excepting the one in question, going along either side of Belknap street, and the evidence shows that there was little traffic at the time in question on either of the streets.

The case was submitted to the jury on a special verdict, and the jury found in its answer to question No. 2 that the defendant Hayes failed to exercise ordinary care in the operation of the automobile as it approached and collided with the plaintiff; and in answer to question No. 3, found that such failure to exercise ordinary care was the proximate cause of plaintiff's injury, and also found that no want of ordinary care on the part of the plaintiff proximately contributed to produce the injury.

The defendants contend: First, that there was no evidence in the case under which they could be found guilty of negligence; and, second, that the evidence in the case conclusively shows that the plaintiff at the time of the happening of the accident, was guilty of contributory negligence, and that therefore defendants' motion for nonsuit or for a direction of a verdict should have been granted, and that after verdict the answer to the question in which it was found that the defendant Hayes was guilty of negligence should have been set aside, and that such answer should have been changed from "Yes" to "No," and that the answer by which the plaintiff was held to be free from contributory negligence should have been changed from "No" to "Yes"; and that judgment should have been entered in favor of the defendants and against the plaintiff, dismissing plaintiff's complaint, etc.

Pickering & Rieser, of Superior, for appellants.

Dietrich & Dietrich, of Superior, for respondent.

DOERFLER, J. (after stating the facts as above). [1, 2] Did the evidence warrant submission of the question involving defendants' negligence to the jury? The accident happened at about noontime, on a clear day in the month of July. The defendant Hayes, with his automobile, was coming along the west side of Ogden avenue, and from the time that he approached the dray, up to the time of the happening of the accident the dray and the occupants thereof were fully within his view. The machine was

driven at a rate of speed of between seven and eight miles per hour, and, assuming that the appliances on the machine were in proper order, the machine was at all times within the easy control of the driver, so that he could readily pursue any course, by either swerving his machine to the left a sufficient distance away from the dray or by stopping it, and thus avoid the accident. It is the duty of a driver of a machine to keep a reasonably careful lookout so that he may be able to avoid a collision, and whether a driver has fulfilled his duty in regard to watching for pedestrians and other persons is generally a question for the jury. *Huddy on Automobiles*, § 332.

Section 1836—52 of the Statutes, among other things provides:

"Every automobile * * * while being used upon any public highway of this state, shall be provided with efficient brakes and an adequate bell, horn or other signal device."

The Legislature evidently realized the necessity for enacting a provision requiring the presence of a suitable horn or signal device upon every automobile propelled along the streets in this state, and the only object and purpose which that body could have had in mind in the enactment of such a precaution was to enable the driver of a machine to give a proper warning of his approach under any circumstances, where such warning would be liable to prevent an accident.

It is true that this court has held that there is no rule of law which requires an automobilist to sound his horn in approaching a street intersection. However, that was not intended to convey the idea that the horn or signal device was a useless appliance, but that a warning or signal by use of such horn or device would be necessary in the exercise of reasonable care, wherever there was anticipated danger which could be averted by the giving of a proper timely signal.

[3] Therefore the matter of the negligence of the defendant presented a proper question for the jury, both upon the theory that the defendant Hayes did not keep a proper lookout, and that he did not seasonably, by means of his automobile horn, sound a warning of danger. Furthermore, while going at the rate of seven or eight miles an hour, and under circumstances from which it must be assumed that he had full control of his machine, it is very questionable indeed whether he could not be deemed guilty of negligence, under the circumstances, in driving his machine so close to the dray while passing it, as to leave a space of but one foot between his machine and the wheels of the dray. As stated there was no other vehicle or pedestrian on Ogden avenue; the street was 40 feet wide; the dray stood between 1 and 3 feet from the west curb of Ogden

avenue, and there was ample space, even on the west side of the street, for the defendant Hayes to pass the dray, without in any way endangering the plaintiff under the circumstances detailed herein. This also was a proper matter to submit to the jury, under all the facts and circumstances in the case, in order to determine the question of negligence. The question of the negligence of the defendant Hayes, if any, was therefore properly submitted to the jury.

Questions of negligence arising out of automobile accidents are peculiarly for the jury, and will not be decided as a matter of law except under the clearest circumstances. *Groeschner v. John Gund Brg. Co.*, 181 N. W. 212.

What was said in the case of *Shortle v. Sheill*, 172 Wis. 53, 178 N. W. 304, is strictly applicable to the instant case:

"There is no yardstick by which it may be determined whether any given action amounts to ordinary care. The decision must, of necessity, be a matter of human judgment. This is signally true in automobile accident cases. Whether the conduct of one charged with responsibility for an automobile accident amounts to negligence is in the vast majority of cases a question calling for the exercise of human judgment, and one upon which men are very likely to differ. In these days, when automobiles are in well-nigh universal use, who is better qualified to pass final judgment upon such matter than a jury, who can apply to the facts of the case a collective and varied experience? The daring, the reckless, the moderate, the careful, and the timid driver, as well as the pedestrian, and he who still clings to Old Dobbin, all find their way to the jury box, and the decision of the jury upon these questions reflects a judgment founded upon varied views, sympathies, and experiences, which a court can disregard only when palpably unsupported by evidence or inconsistent with law."

[4] We come now to the question submitted to the jury in the special verdict, involving the contributory negligence of the plaintiff. In this connection it must be borne in mind that the plaintiff did not look towards the north before climbing down from the wagon, and that he proceeded to climb down backwards in the manner heretofore stated. To hold that the plaintiff would be guilty of contributory negligence as a matter of law, under the facts and circumstances detailed in the evidence, would appear to establish a very harsh rule indeed. In determining the question of negligence, the traffic on the street must be taken into consideration, the width of the street, and all the surrounding facts and circumstances. It is true, had the plaintiff after alighting, with one foot on the pavement, proceeded, without looking, to cross the highway, and then had been struck, it would be quite clear that under the decisions there would

be little difficulty in finding that he was guilty of contributory negligence, as a matter of law. However, in the instant case, he had only partially alighted from the vehicle. There is sufficient evidence to warrant the conclusion that the foot, which had settled on the pavement was not to exceed one foot distant from the dray. The injury would have resulted even though it had been the intention of the plaintiff to pass forward towards the south around the wagon, and to gain access to the west sidewalk in that manner; or it would have happened if he had merely stepped down from the dray and had stood within one foot of the dray, intending to discuss some matter with the driver; or, if he had alighted from the dray for the purpose of either examining some portion of the dray on the traffic side, or of attending to some slight repair upon the wagon. It would seem that whether or not the plaintiff was guilty of contributory negligence in doing what he did at the time of the happening of the collision presented a situation which, like the negligence of the defendant Hayes, constituted a proper jury question. At least, it has been so held by courts of last resort of eminent respectability. *Deitchler v. Ball*, 99 Wash. 483, 170 Pac. 123; *Unhejem v. Hastings*, 38 Minn. 485, 38 N. W. 488; *Kathmeyer v. Mehl* (N. J. Sup.) 60 Atl. 40.

While other courts of eminent standing have held to the contrary doctrine in cases somewhat similar to the instant case, the very fact that there should be a dispute among learned judges upon the question involved in this case on contributory negligence would make it appear clear that under the rulings of this court the matter of contributory negligence is a proper subject to be submitted to and decided by a jury; and what has been quoted and said in the case of *Shortle v. Sheill*, supra, is equally applicable to the question of the plaintiff's contributory negligence as it is with respect to the negligence of the defendant Hayes. We have arrived at this conclusion not without considerable difficulty but after mature consideration. In view of our former holdings and what has been heretofore said and referred to, we hold that the contributory negligence of the plaintiff is a proper matter to be submitted to the jury.

In answer to the fifth question of the special verdict, namely, "What sum will fairly compensate plaintiff for the damages he has sustained?" the jury answered, "\$3,250." The jury further answered that of said amount, the sum of \$1,500 is allowed as damages for loss of earnings since March 8, 1920, and judgment was rendered in favor of the plaintiff and against the defendants for the sum of \$1,725 and costs, etc. The plaintiff in his cross-appeal contends that it was error for the trial court to deduct the sum of \$1,500 from the total

amount of the damages, namely, \$3,250, and to render judgment as aforesaid.

The plaintiff's injury consisted of a simple fracture of the tibia of the right limb, about an inch below the kneejoint. Dr. Ground testified that the bone at the point of the injury in hardening ossifies separately from the shaft and the part which involves the new joint. The injury twisted and bent the bone at the joint, and the ligaments lifted the epiphylum cap off the shaft of the bone. That is what is called an epiphyseal fracture. It is a weak point naturally, and the two pieces of the bone do not become ossified or thoroughly fastened together until the person becomes 24 or 25 years of age, and then they become very firm, and the injury was such as to bend the bone and lift the shaft right off of the tibia. The doctor treated the plaintiff about two months in St. Mary's Hospital, at Superior, and thereafter, when the plaintiff went to St. Paul, he still had some retentive dressing on his limb. The injury will naturally constitute a weak place for a few years. The fact that the bone has been immobilized for so long a time makes the joint stiff and the tissues around the joint have become thickened, and that thickening has to be absorbed before the joint can be used normally, and that always takes a considerable time. The doctor further testified that he would expect it to take a year, or possibly a year and a half, before conditions would become reasonably normal.

The plaintiff testified that since his injury he was able to work, with great difficulty, inconvenience, and pain, at his regular employment, for a period of about one week, for which he earned the sum of \$34, but that the condition of his limb was such as to prevent him from continuing in his employment, and that such disability continued up to the time of the trial.

In December, 1918, the plaintiff filed his application for a discharge from the navy, and his four-year term was changed automatically to one which continued during the duration of the war. He received his discharge from the navy on October 29, 1919. From the time of the happening of the injury, up to the time of his discharge from the navy, the plaintiff received his usual compensation from the government, amounting to \$45 a month.

The plaintiff thereafter presented an application for vocational training, under an act of Congress (U. S. Comp. St. Ann. Supp. 1919, §§ 3078½a-3078½g, 3078½h, 3087½i), and for a period of one year thereafter, under the provisions of said act, he was afforded an opportunity to improve himself in the business of general upholsterer, so as to enable him to pursue a gainful occupation. The work required under the Vocational Rehabilitation Act was not so strenuous, nor

did it require the person to kneel or to stand to any considerable degree while so employed. Under this Vocational Rehabilitation Act, the plaintiff received from March 8, 1920, the sum of \$120 per month, and for a portion of the time his employer paid him the sum of \$6 per week, which was subsequently raised to \$10 per week.

[5] The lower court instructed the jury that, inasmuch as the government paid plaintiff's salary of \$45 a month to him until the time of his discharge on October 29, 1919, nothing was to be allowed to him prior to said date for loss of earnings. The jury was further instructed that in arriving at plaintiff's loss of earnings they were to leave out of consideration the \$120 per month which the plaintiff received from the government under the Vocational Rehabilitation Act, and find his loss of earnings, if any, just the same as if he did not receive any money from the government.

Plaintiff testified that since his injury and up to the time of the trial he would have been able to earn 72½ cents per hour in his former occupation, had he been able to resume it, and that since plaintiff was injured, the compensation for railway car upholsterers has materially increased.

The jury was instructed also by the lower court to answer separately the amount awarded to the plaintiff for damages since March 8, 1920, and the jury fixed said sum at \$1,500, and this amount was subsequently in the judgment deducted from the total amount of the plaintiff's damages, as aforesaid.

The plaintiff in his cross-appeal now raises the question that in making such deduction the court committed error, and that the total damages should be by the judgment fixed at \$3,250, instead of \$1,725.

The Vocational Rehabilitation Act, which was enacted on June 27, 1918, and which is known as sections 10349-10359 of the Federal Statutes, and as set forth in Barnes' Federal Code of 1919, among other things provides as follows:

Sec. 10350. "Every person who is disabled under circumstances entitling him, after discharge from the military or naval forces of the United States, to compensation under article 3 of the act entitled 'An act to amend an act entitled "An act to authorize the establishment of a bureau of war risk insurance in the Treasury Department," approved October sixth, nineteen hundred and seventeen, hereinafter referred to as 'said act,' and who, after his discharge, in the opinion of the board, is unable to carry on a gainful occupation, * * * shall be furnished by the said board, where vocational rehabilitation is feasible, such course of vocational rehabilitation as the board shall prescribe and provide.

"The board shall have power, and it shall be its duty, to furnish the persons included in this section suitable courses of vocational rehabilitation to be prescribed and provided by

(184 N.W.)

the board, and every person electing to follow such a course of vocational rehabilitation shall, while following the same, receive monthly compensation equal to the amount of his monthly pay for the last month of his active service, or equal to the amount to which he would be entitled under article 3 of said act, whichever amount is the greater. If such person was an enlisted man at the time of his discharge, for the period during which he is so afforded a course of rehabilitation, his family shall receive compulsory allotment and family allowance according to the terms of article 2 of said act in the same manner as if he were an enlisted man, and for the purpose of computing and paying compulsory allotment and family allowance his compensation shall be treated as his monthly pay: Provided, that if such person willfully fails or refuses to follow the prescribed course of vocational rehabilitation which he has elected to follow, in a manner satisfactory to the board, the said board in its discretion may certify to that effect to the bureau and the said bureau shall, during such period of failure or refusal, withhold any part or all of the monthly compensation due such person and not subject to compulsory allotment which the said board may have determined should be withheld. * * *

"No compensation under article 3 of said act shall be paid for the period during which any such person is furnished by said board a course of vocational rehabilitation except as is hereinbefore provided."

U. S. Comp. St. Ann. Supp. 1919, § 3078½b.

Article 3 (U. S. Comp. St. Ann. Supp. 1919, §§ 514qqq-514tttt), above referred to, provides for compensation to be paid on account of the death of one serving in the army or the navy, or for partial or total or temporary or permanent disability.

Article 2 of the act entitled "War Risk Insurance" (U. S. Comp. St. Ann. Supp. 1919, §§ 514nnnn-514qq½), provides for compulsory and voluntary allotments for the benefit of the wives and families, which allotments are deducted and paid directly by the government to the dependents.

Section 10304 of the Federal Statutes pertaining to war risk insurance provides as follows:

"(1) *Assignment to United States or Prosecution of Right of Action for Death or Injury; Credit of Recovery on Compensation; Mortality Table Applicable.*—If an injury or death for which compensation is payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the director, as a condition to payment of compensation by the United States, may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or if it appears to be for the best interests of the beneficiary the director may require him to prosecute the said action in his own name, subject to regulations. The director may require such assignment or prosecution at any time after the injury or death, and the failure on the part of the beneficiary to so assign or to prosecute said cause of action in his own

name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned to the United States may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be placed to the credit of the military and naval compensation appropriation. If the amount placed to the credit of such appropriation in such case as in excess of the amount of the award of compensation, if any, such excess shall be paid to the beneficiary after any compensation award for the same injury or death is made." U. S. Comp. St. Ann. Supp. 1919, § 514tttt.

In the next paragraph this section provides that if a recovery has been had as the result of the suit brought or of a settlement, the amount so obtained shall be credited upon any compensation payable or which may become payable to such beneficiary. Said section further provides:

"(2) If an injury or death for which compensation may be payable under this article is caused under circumstances creating a legal liability upon some person, other than the United States or the enemy, to pay damages therefor, then, in order to preserve the right of action, the director may require the conditional beneficiary at any time after the injury or death, to assign such right of action to the United States, or, if it appears to be for the best interests of such conditional beneficiary, to prosecute the said cause of action in his own name, subject to regulations. The failure on the part of the beneficiary to so assign or to prosecute the said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be paid to such beneficiary, and be credited upon any future compensation which may become payable to such beneficiary by the United States on account of the same injury or death."

On June 5, 1920 (Barnes' Fed. Code Supp. 1921) section 10356a was enacted by Congress, which among other things provides as follows:

"That the board may, after June 30, 1920, pay, subject to the conditions and limitations prescribed by section 2 of the Vocational Rehabilitation Act as amended, to all trainees undergoing training under said section residing where maintenance and support is above the average and comparatively high, in lieu of the monthly payments for maintenance and support prescribed by section 2, as amended, such sum as in the judgment of the said board is necessary for his maintenance and support and for the maintenance and support of persons dependent upon him, if any: Provided, however, that in no event shall the sum so paid such person while pursuing such course be more than \$100 per month for a single man

without dependents, or for a man with dependents \$120 per month, plus the several sums prescribed as family allowances under section 204 of article 2 of the War Risk Insurance Act."

The Federal Statutes above quoted and referred to make it clear that Congress first intended to provide for those engaged in the military and naval service, and who had sustained injury, compensation for disability, which compensation matured after the discharge of the soldier or sailor, and which compensation was subject to compulsory allotment for the benefit of dependents in the same manner as the compensation received in the form of monthly pay was subject to while such soldier or sailor was in service.

Article 3 above referred to is a separate and independent article, and has no connections with article 4 (U. S. Comp. St. Ann. Supp. 1919, §§ 514u-514bbb), which provides for soldiers' and sailors' insurance. It is very clear that Congress had in mind at the time of the enactment of the foregoing statutes, not only to relieve in a measure those who had served the government during the period of the war, but also to afford them some compensation by way of appreciation and gratitude of the great sacrifices made. And it cannot logically be maintained that these enactments were brought about or had in view any thought of relieving those who were guilty of wrongdoing towards any one engaged in the military or naval service of the United States.

The plaintiff, after his discharge from March 8, 1920, took advantage of the statutes pertaining to vocational rehabilitation, and received the maximum provided for under said statute, and, in addition thereto, received from his direct employer, up to the month of July, 1920, the sum of \$6 per week, by way of additional compensation, and thereafter the sum of \$10 per week.

Section 10350, referred to above, provides that no compensation under article 3 of said act shall be paid for the period during which any such person is furnished by said board a course of vocational rehabilitation, showing that the amount allowed by way of compensation during the vocational rehabilitation period is substituted for the amount of the compensation provided for in article 3; and said last-named section also provides that, in order to enable one to take advantage of the Vocational Rehabilitation Act, he must have been disabled under circumstances entitling him, after discharge from the military or naval forces, to compensation under said article 3. So that the Vocational Rehabilitation Statutes really act for the time being as a substitute for and a supplement to the provisions of said article 3, and under said article 3 all causes of action and all amounts recovered belong to the United States, and must be ultimately

credited to the military and naval compensation appropriations; so that in any event, it appears that whatever is ultimately realized out of this suit goes to the credit of the United States, and does not constitute or give to the plaintiff double compensation for the damages sustained for loss of time.

It has been held by this court in *Gatzweiler v. T. M. E. R. & L. Co.*, 136 Wis. 34, 116 N. W. 633, 18 L. R. A. (N. S.) 211, 128 Am. St. Rep. 1067, 16 Ann. Cas. 633, that the amount received by an injured party under an accident policy for which he has paid the premiums cannot be considered by way of partial or total satisfaction of damages claimed by such injured person from a tortfeasor.

In *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304, which was an action for an injury caused by a defect in a highway, defendant claimed to have the amount received by plaintiff on an accident insurance policy deducted from the recovery, but the court said:

"There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense, or inure to the benefit of the defendant. The insurer and the defendant are not joint tortfeasors or joint debtors so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory."

In answer to the objection that plaintiff was not entitled to more than one recovery, the court said:

"Defendant was not in a position to raise that question, since it was primarily liable for the injury."

See, also, *Regan v. N. Y. & N. E. R. Co.*, 60 Conn. 134, 22 Atl. 503, 25 Am. St. Rep. 306; *Missouri, K. & T. R. Co. v. Rains* (Tex. Civ. App.) 40 S. W. 635; *Louisville & N. R. Co. v. Carothers*, 65 S. W. 833, 66 S. W. 385, 23 Ky. Law Rep. 1673; *Pittsburgh, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138.

It also seems to be the prevailing doctrine in this country that where the salary of an injured person is continued by his employer during the time of his inability to perform services, such payment is no ground for diminution of the damages to be paid by the one who has caused the injury. *Williams v. St. Louis & S. F. R. Co.*, 123 Mo. 573, 27 S. W. 387; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317; *Elmer v. Fessenden*, 154 Mass. 427, 28 N. E. 299; *Missouri P. R. Co. v. Jarrard*,

65 Tex. 560. New York and Alabama courts seem to hold the contrary view.

From the foregoing statutes we hold that the lower court, in reducing the amount of the plaintiff's damages for loss of earnings since March 8, 1920, in the sum of \$1,500, committed error, and that the judgment should be for the full amount of the damages as found by the jury, namely, \$3,250.

The judgment of the lower court is therefore modified accordingly, and, as so modified, affirmed.

It is so ordered.

CARL HARTMAN CO. v. FRIDAY.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

Fraud §64(1)—Evidence as to fraud in sale of boiler held insufficient for jury.

In an action for buyer's failure to perform a contract for the sale of an engine and boiler, in which buyer counterclaimed for false representations by the seller, evidence held insufficient to carry to the jury the question of fraud.

Appeal from Circuit Court, Dodge County; Martin L. Lueck, Judge.

Action by the Carl Hartman Company against S. B. Friday. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff, a dealer in new and secondhand machinery, at Green Bay, Wis., under a written contract, sold and delivered to defendant at Beaver Dam, Wis., an engine and boiler, each secondhand. Plaintiff brought this action to recover damages of defendant for his partial failure to carry out the contract. Defendant answered and also counterclaimed.

The substance of the counterclaim, so far as necessary here, was to the effect that certain material and false representations were made by plaintiff's president with reference to certain conditions and qualities of the boilers. In the special verdict as submitted to the jury such questions were answered in plaintiff's favor. In addition to the issues so contained in the special verdict, defendant insisted on the trial, and now here, that the court should have also submitted to the jury questions concerning certain other alleged misrepresentations by plaintiff's agent to defendant concerning the front of said boiler.

The court held that the evidence did not warrant a submission of any such issues to the jury, and upon such ruling and the special verdict he directed judgment dismissing the counterclaim and granting damages to the plaintiff upon his cause of action. From such judgment the defendant has appealed.

Clark & Lueck, of Beaver Dam, for appellant.

C. W. Lomas, of Green Bay, for respondent.

ESCHWEILER, J. (after stating the facts as above). The engine and boiler in question had been in use in or near Green Bay prior to the time of the contract between the parties. The boiler was one of a set of several boilers, but the front for it, as sold to the defendant, was, to his knowledge, from a different boiler, and it had been stored in another yard than where the boiler itself was at the time of the sale.

Defendant's contention here presented arises from the fact that the front which was sold and subsequently placed by him upon the boiler had doors therein not sufficiently large to permit of the separate taking out on each side of 5 of the outermost of the 60 or 70 flues therein contained. In case of removal however, of all the flues at one time, these 10 could be taken out with the others and be removed through the manhole. Their separate removal, however, would require the taking down or apart of the front. There was no testimony as to how often it might reasonably be anticipated that such outer flues would require separate removal or what the necessary expense would be in such case, the only testimony in that regard being by plaintiff, to the effect that such a removal and replacing of the front could be done by three men in an hour.

The court refused to submit to the jury any question upon what defendant claims was material representations by plaintiff in connection with this boiler front on this particular point. The only testimony in the record upon which such questions could have been properly submitted to the jury, if at all, was that by the defendant himself. He testified that the plaintiff said this front was of the proper size for that boiler, and again:

"He [plaintiff's president] didn't say anything particular in regard to the doors, but the front was supposed to be in usable condition and proper to fit this boiler. That was the representation that he made."

Defendant nowhere testifies that he relied in making this purchase upon anything in the nature of a representation with reference to the matter here involved, and on repeated questions in direct examination as to the consideration that induced him to enter into this purchase; the only one he gives is the statement he claims plaintiff made to him that there would be an inspection by an official boiler inspector of an insurance company, and submitted to him. The issue presented on this latter feature was submit-

ted to the jury and decided by them against defendant's contention.

The defendant had ample opportunity to examine, and did examine, the boiler itself twice, and this particular front once, before the purchase. There was no concealment or fraud by the plaintiff shown. We think the court was justified in its rulings on the grounds that there was no material representation made by the plaintiff in that regard, and that defendant had ample opportunity, and availed himself of it, to ascertain all the facts before he signed the contract.

Complaint is also made by appellant as to the court's ruling in the admission of certain testimony by one of plaintiff's witnesses. We do not deem the admission of such testimony, were it erroneously received, to have been a prejudicial error, and it becomes immaterial in view of the disposition that is now being made of this case.

Judgment affirmed.

STATE v. FISCHER.

(Supreme Court of Wisconsin. Oct. 10, 1921.)

1. Criminal law $\S$ 84(1)—Circuit Court's jurisdiction taken away only by unmistakable language.

Under Const. art. 7, $\S$ 8, and St. 1919, $\S$ 113.03, the circuit court is a court with general jurisdiction to hear all matters, civil and criminal, within this state, and its jurisdiction can be taken away from it only by unmistakable legislative language to that effect.

2. Criminal law $\S$ 84(6)—Kenosha county circuit court has jurisdiction to summon grand jury and proceed with indictments.

The Kenosha County Municipal Court Act, though it gives the municipal court of Kenosha county, created by it, jurisdiction to summon a grand jury and proceed with indictments, does not deprive the circuit court of Kenosha county of such jurisdiction, in view of sections 3, 6, 7, 10.

3. Criminal law $\S$ 1011—Prohibition $\S$ 3(2)—Proper remedy where indictment has been returned in court not having jurisdiction.

The proper remedy where indictment has been returned in court not having jurisdiction is prohibition and not certiorari.

Error to Circuit Court, Kenosha County; E. B. Belden, Judge.

George Fischer, Jr., was indicted for the unlawful sale of intoxicating liquor, and he petitions for writ of certiorari to review orders of the circuit court overruling his motions to dismiss an indictment and quash indictment. Denied.

Cavanagh & Mittelstaed, of Kenosha, for plaintiff in error.

William J. Morgan, Atty. Gen., J. E. Messerschmidt, Asst. Atty. Gen., Frank S. Symmonds, Dist. Atty., of Kenosha, and Mortimer E. Walker, Sp. Asst. Dist. Atty., of Racine, for the State.

PER CURIAM. In this case it is decided:

1. That the writ of certiorari to review the orders of the circuit court of Kenosha county overruling defendant's motion to dismiss and quash the indictment presented by the grand jury against the above-named defendant was improvidently issued and must be quashed.

2. That the circuit court of Kenosha county by indictment has jurisdiction of the offense charged against this defendant.

An opinion will be filed expressing the views of the court upon the question involved in this decision.

Petition to this court for a writ of certiorari to review orders of the circuit court of Kenosha county, Hon. E. B. Belden, Judge, presiding, dated September 1, A. D., 1921, overruling petitioner's motion to dismiss an indictment and overruling petitioner's motion to quash such indictment, for the reason that said circuit court of Kenosha county has no jurisdiction of the matter.

DOERFLER, J. At the regular March term in the year 1921 of the circuit court for Kenosha county, a grand jury having been summoned and impaneled and sworn and charged to inquire for the state of Wisconsin, did on the 12th day of August, 1921, during said term, present an indictment containing four counts against the petitioner, charging him with the unlawful sale of intoxicating liquors under section 1569-3 of the Wisconsin Statutes. Petitioner was thereupon arraigned before said circuit court, pleaded not guilty to each of the counts of said indictment, and, among other things, moved to dismiss said indictment, for the reason that the circuit court for Kenosha county has no jurisdiction in said matter.

The motion of the petitioner was overruled, and he now seeks to have a review of the order of the circuit court by a writ of certiorari from this court.

During the argument of the matter before this court, it was stipulated in open court, by the respective counsel for the parties, that if this court should be of the opinion that the matter could not properly and legally be determined upon a writ of certiorari, that then and in that case, the matter could be treated as though it were before the court upon a petition for a writ of prohibition.

We will first consider and determine the issue involved with respect to the jurisdiction of the circuit court.

Article 7, $\S$ 8, of the Constitution of Wisconsin, provides as follows:

"The circuit courts shall have original jurisdiction of all matters civil and criminal within this state, not excepted in this Constitution, and not hereafter prohibited by law."

Section 113.03 of the Statutes (1919) reads as follows:

"Circuit courts have the general jurisdiction prescribed for them by the Constitution and have power to issue all writs, process and commissions provided therein or by the statutes, or which may be necessary to the due execution of the powers vested in them. They have power to hear and determine, within their respective circuits, all civil actions and proceedings and all cases of crimes and misdemeanors of every kind not exclusively cognizable by a justice of the peace or some other inferior court; and they have all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice, and to carry into effect their judgments, orders and other determinations, subject to re-examination by the Supreme Court as provided by law. Said courts and the judges thereof have power to award all such writs, processes and commissions, throughout the state, returnable in the proper county."

[1] The circuit court, therefore, is a court with general jurisdiction to hear all matters, civil and criminal, within this state, and no portion of its constitutional or statutory jurisdiction can be deemed to have been taken away from it by the Legislature, excepting only by some unmistakable legislative language to that effect. *Wieden v. State*, 141 Wis. 585, 124 N. W. 509; *State v. Grunke*, 88 Wis. 159, 59 N. W. 452; *Faust v. State*, 45 Wis. 273; *Goyke v. State*, 136 Wis. 557, 117 N. W. 1027, 1126.

So that it is clear from the provisions of the Constitution and statutes above cited, and the interpretations of such provisions in the cases above referred to, that the circuit court of Kenosha county at the time when the grand jury was summoned, and while the proceedings were had under the indictment in question, had full and complete jurisdiction over the subject-matter involved, unless said circuit court had been deprived of such jurisdiction by legislative enactment, clear and unmistakable in its import and in the language used.

Chapter 18 of the Laws of 1909, creating a municipal court in Kenosha county, and defining its jurisdiction, etc., provides among other things as follows:

"Sec. 3. The municipal court of Kenosha county shall have and exercise powers and jurisdiction concurrent with and equal to the circuit court of Kenosha county in bastardy cases and in all cases of crimes and misdemeanors arising in said county, wherein the maximum penalty does not exceed five years in the state prison."

Under this section of the Kenosha Act, it is clear that no jurisdiction is taken away

from the circuit court, and that the jurisdiction of the municipal court in all cases of crimes and misdemeanors arising in said Kenosha county, wherein the maximum penalty does not exceed five years in the state prison, is concurrent with and equal to that of the circuit court.

Section 6 of said Kenosha Act provides:

"Said judge and the several circuit court commissioners shall have exclusive jurisdiction to institute and conduct examinations in all criminal and bastardy cases arising within the county of Kenosha, and the power and jurisdiction to cause to come before him or them the persons so charged with committing bastardy or any criminal offense, within such county and commit them to jail or bind them over for trial at the next term of said municipal court or to the circuit court as the case may require, and on a plea of guilty by the accused and a request by him to be sentenced, the said judge shall have power, authority and jurisdiction to sentence the accused for any offense except homicide."

Section 6 makes it clear that the object and purpose of creating the Kenosha municipal court was to relieve in a large measure the circuit court of Kenosha county, and to divert a considerable portion of the business which prior to that time had been sent to the circuit court, to the municipal court. So that, while the circuit court has not been deprived of any jurisdiction, and while it has not had its jurisdiction curtailed, the Legislature has seen fit, by means of the Kenosha Act, to establish a new course which actions and proceedings must take, which, after having originated in the municipal court and before court commissioners, are diverted from their former course to the circuit court, to the newly created court, namely, the municipal court.

This conclusion so arrived at is the only one which harmonizes with the provisions of section 3 of the Kenosha Act, under and pursuant to which the municipal court of Kenosha county is authorized to exercise powers and jurisdiction concurrent with and equal to the circuit court of Kenosha county in bastardy cases and in all cases of crimes and misdemeanors arising in said county, wherein the maximum penalty does not exceed five years in the state prison.

Note, however, that the section last above referred to confers exclusive jurisdiction to institute and conduct examinations, etc., in cases referred to in said section, and nowhere refers to indictments of a grand jury. So that, unless in other provisions of the act, in express and clear and unmistakable language, it deprives the circuit court of its right to summon a grand jury in all criminal cases, and to proceed by indictment, the circuit court has not been deprived of such jurisdiction, and still retains the same.

Inasmuch as the other provisions referred to in said section 6 are not germane to the

specific issue involved herein, they will not be further considered herein.

Section 7 of said Kenosha Act provides as follows:

"All examinations, recognizances and commitments from or by said municipal judge or other examining magistrates of said county of Kenosha in bastardy cases, and in all criminal cases wherein the maximum penalty does not exceed five years in the state prison, shall be certified and returned to such municipal court instead of to the circuit court for said county of Kenosha, within the time prescribed by law, and the attendance of witnesses required upon the trial of any person so committed shall be secured in the same manner as provided by the law in the circuit court, and all such cases shall thereafter be proceeded with and tried in said municipal court, as provided by law in similar cases in circuit courts."

Section 10 of said Kenosha Act provides:

"If any person charged upon indictment or information with a criminal offense shall have procured a change of venue to the circuit court of Kenosha county, said municipal court shall commit or hold the party to bail to appear at the next term of the circuit court," etc.

[2] The word "indictment," as used in section 10, refers specifically to an indictment returned in the municipal court of Kenosha county, and inasmuch as section 3 of the act confers concurrent jurisdiction upon the municipal court, equal to the circuit court of Kenosha county, in all cases of crimes and misdemeanors arising in said county, wherein the maximum penalty does not exceed five years in the state prison, the conclusion is irresistible that the conferring of such jurisdiction also gives jurisdiction to the municipal court to summon a grand jury and to proceed by indictments, etc.

Section 10 also makes it clear that the circuit court of Kenosha county has jurisdiction to hear and try all cases coming to it pursuant to a change of venue from the municipal court.

Nowhere in the Municipal Court Act is there anything to indicate by express language, or by implication, that it was the intention of the Legislature to, or that it did, deprive the circuit court of Kenosha county of jurisdiction to summon a grand jury and to proceed with indictments. Therefore it necessarily follows that the jurisdiction of the circuit court with respect to the matters involved in the instant case has in no wise been curtailed or impaired.

We now come to the other issue involved in this case, namely: Assuming that the circuit court had no jurisdiction in this case, would the proper procedure be to apply for a writ of prohibition, or would the writ of certiorari afford a proper remedy?

In *Re Hauser et al. v. State*, 33 Wis. 678, and in *Martin v. State*, 35 Wis. 204, writs

of certiorari were issued, and the questions involved in those cases were considered and determined by this court as though such writs were proper writs under the circumstances. In those cases, however, the regularity and propriety of the writs were assumed, and the practice was not in fact determined in the decisions.

In *Chittenden v. State*, 41 Wis. 292, which was a criminal case in the circuit court in Dane county, and in which an attempt was made to remove the case for a second time, and the court retained jurisdiction, and it was sought in that case to raise the question of jurisdiction of the court by a common-law writ of certiorari, the court in that case uses this language:

"To our minds it is a serious question whether this position of counsel is not correct and in strict accord with the principles and rules of practice which govern proceedings in civil and criminal actions. It is obvious that the writ is resorted to in the present case as a mode of appeal from the decision of the circuit court refusing to dismiss all proceedings in the cause. And the question is whether such a ruling can be brought before this court for review by a common-law certiorari. The circuit court is a court of general jurisdiction in civil and criminal matters, under the Constitution; and it was proceeding in the action according to the course of the common law. If the court was proceeding in the cause without jurisdiction, the appropriate writ to be applied for from this court would seem to be a writ of prohibition, and not a common-law certiorari. It seems to us, if the writ is a proper process for correcting the alleged error of the circuit court in refusing to dismiss the proceeding, it might be resorted to at any stage of the cause to bring up for review any erroneous decision which that court might make. The great inconvenience which would result if such a practice is sanctioned is too obvious to need comment. True, in the *Hauser Case* the writ was sued out to review a decision of the municipal court of the city of Milwaukee refusing to quash an information for publishing a libel. In the *Martin Case* the question was whether the circuit court, under the circumstances, should have changed the place of trial. If the question of practice had been considered and settled by the court in those cases, we should feel bound by the adjudications. But it was not; and therefore, under the circumstances, the question of practice will be deemed an open one in this court. On account of the absence of the Chief Justice, no attempt will be made to settle the practice in this case. But we thought it advisable to make the suggestions we have, in order that the profession might not be misled by the above decisions, or infer that the practice was already definitely determined and settled in such cases."

It is also held, in *Barry v. Blackhawk County District Court*, 167 Iowa, 306, 149 N. W. 449, that the mere fact that a court proposes to act in excess of jurisdiction or entirely without jurisdiction is to be remedied by a writ of prohibition rather than

the writ of certiorari. See, also, 11 C. J. p. 90. And in speaking of a writ of certiorari, it is said:

"It is not a flexible remedy, inasmuch as all that can be done under it is to quash or to refuse to quash the proceedings complained of. The office of a certiorari is to bring up the proceedings of the court below for examination, that they may be affirmed or quashed, and not to enforce any rights growing out of those proceedings. It would therefore not be a proper or an adequate remedy."

"The writ of prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal properly and technically denominated such, or to an inferior ministerial tribunal possessing incidentally judicial powers and known as a quasi judicial tribunal, or even, in extreme cases, to a purely ministerial body, commanding it to cease abusing or usurping judicial functions. A writ of prohibition is a prerogative writ to be used with great caution and forbearance for the furtherance of justice and for securing order and regularity in all the tribunals where there is no other regular and ordinary remedy. The legitimate scope and purpose of the writ is to keep inferior courts within the limits of their own jurisdiction, and to prevent them from encroaching upon the jurisdiction of other tribunals."

32 Cyc. 598, 599.

"The power of 'a general superintending control over all inferior courts' which the Constitution (article VII, § 3) grants to this court was first extensively considered and its limits defined in the case of *State ex rel. Fourth National Bank v. Johnson*, 103 Wis. 591, 79 N. W. 1081. The subject has been discussed in a number of cases since that time, but no attempt has been made either to vary or enlarge the general principles laid down in the first named case, but, on the other hand, in all of the subsequent cases those principles have been either literally or in substance approved and applied.

"Those principles in substance are that this jurisdiction is not to be exercised upon light occasion, but only upon some grave exigency; that the writs by which it is exercised will not be used to perform the ordinary functions of an appeal or writ of error; that the duty of the court below must be plain; its refusal to proceed within the line of such duty or, on the other hand, its intent to proceed in violation of such duty must be clear; the results must be not only prejudicial but must involve extraordinary hardship; the remedy by appeal or writ of error must be utterly inadequate; and the application for the exercise of the power of superintending control must be speedy and prompt."

Petition of *Pierce Arrow Motor Car Co.*, 143 Wis. 282, 127 N. W. 998; *State ex rel. Fourth National Bank v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; *State ex rel. Mil. E. R. & L. Co. v. Circuit Court*, 133 Wis. 442, 113 N. W. 722; *State ex rel. Milwaukee v. Ludwig*, 106 Wis. 226, 82 N. W. 158; *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158.

[3] It will readily be seen that, assuming that the circuit court had no jurisdiction in the instant case, all of the requirements based upon the aforesaid principles would exist in the highest degree, and that therefore a writ of prohibition, as is practically conceded by the learned counsel for the state, and as is strongly intimated in the case of *Chittenden v. State*, 41 Wis. 292, would be the proper and the only remedy that would afford adequate relief.

However, it having been herein held that the circuit court has jurisdiction in this case, the application for a writ of prohibition must be denied.

It is so ordered.

KRESSINE v. JANESVILLE TRACTION CO.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

1. Negligence $\S$ 23(1)—Care required to prevent injury by implements attractive to children.

One may not maintain in a public street an implement, machine, or structure attractive to children without taking due care to prevent injury resulting to them by reason of natural childish interference therewith.

2. Negligence $\S$ 23(2)—Standing street car attraction to children.

A street railroad company leaving a street car standing on the track in a public street is chargeable with knowledge that it is an alluring object to children, and is therefore required to render its presence harmless to ordinary childish interferences therewith.

3. Negligence $\S$ 25—Precautions to prevent injury to children attracted by street car held sufficient.

A street railroad company which tied the trolley pole down to top of a car left standing in the street, turned the switch at both ends of the car, set the brakes, removed the controller, and locked the doors, held as a matter of law to have taken proper precaution to prevent children from moving car and injuring themselves.

Appeal from Circuit Court, Rock County; George Grimm, Judge.

Action by Laverne Kressine, by his guardian, against the Janesville Traction Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

This is an action to recover damages for personal injuries sustained by plaintiff on June 13, 1919, a boy then about three years of age. The evidence shows that on or before June 13, 1919, a repair crew in the employ of defendant had been habitually conveyed to the then terminus of the Jackson Street line in the city of Janesville in an old street

car. The workmen were let out of the car at the scene of their work, and the foreman then took the car to the end of the line on South Jackson street, which was the only place the car could be left without interfering with regular city service. The testimony shows that the foreman, upon leaving the car, habitually pulled the trolley pole down away from the trolley wire, and tied it down to the top of the street car, it being necessary for him to climb to the top of the street car to do so. He then threw out the overhead switch, which is a cut-out or switch located on the ceiling of the street car, and as high as a man can reach, which broke the connection so that the car could not be started unless the switch was put in again. He also set the brake on the car, removed both of the controller levers, the forward and reverse controls of the car, and took them away with him to the place where the repair gang was working, so that nothing but the square projections on which they fit was left. Finally he closed both of the doors of street car. These doors had no locks, but did have a catch or lever on the inside, so that when shut it was necessary to get in through a window in order to open them again. It appeared, however, that one of the doors of the car stuck at times, and that it was not always possible to get it entirely shut.

Children were in the habit of congregating in the street in the vicinity of this work car. They frequently got into the car through the window or doors, in some manner not clearly appearing, and frequently played in and about the car. The employees of the defendant company knew of this fact, and frequently chased them away. On one or two occasions prior to the day of the accident the children did put up the trolley pole, threw in the overhead switch, and by some means not described had managed to start the work car. One witness testified that on one occasion they operated it in that manner a distance of about half a block and back again. It does not appear that any employee of the defendant knew that the work car was ever moved by the boys, or that they had ever touched the trolley pole or overhead switch; neither is there any evidence that the boys ever left the trolley pole up, or the overhead switch turned on, when they departed on any occasion previous to the accident.

On the day of the accident, the witness Charles Knoff, a motorman employed by the defendant, and in charge of a car in city service on the South Jackson street line, ran his car to the temporary terminus of the line on South Jackson street at the scene of the accident, and stopped his car at about six or eight feet north of the work car. He turned the trolley pole around ready for the return trip, and went back into the car, proceeding to the front end where he was preparing to start. While so engaged, and with his car standing still, the plaintiff and

his companions who were playing in the work car at the time started it up. The plaintiff was on the front end of the work car. The work car traveled the six or eight feet intervening between the two cars without attracting the attention of the motorman on the street car, and bumped into the regular car, pushing it along. The plaintiff boy was caught between the two cars, and sustained the injuries, to recover damages for which this action was brought. It was necessary for the motorman on the service car to enter the work car to stop it. He found that the boys had picked up an instrument called an insulator, which resembles very much the handle of a dumb-bell, upon the end of which is a staple-shaped opening. The boys had pressed this opening down over the controller shaft so as to enable them to start the car. This insulator had never been used for such a purpose to the knowledge of any one who testified in the case, nor had any of the witnesses ever considered it as capable of such use.

The evidence showed that one of the boys, a brother of the plaintiff, had climbed on top of the street car and released the trolley pole from its fastenings and placed it in contact with the trolley wire. There was also testimony to the effect that on several occasions when the city service cars came to the end of the line on South Jackson street previous to the accident, motormen had permitted boys to help them turn the trolley pole around, and that at times conductors or motormen had given the boys a penny on such occasions.

At the close of the evidence the defendant moved the court to direct a verdict in its favor, which motion was denied. A special verdict was returned by the jury, in which it was found that the defendant was guilty of a want of ordinary care in leaving the car under the circumstances in the condition it was left on the day of the injury, which want of ordinary care was the proximate cause of the injury; that the plaintiff was not guilty of a want of ordinary care which proximately contributed to produce the injury; and that the plaintiff was not of sufficient age and discretion to care for his own safety and render it prudent to go about alone. Damages were assessed at the sum of \$1,383.33. The defendant thereupon moved the court to change the answer to the first question of the special verdict from "Yes" to "No," and for judgment on the verdict as amended; for judgment upon the verdict as rendered; for judgment notwithstanding the verdict; and to set aside the verdict and for judgment for defendant. All of said motions were denied, and judgment was rendered for the plaintiff. The defendant appealed from such judgment.

Nolan, Dougherty & Grubb, of Janesville, for appellant.

Kading & Kading, of Watertown, for respondent.

OWEN, J. (after stating the facts as above). [1] In recognition of the fact that children will play in a public street, this court has held that one may not maintain therein an implement, machine, or structure attractive to children without taking due care to prevent injury resulting to them by reason of natural, childish interferences therewith. *Bussye v. Rogers*, 120 Wis. 443, 98 N. W. 219, 64 L. R. A. 183; *Harris v. Eastern Ry. Co.*, 152 Wis. 627, 140 N. W. 288, 45 L. R. A. (N. S.) 1058; *Kelly v. Southern Wisconsin Ry. Co.*, 152 Wis. 328, 140 N. W. 60, 44 L. R. A. (N. S.) 487; *Webster v. Corcoran*, 156 Wis. 579, 146 N. W. 815. The duty thus cast upon him who places or maintains such an implement, machine, or structure in the street is founded upon considerations of humanity rather than any legal relations existing between him who maintains the dangerous apparatus and the children who may come in contact therewith. It follows naturally from a recognition of the fact that children of tender age have not acquired an appreciation of the impropriety of meddling with other people's property nor the dangers lurking in the complicated machine. The all-wise Providence has implanted in the child a curiosity which can be satisfied only by feeling and handling new and strange objects. This is a trait which frequently tries the patience of adults, but it is an instinct ordained by nature, and cannot be changed by man.

In fixing a standard of human conduct involving the safety of children, this trait cannot be ignored. Children are all about us wherever we go and whatever we do, especially if it be in the public street. That their presence in the public street is not only an aggravation to adults, but dangerous to their safety, all will concede. But that they will be in the public streets at inopportune times and places is a fact that cannot be ignored. From these considerations this court has laid down the rule that—

"Conservation of child life and safety, as to artificial peril, is one of such importance that ordinary care may well hold every one responsible for creating and maintaining a condition involving any such with reasonable ground for apprehending that children of tender years may probably be allured thereto." *Webster v. Corcoran*, 156 Wis. 580, 146 N. W. 815; *Kelly v. Southern Wisconsin Ry. Co.*, 152 Wis. 328, 140 N. W. 60, 44 L. R. A. (N. S.) 487.

[2] The defendant had a lawful right to leave the street car here in question standing on the track in the street as it did. It was unquestionably chargeable with knowledge of the fact that children were continuously playing in the street, around and about the street car, and that the car was a most alluring object to the children of that neighborhood. This laid upon the defendant a duty

to render its presence harmless to the ordinary childish interferences therewith in the nature of original research and investigation. The jury found that the defendant company failed in its duty in this respect. This finding is challenged as being contrary to the evidence, and we are to determine whether the conduct of the defendant fulfilled its obligations in this respect as a matter of law.

[3] That the probability of childish interference with the car was appreciated, and a bona fide effort made to render it innocuous to probable childish incursions, is manifest. The employes who had charge of the car testified that the following things were done to render it inanimate and irresponsible to any childish intermeddling therewith: First, the trolley pole was tied down to the top of the car; second, the switch at either end of the car was turned, thus breaking for a second time the electric current; third, the brakes were set; fourth, the controller, a crank-shaped device which regulates the flow of electric current when in the hands of the motorman, was taken away; and, fifth, the doors were locked. That they did all these things there is no direct testimony to dispute. But it is contended that the testimony in this behalf was either so shaken upon cross-examination, or made improbable by other circumstances in the case, that the jury had a right to disbelieve that the doors were locked, or that the switch at the end of the car had been turned. Granting this contention, it remains conceded by every witness in the case that the trolley pole was tied down to the top of the car, and there is no reason whatever to doubt that the controller was taken away. It is a verity in the case, then, that the trolley pole was disconnected from the electric overhead wire and securely tied down to the top of the car, and the controller taken away. Without contact by the trolley pole with the electric overhead wire the street car was an inert object. The controller was generally regarded as an indispensable instrument for the setting of the car in motion.

With these facts in mind, the question is whether, in tying down the trolley pole and removing the controller the company was in the exercise of due care for the safety of children who might be playing thereabouts. The care required under such circumstances is reasonable care. It is the care that men of ordinary prudence would exercise under the same or similar circumstances. The dangers which it was the duty of the company to guard against were such as reasonably might have been anticipated. It was not an insurer of the safety of the children. It was not the duty of the company, as we view it, to so dismantle or disempower the car as to render it harmless under every conceivable circumstance. It was charged with knowledge of ordinary childish conduct, and it was

bound to anticipate consequences resulting from such conduct. It was not bound to anticipate consequences resulting from the unusual or extraordinary conduct or the precocious ingenuity displayed by this particular crowd of boys.

In considering a similar situation, the Minnesota court said:

"We do not mean to intimate, in respect to the matter of fastenings in a case like this, that they must be such as to render it impossible for children to remove them, nor that the fact that in the particular case they were removed by such children necessarily makes a case of negligence. But they ought to be such (we are speaking of cases where very young children, to the knowledge of the defendant, have ready access to, and may be attracted by, turntables and car wheels standing on the tracks) that an ordinarily prudent person would deem them sufficient to render it improbable that children within the rule would remove them." *O'Malley v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 289, 45 N. W. 440.

We think this language quite clearly and correctly states the degree of care required under the circumstances here, and it seems to us that the conduct of the defendant responded fully to that standard. In the first place, it should hardly be required to anticipate that boys of eight or nine years of age would crawl on top of the street car and untie the trolley pole, so that it might be placed in contact with the electric wire; but, even should it be held to such an anticipation, certainly it could not be held to anticipate that these boys would seize upon an implement never used for that purpose and make it serve as a controller. To hold the defendant responsible for the plaintiff's damage is to require it to be an insurer of the safety of children in and about its cars under all circumstances, and would well-nigh lay upon it the duty of placing a guard at a car when left standing on a street. We do not think the defendant's negligence was a jury question. Its conduct responded to the degree of care required by it under the circumstances. It follows that the judgment should be reversed and the cause remanded, with instructions to dismiss plaintiff's complaint.

So ordered.

LYES v. SUPERIOR SHIPBUILDING CO. et al.

(Supreme Court of Wisconsin. Oct. 18, 1921.)

Negligence §136(27) — Contributory negligence of crane repairer in putting head in dangerous position held for the jury.

In an action against a shipbuilding company for the death of an electric company's workman, injured while riding in a cabin of a crane which was being moved to test hoisting mechanism on which he had made repairs, with

the aid of two other skilled workers, who were engaged with him in making the test, held, on the evidence as to his experience and knowledge of the dangerous conditions, that the question of contributory negligence in putting his head in a dangerous position was for the jury, whose verdict finding him guilty must stand.

Doerfler, Eschweiler, and Owen, JJ., dissenting.

Appeal from Circuit Court, Douglas County; W. B. Foley, Judge.

Action by Henry Lyes against the Superior Shipbuilding Company and another. From judgment for defendants, plaintiff appeals. Affirmed.

This action was brought by plaintiff for damages alleged to have been caused by the death of his son at the plant of the defendant company. The deceased was killed while riding in a cabin of a crane which he had been engaged in repairing, and which was being moved to a position over a propeller wheel to test the lifting or hoisting mechanism which had been repaired.

Fred Lyes, the deceased, had been engaged in electrical and mechanical work for 5 years prior to his death. At the time of his death and for 2½ years prior thereto, he had been employed by the Benson Electric Company. On the day in question he had been sent to the plant of the Superior Shipbuilding Company with a workman named Anderson to assist in the repair of a motor of a movable crane. Anderson asked that the deceased be sent with him because of his ability and knowledge in this work. At the plant of the defendant company they met defendant Louis Facette, who had had over 20 years' experience in the operation of the crane. The crane consists of a large steel frame 500 to 600 feet long, extending along a ship dock. Upon this frame there are tracks, and upon the tracks a movable bridge runs the long way of the frame. The bridge has a stationary arm about 200 feet in length extending out on either side of the frame, which is part of and moves with the bridge. The frame extends north and south, and the arms of the bridge east and west. Upon this bridge there is a trolley, which includes a cabin, with motors and drums above the cabin, and the lifting device and hook with which the work is done. The cabin and hook move together with the trolley, the hook being to the west of the cabin. The operator of the cabin faces west, and has three controllers in front of him which are connected with motors, and work independently of each other, one to move the bridge along the frame either to the north or to the south, the second to move the trolley out upon the cross-arm either to the east or the west, and the third to raise or lower the hook in doing the work.

The trouble which Anderson and the deceased undertook to fix was with the controller and the motor which raised and lowered the hook. Deceased and Anderson first went over the blueprint of the electrical equipment and mechanism, and then examined the motors and electrical equipment of the cabin. The cabin is reached by means of a stationary stairway up the frame, and then by another stationary stairway up the bridge or traveling crane. At the top of this stairway, and part thereof, is a landing platform which is used to enter the cabin when the cabin is in position. The platform and stairway are supported from above by 3-inch angle irons. Anderson testified that the platform came within about 4 inches of the door of the cabin, and the diagram introduced in evidence gives the distance as 5 inches.

In doing their work in the forenoon, Anderson and the deceased were all over the cab. They finished their work of repairing the crane in the forenoon, but, at the request of the defendant Facette, returned in the afternoon to test the work of the hook in lifting to be sure that the trouble had been remedied. They decided to move the crane over and pick up a propeller wheel which was lying upon the ground about 100 feet south and 30 feet east of where the cabin was stationed. In order to reach the place where the propeller wheel lay and pick it up, three movements were necessary: First, to move the bridge south to a point opposite the propeller; second, to move the trolley with the cabin and hook out to a point far enough east of the propeller so that the hook would be directly above it; and then to lower the hook and pick up the propeller. All three movements could be carried on at the same time. The ordinary way for the operation to be made was to start the bridge running south, then start the trolley out upon the cross-arm toward a point opposite the object to be lifted. The stairway and landing platform to the cabin being stationary upon the bridges, the cabin leaves it as it moves out upon the cross-arm.

The three men were in the cabin. Anderson threw on the switches, which had been disconnected, and asked Facette to "Run it; everything is all right." Facette was standing or sitting at the west side of the cabin, immediately in front of the controllers, facing the west window, where he could lean out and see when he was properly placed. Immediately before starting, the deceased had been standing entirely inside of the cabin, and by the doorway at the south side thereof. Facette started the motor moving the bridge to the south, and then started the motor moving the cabin and trolley out upon the cross-arm to the east. When the cabin had moved the distance of about the width of the platform, Anderson saw that the deceased had been struck or his head crushed

between the east angle iron supporting the platform and the door jamb of the cabin.

The jury found that the defendant Facette, the operator of the cabin, failed to exercise ordinary care in moving the cabin without giving a signal or warning; that the operator did not fail to exercise ordinary care in the manner in which he started the cabin; and that the deceased was guilty of contributory negligence. The trial court granted the defendant's motion for judgment upon the verdict, from which judgment appeal is taken.

Adams & Jones, of Duluth, Minn. (Powell & Sprowls and C. Z. Luse, all of Superior, of counsel), for appellant.

Hanitch, Hartley, McPherson & Johnson, of Superior (Kelley & Cottrell, of Cleveland, Ohio, of counsel), for respondents.

SIEBECKER, C. J. (after stating the facts as above). The jury's answer to question 5 shows that they found that Lyes, the deceased, was informed of the danger to his safety attending the operation of the crane at the time of the accident, and that he, as an ordinarily careful and prudent man, was guilty of a want of ordinary care in failing to protect himself from being injured by having his head caught between the angle iron of the landing platform for entering the cabin and the jamb of the cabin door. The evidence tends to show that the deceased was an intelligent and experienced person in working about machinery, and that he had several years' experience as a workman in the electrical business. He, with one Anderson, as heretofore stated in detail, worked in and about the cabin of the crane, and passed up and down the stationary stairway attached to the frame and bridge, and leading to the door of the cabin, in passing in and out of the cabin over the landing platform connected with the stairway, over which persons passed to go in and out of the cabin. The angle irons supporting the platform were in plain sight to any one going in and out of the cabin.

The jury was well sustained in concluding that the deceased understood the construction of the bridge, the arms of the crane, and the cabin with its different parts and apparatus. It is manifest from what transpired during the forenoon of the day in question, and after Anderson, Facette, and deceased had returned to the crane after lunch to test the efficacy of the repairs made during the forenoon, that the deceased was informed that the crane was to be put into operation, and that he was engaged with Anderson and Facette in making this test. Under these circumstances the jury was abundantly warranted in finding that the deceased was fully informed that the crane was to be operated to lift the propeller wheel which had been selected for testing the re-

pairs on the crane. The evidence shows that the deceased participated in making the test; that the propeller was so located as to require the moving of the crane arms on the bridge and the cabin and the trolley and hook which was to be hitched onto the propeller wheel in order to lift it; that the deceased, Anderson, and Facette had entered the cabin to operate the crane to make the test; that Facette was in place to operate the controllers of the motors which operated the crane on the bridge, the cabin on the crane arm, and the trolley and hook for lifting the trolley wheel; that Anderson called to Facette, "Everything is all right—go ahead," and that Facette immediately started the motor to move the crane on the bridge, and then started the motor that moved the cabin; that the cabin moved a few inches; that deceased's head was caught between the door jamb and the angle iron, injuring him and causing his death.

There is evidence tending to show that decedent was standing inside the cabin near the door immediately before these movements of the crane and cabin started. The conditions surrounding him at this time were open and obvious, and he, as an intelligent and experienced man, must be held to exercise the degree of care for his protection from danger that an ordinarily careful and prudent person would exercise under the same or similar circumstances. Under the foregoing facts and circumstances surrounding this accident, the decedent must be held to have had knowledge of all the obvious perils that threatened his safety which were discoverable by reasonable observation and the use of his senses.

It is contended that the decedent was subjected to a hidden danger in that the operator of the crane started the cabin without giving him notice thereof. This claim is not well founded, because the facts and circumstances warrant the inference by the jury that decedent was informed of the necessity of moving the cabin or trolley with the hook in order to hitch onto the trolley wheel, and that he and his associates were in the cabin to do this very thing. We think under all of the facts it was a jury question whether or not decedent was guilty of a want of ordinary care in putting his head in the dangerous position which caused his death. We consider this question, under the facts and circumstances of this case, to be within the rule stated in *Klotz v. Power & Mining Co.*, 136 Wis. 107, 116 N. W. 770, 17 L. R. A. (N. S.) 904:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions

from them." *Richmond & D. Ry. Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 743, 37 L. Ed. 642.

It is considered that the circuit court properly submitted the contributory negligence question to the jury and that the judgment awarded on the verdict must stand.

The judgment appealed from is affirmed.

DOERFLER, J. (dissenting). The deceased at the time of the accident was 22 years of age, and had had about 8 years of experience as an electrical worker. The evidence does not show that the deceased had ever been employed before in repairing or installing electrical apparatus for cranes like the one on which he was injured, nor does it appear that he was familiar with the various movements of the crane and its parts.

On the morning of the day of the accident, the deceased and Anderson examined the blueprints of the crane, showing its electrical operation, and after that they ascended into the cab to examine the electric motor which operated the hoist, which motor was defective and out of order. The deceased knew when he returned to the shipyard after dinner that he was there for the purpose of testing out the electrical motor that operated the hoist, in order to ascertain the efficacy of the repair work which he and Anderson performed during the morning. The deceased must also be presumed to have known that, in order to lift the propeller wheel, which was between 100 and 200 feet south of the cab, and about 30 to 40 feet east of the trestle, it would be necessary to utilize all of the motors. There is no testimony, however, to establish knowledge on the part of the deceased that the three movements involved in the test referred to would be performed simultaneously, or that it was the usual and customary practice in the operation of the crane to so perform these movements.

There is nothing in the evidence to show that the deceased, in anything that he did, had occasion to examine into the location of the angle irons on which the platform was suspended, or to determine what portions of the crane moved with the cab when the same was operated out on the cross-arms. The impression that an ordinary person would obtain from the knowledge possessed by the deceased, in so far as it is disclosed by the testimony, is that the bridge would be operated on the main tracks on the trestle until it arrived at a point opposite to where the propeller wheel was located, and that the cab would then be operated upon the cross-arm, and that that operation would be followed by the movement of the hoist. In any event, the operation on the main track was first started, and the movement of the bridge thereon was not connected with any danger to the deceased while he was standing in the doorway, or even if he extended his head beyond the doorway. Had the bridge con-

tinued in its course on the main track to a point opposite to where the propeller wheel was situated before the motion of the cab on the cross-arm was called into play, there would have been ample justification for a jury finding the deceased guilty of contributory negligence if he had been injured by having his head caught between the door jamb and the angle iron.

Contributory negligence is a defense, and must be proved by the defendant, unless the plaintiff by his own evidence establishes the fact that he was guilty of such negligence. *Grimm v. Mil. Elec. Co.*, 188 Wjs. 44, 119 N. W. 833.

The answer of the jury to the fifth question of the special verdict is therefore based solely upon speculation and conjecture. On the evidence as it appears in the record, the question of contributory negligence should not have been submitted to the jury at all, but, having been submitted, and answered in the manner as shown by the verdict, the answer should have been changed in accordance with the request of plaintiff's counsel.

ESCHWEILER and OWEN, JJ., concur in the foregoing dissent.

MURPHY v. CASEY. (No. 22424.)

(Supreme Court of Minnesota. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Exemptions §50(1)—Insurance policy in favor of another held exempt from insured's creditors.

Under Gen. St. 1913, § 3465, a policy of insurance effected in favor of another is exempt from the claims of creditors of the insured, and his rights and interests under the contract are as to creditors seeking to acquire them subordinate to those of the beneficiary.

2. Execution §43—Insured's option for cash surrender value cannot be attached or levied upon by insured's creditors while beneficiary's ultimate right remains.

The right or option reserved to the insured to surrender the policy and demand the then cash value thereof, to which the beneficiary can make no valid objection, cannot be attached or levied upon by his creditor, so long as the right of the beneficiary to the ultimate payment of the policy at the insured's death remains in force and effect.

3. Attachment §57—Insured's contingent interest, dependent on his outliving beneficiary, cannot be attached.

Neither can the contingent interest of the insured, dependent upon whether he outlives the beneficiary and the policy becomes payable to his estate be attached by the creditor during the life of or before the rights of the beneficiary have lawfully been terminated.

Appeal from District Court, Aitkin County; C. W. Stanton, Judge.

Action by F. E. Murphy against J. Ambrose Casey, in the form of a creditors' bill in aid of execution. Demurrer to complaint sustained, judgment for defendant, and plaintiff appeals. Affirmed.

Washburn, Bailey & Mitchell, of Duluth, for appellant.

L. T. Mahany, of Aitkin, and T. D. O'Brien, of St. Paul, for respondent.

BROWN, C. J. On October 16, 1918, plaintiff duly recovered a judgment against defendant in the district court of St. Louis county for the sum of \$11,844.34. Execution was issued thereon on December 9, 1918, and subsequently returned unsatisfied. On May 2, 1919, a second execution was issued, under which the sheriff levied upon an alleged interest of the judgment debtor in and to certain policies of life insurance issued to him by the Northwestern Mutual Life Insurance Company on September 3, 1910. This action, in the form of a creditors' bill, was brought in aid of the execution and to subject defendant's interest in the policies to the payment of the same. All the facts upon which the claim is based are set forth in the complaint to which defendant interposed a general demurrer. The demurrer was sustained and judgment thereon rendered for defendant, from which plaintiff appealed.

[1] The policies of insurance were issued to defendant on his application long prior to the judgment made the basis of the action, and payable at the insured's death to his mother, Emma E. Casey, as sole beneficiary, with the reserved right on his part, as the insured, to change the beneficiary at any time. The policies are all of the 20-year payment plan, and each contains a cash surrender option, which the insured may exercise, and by a surrender thereof at the time and manner therein provided demand and be entitled to receive from the insurance company the stipulated surrender value of each, in the exercise of which the beneficiary has no restraining voice. The policies also provide that, in the event the beneficiary shall not be living at the death of the insured, the amounts due thereon at his death shall become payable to his heirs, executors, administrators, and assignees; no other beneficiary having been designated prior to his death.

It is contended by plaintiff that the cash surrender option given by the policies to defendant, in the exercise of which the named beneficiary has no voice, and also the contingent interest in and to the amounts payable in the event the beneficiary dies before the insured, are property rights in defendant which are available to creditors, and that the trial court erred in not so holding.

Both these contentions are answered adversely to plaintiff by section 3465, G. S. 1913, by which insurance policies of this character, having a designated beneficiary, are exempt from the claims of creditors of the insured. The statute provides that—

"Whenever any insurance is effected in favor of another, the beneficiary shall be entitled to its proceeds against creditors and representatives of the person effecting the same. All premiums paid for insurance in fraud of creditors shall inure to their benefit from the proceeds of the policy, if the insurance company is specifically notified of the claim before payment."

No claim is here made on the theory that the premiums paid on these policies were in fraud of creditors, and rights arising under the latter clause of the statute are not involved; the sole claim presented being the asserted right to resort to the interests of the insured in the cash surrender option and his alleged contingent right in the event he shall survive the beneficiary.

[2] Our conclusion, after full consideration of the questions involved, is that the statute is one of exemption, and that the policies in question, so long as they remain without change of beneficiary by death or otherwise, are exempt from the claims of creditors, and the interests of the insured here sought to be reached are not available to them. To grant the relief on either ground asserted by plaintiff would in our view of the matter wholly destroy the intent of the statute and deprive beneficiaries in such cases of the protection the Legislature intended to secure to them. While it is true that the insured may cash in his policy without regard to the wishes of the beneficiary, that reserved right, since the insurance was effected and taken out for the benefit of the latter, to give force and effect to the statute, must, as to creditors seeking to exercise it in the place and stead of the insured, be deemed and held subordinate to the rights of the beneficiary. There are no sound reasons, either in morals or in equity and good conscience, why the creditor, to the detriment of the beneficiary, should be given the right and privilege of the insured in such cases. No credit is extended to the insured on the faith of the insurance, for all persons dealing with him are bound to know the law, and that money to become due thereon, when payable to a third person, is exempt from their claims. The statute is wise in its purpose, securing as it does after the death of the insured pecuniary aid and assistance to the beneficiary, usually some one who is dependent upon the insured for support, and should not be frustrated or impaired by opening the door to those who have no just or equitable claim to the money. The authorities sustain this view of the question. In re

Johnson (D. C.) 176 Fed. 591, involved the construction of our statute in federal bankruptcy proceedings, and the conclusion stated was there applied. The court followed the rule of other federal courts, and held that the insurance policy there involved did not pass to the trustee in bankruptcy, for the reason that it was exempt under our statute to the beneficiary. In re Pfaffinger (D. C.) 164 Fed. 526; Holden v. Stratton, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018; Hiscok v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771. The case of Cohen v. Samuels, 245 U. S. 50, 38 Sup. Ct. 36, 62 L. Ed. 143, is not an authority to the contrary and does not support plaintiff's case.

[3] What has been said and the conclusion reached applies equally to both of plaintiff's contentions. To hold with plaintiff on either point would result in the destruction of rights the Legislature intended to secure to the beneficiaries in such insurance contracts. To extend to the creditor the option to surrender the policy for the cash value would wipe out the rights of the beneficiary altogether. And to award to the creditor the insured's contingent interest, to come into life only in the event he outlived the beneficiary, would throw the whole contract relations of the parties into confusion, and prejudice and finally in all probability wholly destroy the benefit intended by the law to protect in the beneficiary. With the insured's rights turned over to the creditor he naturally would have no further interest in keeping the policy alive by the payment of premiums; while the creditor would willingly let the policy lapse for nonpayment, accepting the lapsed value in discharge of his claim. It is not likely that any creditor, in a case where the policy has 10 or 15 years to run, would consent to pay the maturing premiums, thus to keep the contract in force, in the hopes that the contingent interest of the insured would some time ripen by the death of the beneficiary, only to be confronted later on with the prior death of the insured, and the unquestionable right of the beneficiary to the insurance and the whole thereof. A situation of that kind is not at all improbable. Other uncertainties and confusion readily are suggested, all to the detriment of the beneficiary, and all impairing the rights intended to be secured by the statute. The court should not create a situation which will bring about results of the kind. It will be time enough for the creditor to reach out for the contingent interest of the insured after the rights of the beneficiary have been terminated by death or other lawful way.

We conclude, therefore, that the learned trial judge correctly disposed of the case, and the judgment appealed from will be and is affirmed.

MOE v. SHAFFER. (No. 22442.)

(Supreme Court of Minnesota. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Judgment $\S$ 43—Entered on warrant of attorney authorizing it without process is valid.

A judgment is not void for want of service of process, if entered upon a warrant of attorney expressly authorizing its entry without process.

2. Fraud $\S$ 35—Waived by new agreement after discovery.

A party to a contract procured by fraud waives the fraud, if after discovering it he enters into a new agreement for the discharge of his obligation on different terms. *Humphrey v. Sievers*, 137 Minn. 373, 163 N. W. 737, followed and applied.

3. Judgment $\S$ 822(1), 942—Want of jurisdiction, fraud, or payment are the only defenses against judgment of court of record of sister state; presumed that attorney's fees in judgment are in proper amount.

The only defenses to an action upon a judgment of a court of record of a sister state are want of jurisdiction, fraud, or payment. The presumption is that the court properly fixed the amount included in the judgment for attorney's fees.

4. Limitation of actions $\S$ 169—Cause arising in and barred in another state cannot be sued on in this.

If no action could be maintained on a cause of action in the state where it arose, because of the bar of the statute of limitations, none can be maintained in the courts of this state, unless plaintiff has been a citizen thereof ever since the cause of action accrued.

5. Limitation of actions $\S$ 187—Plaintiff must set up by reply defendant's absence from state as statutory exception.

When the statute of limitation is pleaded as a defense, if the facts bring the case within any of the exceptions to the statute, they must be set up by reply. Defendant's absence from the state is such an exception.

6. Statutes $\S$ 281—Of foreign state need not be set forth in *hæc verba*.

It is not necessary in pleading a statute of a foreign state to set it forth in *hæc verba*. It is sufficient if its terms are so pleaded that the court can determine its effect.

7. Pleading $\S$ 359—Part of pleading containing statute not in effect may be stricken.

If in fact a statute which is pleaded is not in effect, that part of the pleading may be stricken as sham.

Appeal from District Court, Wilkin County; Stephen A. Flaherty, Judge.

Action by Nels J. Moe against Oliver E. Shaffer. Plaintiff's demurrer to all defendant's defenses was sustained, and defendant appeals. Order sustaining demurrer reversed.

Lewis E. Jones, of Breckenridge, for appellant.

George D. Smith, of Grand Forks, N. D., for respondent.

LEES, C. November 19, 1910, L. W. Brewer, as trustee in bankruptcy of the estate of the J. E. Edmunds Company recovered a judgment against the defendant in the circuit court of La Salle county, a court of record of the state of Illinois. The judgment was founded on a promissory note executed by defendant to J. E. Edmunds, containing authority to any attorney of a court of record to appear in such court in term time or vacation and confess judgment without process in favor of the holder of the note for the amount unpaid thereon, "with costs and ——— dollars attorney's fees." There was a partial payment of the judgment as the result of an execution issued thereon, and thereafter, and in February, 1911, Brewer assigned the judgment to plaintiff, who brought an action upon it in the district court of Wilkin county in February, 1920.

The defendant answered, setting up the following defenses: (1) That the judgment was void for the reason that he was not served with process and did not appear in the circuit court of La Salle county. (2) that the note was given in part payment for a stock of goods purchased from Edmunds by the defendant, and that in making the sale Edmunds had practiced a fraud upon him in certain respects set out in the answer. (3) that the judgment as entered included an attorney's fee of \$400, which was not authorized by the terms of the warrant of attorney. (4) That the statutes of Illinois provide that no action can be maintained on any judgment entered by confession or by virtue of a warrant of attorney or power contained in any promissory note after the expiration of seven years from the rendition of the judgment, unless the judgment has been renewed by a writ of *scire facias* or an original suit instituted thereon within said period of seven years; that said judgment had not been so renewed, and was of no force or effect in the state of Illinois after November 18, 1917, and that any right of action thereon became barred by the statute of limitations of said state on said date.

Plaintiff demurred to each of these defenses separately and collectively, on the ground that they did not state facts sufficient to constitute a defense and failed, when taken separately or as a whole, to state any equities in defendant's favor. The demurrer was sustained, and defendant appealed.

[1] 1. The first defense was not good, for the reason that the warrant of attorney expressly authorized the entry of judgment without process.

[2] 2. The second defense was not good for the reason that defendant alleged that after the note came into Brewer's hands, defendant informed him of the fraud Edmunds had perpetrated upon him, whereupon Brewer agreed that, if defendant would assist him in discovering assets which Edmunds was believed to be concealing from his creditors, he (Brewer) would accept a certain sum in full payment of the note. It was not alleged that defendant had paid the amount agreed upon or assisted Brewer in uncovering Edmunds's hidden assets. This brings the case within the rule approved by this court that, after discovering the deceit:

"The party deceived * * * must stand towards the other party at arm's length, must comply with the terms of the contract on his part, must not ask favors of the other party or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it. If he does so he waives the fraud." *Humphrey v. Sievers*, 137 Minn. 373, 163 N. W. 737; *Tysdal v. Bergh*, 142 Minn. 288, 172 N. W. 180.

[3] 3. The third defense was not good. It is elementary that the judgment of a court of record of a sister state is entitled to full faith and credit in this state and is not open to collateral attack. The only defenses that can be made to an action upon it in the courts of this state are want of jurisdiction, fraud, or payment. *Cone v. Hooper*, 18 Minn. 531, (Gil. 476); *Alden v. W. J. Dyer & Bros.*, 92 Minn. 134, 99 N. W. 784; *Tillinghast v. U. S. Sav. & Loan Co.*, 99 Minn. 62, 108 N. W. 472; *Gundlach v. Park*, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302. The presumption is that the amount for which the judgment was entered was correct. *Hersey v. Walsh*, 38 Minn. 521, 38 N. W. 613, 8 Am. St. Rep. 689. It will be presumed that the court fixed the amount of attorney's fees, since it is not alleged and will not be presumed that the judgment was not entered by the court in term, instead of in vacation. *Gundlach v. Park*, *supra*.

[4] 4. The fourth defense is good, if sufficiently pleaded. If no action on the judgment could be maintained in Illinois after November 18, 1917, none could be maintained in this state after that date. G. S. 1913, § 7709; *Luce v. Clark*, 49 Minn. 356, 51 N. W. 1162.

[5] There may be a statute in Illinois similar to G. S. 1913, § 7708, whereby the running of the statute of limitations is suspend-

ed during the absence of the debtor from the state; but, if so, it is nowhere set out in the pleadings and in any event would not apply to an action on a judgment. *Gaines v. Grunewald*, 102 Minn. 245, 113 N. W. 450. Defendant having pleaded the statute of limitations as a defense, if the facts bring the case within any exceptions to the statute in force in Illinois, they must be set up by reply. *Trebby v. Simmons*, 38 Minn. 508, 38 N. W. 693; *Bd. Co. Comm. v. Miller*, 101 Minn. 294, 112 N. W. 276; *Ferrier v. McCabe*, 129 Minn. 342, 152 N. W. 734; *Riley v. Mankato Loan & Trust Co.*, 133 Minn. 289, 158 N. W. 391. If absence from the state is an exception, it must be so pleaded by the plaintiff. *West v. Hennessey*, 58 Minn. 133, 59 N. W. 984.

[6] It is urged that in pleading the Illinois statute it should have been set out in full, or at least so much of it as is material to the defense. A statement to that effect is found in *Becht v. Harris*, 4 Minn. 504 (Gil. 394). In *Hoyt v. McNeil*, 13 Minn. 390 (Gil. 362), it was said that the "terms" of a foreign statute must be set forth, so that the court may determine whether the effect claimed for it is legitimate. This was repeated in *Myers v. Chicago, etc., Ry. Co.*, 69 Minn. 476, 72 N. W. 694, 65 Am. St. Rep. 579, and is in accordance with the general rule that, in pleading the statute of a foreign state, it is not necessary to set it forth in *hæc verba*, and that it is sufficient to state the substance of those portions of the statute that are relied on. 36 Cyc. 1241. *Becht v. Harris*, *supra*, in so far as it intimates that the rule is otherwise, is disapproved. It is also urged that in *J. L. Bieder Co. v. Rose*, 138 Minn. 121, 164 N. W. 586, this court had before it the Illinois statute of limitations, and expressly held an action on a judgment might be brought at any time within 20 years of the date of its rendition. In that case the judgment was not one by confession, and if there is a statute such as defendant pleads here, it would have not been applicable.

[7] Finally, it is urged that in fact there is no such statute in effect. If this be true, plaintiffs may move to strike this defense from the answer as sham. G. S. 1913, § 7762.

In so far as the demurrer goes to the defense of the statute of limitations, it should have been overruled, and sustained only as to the other defenses pleaded. The order sustaining it as to all the defenses pleaded must therefore be and it is hereby reversed.

STATE v. ALLYN. (No. 22577.)

(Supreme Court of Minnesota. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Criminal law $\S$ 304(17)—Master and servant $\S$ 68—Minimum Wage Commission's order ineffective unless mailed to employer; Wage Commission's order not subject to judicial notice.

Chapter 547, Laws 1913 (Gen. St. 1913, §§ 3904-3923), providing for the appointment of a Minimum Wage Commission and investigation of wages of women and minors and the making of an order fixing a minimum wage by it, considered, and *held*, that a copy of such order must be mailed to each employer affected, so far as practicable, before the order becomes effective. Courts will not take judicial notice of such orders.

2. Master and servant $\S$ 84—Minimum Wage Commission order held inadmissible in evidence.

To render the orders admissible in evidence, compliance with the provisions of section 6 must be shown.

3. Master and servant $\S$ 84—Wage earner's ability judicial question depending on proof.

Laws 1913, c. 547 (Gen. St. 1913, §§ 3904-3923), delegates no power to the Minimum Wage Commission authorizing it to determine and define who shall be deemed persons of ordinary ability, but leaves that question open for the courts. It was error to exclude testimony as to whether the complainant, a minor, was a person of ordinary ability.

Appeal from Municipal Court of Mankato; Hiram S. Goff, Judge.

George W. Allyn was convicted in the municipal court of the city of Mankato of employing a minor of ordinary ability as a clerk in a mercantile business at a weekly wage of less than \$10.25 in a village of less than 5,000, contrary to the Minimum Wage Commission order. Verdict against the defendant, and from an order denying his motion for new trial, he appeals. Reversed, and new trial granted.

Thomas J. McDermott, of St. Paul, and O. J. Laurisch, of Mankato, for appellant.

Clifford L. Hilton, Atty. Gen., J. E. Markham, Asst. Atty. Gen., and Charles E. Phillips, Co. Atty., of Mankato, for the State.

QUINN, J. This action was instituted under chapter 547, General Laws of Minnesota for 1913 (Gen. St. 1913, §§ 3904-3923) in the municipal court of the city of Mankato. The complaint charged defendant with having employed a minor of ordinary ability as a clerk in the mercantile business at a weekly wage of less than \$10.25, at Madison Lake, a village of less than 5,000 inhabitants, contrary to an order of the Minimum Wage

Commission, designated as order No. 10, and against the form of the statute in such case made and provided. The cause was tried to a jury, a verdict returned against the defendant, and from an order denying his motion for a new trial, this appeal was taken.

[1, 2] Chapter 547 created and established a commission known as the Minimum Wage Commission, consisting of three persons of whom the commissioner of labor shall be chairman, the Governor to appoint two others, one of whom shall be an employer of women, and the third a woman who shall act as secretary. This statute provides for an investigation by the commission of wages paid to women and minors and the making of an order fixing a minimum wage. Section 6 (section 3909) provides that—

"The commission shall then issue an order, to be effective thirty days thereafter, making the wages thus determined the minimum wages in said occupation throughout the state. * * * A copy of said order shall be mailed, so far as practicable, to each employer affected; and each such employer shall be required to post such a reasonable number of copies as the commission may determine in each building or other work place in which affected workers are employed. The original order shall be filed with the commissioner of labor."

On July 5, 1919, the commission issued order No. 10, fixing the minimum wage for women and minors of ordinary ability in any occupation, working not to exceed 48 hours per week, at or in any place other than a city, village, or borough having 5,000 or more inhabitants in the sum of \$10.25 per week, to take effect and be in force on and after August 5, 1919. On the same day the commission adopted order No. 11, which defines learners and apprentices, fixes a minimum wage for the first three months, a higher wage for the second three months, and a still higher wage for the third three months, and then attempts to provide that thereafter such learner or apprentice shall be deemed a worker of ordinary ability.

Upon the trial copies of the orders referred to were placed in evidence by the prosecution, but no proof as to any investigation or other acts of the commission was offered. There was no showing that such orders were ever published or copies thereof mailed to parties affected thereby. Defendant offered proof that he had never received copies of either of such orders, or heard of the same either by mail or otherwise. These offers were objected to and excluded. Without notice of such orders an employer could hardly know of the wages thus established, much less post copies thereof in his place of business. While the law presumes that public officials properly perform their official acts in connection with their duties, yet such pre-

sumption may be rebutted by competent proof. The presumption of due receipt of a letter may be rebutted by evidence that it was not in fact received. 16 Cyc. 1070. The proof should have been received.

The purpose of the statute seems clear. No other mode of publication is provided for. The order, when considered in connection with the statute, amounts in effect to a penal law. To enforce such an order without notice would be to subject every employer to prosecution, though innocent of any intent to evade the law. Such was not the intent of the Legislature. We hold that under this statute the orders referred to do not become effective until 30 days after issue by the commission and the mailing of copies thereof, so far as practicable, to the employers affected. To render the orders admissible in evidence, compliance with the provisions of section 6 must be affirmatively shown. Courts will not take judicial notice of such orders. It then becomes the duty of such employer to post copies thereof as determined by the commission. The statute is mandatory as to the mailing and posting of copies of such orders.

[3] The statute is silent as to the power of the commission to determine and define who shall be deemed workers of ordinary ability. It leaves those matters for the courts, especially in a criminal proceeding like this. It was therefore error on the part of the trial court to exclude the testimony bearing upon that phase of the case. For these reasons a new trial should be granted.

Reversed.

IN RE UNIVERSITY AVE.

PITTSBURGH COAL CO. v. CITY OF ST. PAUL.

(No. 22435.)

(Supreme Court of Minnesota. Oct. 21, 1921.)

(Syllabus by the Court.)

1. Municipal corporations ~~§~~408(2)—Charter amendment limiting paving assessment to 12-foot strip held not applicable to assessment levied prior to amendment.

On May 27, 1920, the council of St. Paul made a final order for paving a street in a proceeding instituted and carried on pursuant to the provisions of the city charter. Prior to November 27, 1920, it was completed, and on that day the commissioner of finance reported a preliminary assessment, which was on the same day approved by the council; and on December 29, 1920, after a notice of a public hearing, the assessment was ratified by the council and was certified to the district court for confirmation, and was confirmed on March 24, 1921. At the November 2, 1920, general

election, an amendment to the charter was adopted, effective 30 days thereafter, limiting assessments against abutting property for paving to the cost of a strip of pavement 12 feet wide adjacent to the property, the rest to be paid by the city. *Held*, that the assessment was properly levied in accordance with the provisions of the charter prior to the amendment becoming effective.

2. Municipal corporations ~~§~~413(2) — Provision that council may pay for paving street intersections out of general fund held not mandatory.

The provision of section 235 of the Charter to the effect that the council may pay the cost of paving street intersections out of the general funds of the city is permissive, not mandatory.

Appeal from District Court, Ramsey County; F. N. Dickson, Judge.

In the matter of the assessment for paving University Avenue, in the City of St. Paul. From the judgment of the district court affirming an assessment by the City of St. Paul against the property for such improvement, the Pittsburgh Coal Company appeals. Judgment affirmed.

O. H. O'Neill, of St. Paul (Milton E. Firestone and Samuel Lipschultz, both of St. Paul, of counsel), for appellant.

Arthur E. Nelson and C. F. McNally, both of St. Paul, for respondent.

DIBELL, J. The Pittsburgh Coal Company appeals from the judgment of the Ramsey district court confirming an assessment against its property for the improvement of University avenue in St. Paul.

[1] The assessment was made under the home rule charter of the city (sections 233-257). On May 13, 1919, the city council made a final order for the improvement. On November 27, 1920, the commissioner of finance reported a preliminary assessment to the common council. On the same day the council approved it. On December 29, 1920, at the time fixed for a public hearing, the council ratified it and certified it to the district court for confirmation, and it was confirmed on March 24, 1921. These proceedings were had in compliance with the charter as it stood prior to the going into effect of an amendment to section 235 of the charter adopted at the November 2, 1920, general election, and effective 30 days after that date. This amendment added the following proviso:

"Provided further that the amount which may be assessed against abutting property for paving any street, boulevard, parkway or other highway shall not exceed the cost of a strip of such pavement 12 feet wide adjacent to the property thus assessed. The cost of the pavement over and above the amount assessed against all property benefited shall be paid out

of the city revenue or from money raised by bond issue or both."

This proviso was in effect at the time of the formal ratification by the common council on December 27, 1920, and at the time of the confirmation by the district court by the judgment from which this appeal is taken. Before the going into effect of the amendment the work was completed. What was done by the council and by the court in reviewing and confirming the assessment was what would have been done in regular course if the amendment of November 2 had not been adopted. The contention of the coal company is that upon the amendment becoming effective, 30 days after the election, the assessment could not exceed the amount thereby prescribed. We are not of that opinion. Our view is that the improvement, and the assessment for it, had proceeded so far at the time of the going into effect of the amendment that the assessment should be levied in accordance with the charter as it was before the amendment. We do not hold that the date of the passing of the final order is the determining date. That question is not before us. Our holding is that with the improvement completed and the assessment so far in progress as it was when the amendment was adopted it should be made in accordance with the charter as it was before the amendment.

Counsel have filed helpful briefs in connection with their oral arguments. It is unnecessary to discuss the authorities. The question is finally one of construction.

[2] 2. The coal company further claims that under section 235 of the charter the city must pay the cost of paving street intersections. This section provides that nothing contained in it shall prevent the council from paying the cost of street intersections out of the general funds of the city. We do not construe the language as mandatory. It is permissive.

Judgment affirmed.

ALLEMAN v. DIRECTOR GENERAL OF RAILROADS et al. (No. 22382.)

(Supreme Court of Minnesota. Oct. 21, 1921.)

(Syllabus by the Court.)

1. Nuisance §42—Want of notice before suit held not ground for judgment notwithstanding verdict.

That notice to abate the nuisance for which plaintiff recovered damages was not given before suit, does not entitle defendant to judgment notwithstanding the verdict, where want of notice was not pleaded, and where defendant attempted to take no other advantage of the lack of proof of notice than by motion for a

directed verdict. Defendant did not move for a dismissal or a new trial.

2. Appeal and error §856(1)—Judgment notwithstanding verdict should not result to a party on appeal on a ground not presented to trial court.

Judgment notwithstanding the verdict should not result to a party on appeal upon a ground not presented to the trial court, either by the pleadings, or by the motion for directed verdict, or by the motion for judgment.

Appeal from District Court, Mower County; S. D. Catherwood, Judge.

Action by M. J. Alleman against the Director General of Railroads and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Briggs, Weyl & Briggs, of St. Paul, and J. N. Nichol森, of Austin, for appellants.

Sasse & French, of Austin, for respondent.

HOLT, J. The appeal is from a judgment awarding plaintiff damages for the flooding of his farm. The only ground upon which a reversal is asked is that the court erred in denying defendant's motion for judgment notwithstanding the verdict.

The right of way of defendant's railway extends through plaintiff's 140-acre farm. It runs nearly north and south. A public highway intersects the farm east and west, crossing the right of way by a viaduct under the track. The railway track is laid on a high embankment constructed in part from a borrow pit on the westerly side thereof. That part of the farm north of the highway and west of the right of way slopes toward the east, and the natural outlet for the drainage thereof is a ravine on the east side of the embankment. The claim is that some 18 rods north of the viaduct is the proper place for a culvert through the embankment; that the one existing further north is at too high a level, and as it now is the water held up by the embankment does not pass into the northerly culvert or over the viaduct until a large part of the field is flooded.

The complaint charged as the gist of the action that defendant negligently maintains the railway embankment without providing a suitable outlet for the surface waters collected by it, thereby maintaining a continuous nuisance to plaintiff's damage. In addition to the general denial, defendant's answer admitted ownership of the right of way, and alleged that the railroad was constructed thereon more than 25 years ago, and has been maintained as constructed up to the present time, and pleaded the statute of limitations as a bar.

[1] Defendant rests the appeal on two propositions. The first is that, since it became the owner of the right of way after the construction of the railroad by another, it

has not caused the nuisance, and is not subject to suit without a previous notice to abate. It is true that a mere passive continuer of a nuisance created by another is entitled to notice before suit. *Thornton v. Smith*, 11 Minn. 1 (Gil. 1); *Bartlett v. Siman*, 24 Minn. 448; *Sloggy v. Dillworth*, 38 Minn. 179, 38 N. W. 451, 8 Am. St. Rep. 656. But no such defense was pleaded. And what is more, it is technical, and perhaps goes more to an inadvertent defect in the proof, or to an omission to take a preliminary step prior to suit, than to the merit of plaintiff's cause of action, and defendant should not have judgment. It has refrained from asking a new trial.

[2] The second ground upon which defendant asks a reversal is: The evidence discloses that, after the railroad had been constructed in the shape it now is in, the then owner of the farm conveyed the right of way to defendant's grantor; hence, under the doctrine of *Radke v. Minneapolis & St. Louis Ry. Co.*, 41 Minn. 350, 43 N. W. 6, no claim can be made on account of any nuisance due to the manner in which the construction of the railroad interferes with the flow of surface waters. This defense was not pleaded, and the record does not indicate that such an issue was raised or litigated by consent or otherwise. Indeed quite the contrary, for neither the motion for a directed verdict nor the one for judgment non obstante was based upon the ground that plaintiff was concluded or barred by the conveyance of the right of way by the former owner of the farm to defendant's grantor, nor was any issue involving that proposition submitted to the jury. We are of opinion that defendant should not now be permitted to urge that ground in this court for judgment in its favor on the merits. The *Radke* Case was where a new trial was asked. In *McCarty v. St. Paul, M. & Man. Ry. Co.*, 31 Minn. 278, 17 N. W. 616, the defense now urged was pleaded. The record in this case leaves the impression that, had the issue now sought to be raised in this court been made and litigated, there would have been a question for the jury under the rule intimated in the *Radke* Case as to the knowledge the grantor of the right of way had of conditions when the deed was delivered, and also whether or not the passages left for the water at that time have been since maintained in proper condition.

Judgment affirmed.

H. W. WHITE INV. CO. v. KELSO.
(No. 22513.)

(Supreme Court of Minnesota. Oct. 21, 1921.)

(Syllabus by the Court.)

Brokers §57(1)—Broker agreeing to sell for cash, procuring a purchaser for part cash and assumption of mortgage, does not earn commission.

A broker authorized by his principal to sell for cash at a specified price does not earn his commission by procuring a purchaser at the price asked who proposes to assume a mortgage upon the property and pay the difference in cash.

Appeal from Municipal Court of Minneapolis; Frank E. Reed, Judge.

Action by the H. W. White Investment Company against Charles D. Kelso. Directed verdict for plaintiff, and from an order denying a new trial, the defendant appeals. Order reversed.

Arthur Le Sueur, of St. Paul, for appellant.

Robert M. Crounse, of Minneapolis, for respondent.

DIBELL, J. Action by a real estate broker to recover commissions. The court directed a verdict for the plaintiff. The defendant appeals from the order denying his motion for a new trial.

The defendant listed with the plaintiff, a real estate broker, a piece of property in Minneapolis for sale for cash for \$6,000. The plaintiff procured a purchaser who offered to assume a mortgage of \$2,700, and pay the balance of \$3,300 in cash. The defendant declined the offer. The terms offered by the purchaser were not those upon which the defendant authorized his broker to sell. It may be material to the seller that he have all cash instead of part cash and an assumption of a mortgage. Anyway, the terms of sale required all cash. That a broker, to earn his commission, must procure a purchaser ready to purchase on the terms which he is authorized by the owner to offer is fundamental. *Bergh v. Stanek*, 184 N. W. 371. This the plaintiff did not do.

Order reversed.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

**STATE ex rel. COMMON SCHOOL DIST.
NO. 19 et al. v. MOWER COUNTY et al.
(No. 22412.)**

(Supreme Court of Minnesota. Oct 21, 1921.)

(Syllabus by the Court.)

1. Schools and school districts $\S$ 37(1)—Statute giving district right to initiate annexation proceedings held supplementary to former statute.

Chapter 236, Laws 1919, conferring upon a school district the right to initiate proceedings before the board of county commissioners for the annexation of adjacent land to its district, construed, and held not an independent enactment on the subject-matter thereof, but as supplementary to Gen. St. 1913, $\S$ 2677, and conferring the same right upon the school district as is there extended to the freeholders.

2. Schools and school districts $\S$ 22—Act giving school district right to initiate annexation proceedings held constitutional.

As so construed the act is not unconstitutional.

3. Schools and school districts $\S$ 39—Statute gives right of appeal from order annexing territory, so that certiorari is not available.

Gen. St. 1913, $\S$ 2677, grants the right of appeal from orders made thereunder, and certiorari is not available as a method of review; the right of appeal extends to proceedings initiated by a school district under chapter 236, Laws 1919.

Appeal from District Court, Mower County; S. D. Catherwood, Judge.

Proceeding before the Board of County Commissioners of Mower County on petition of School District No. 77, praying that certain land in an adjoining district be made a part of the petitioning district, which petition was granted. Certiorari by the State on the relation of Common School District No. 19, and property owners residing in affected districts from the district court to review such order. Writ discharged and action of county board affirmed, and the property owners appeal. Order affirmed.

Sasse & French, of Austin, and Parker & Gullickson, of Spring Valley, for appellants.

J. N. Nichol森 and B. E. Hughes, both of Austin, for respondents.

BROWN, C. J. This proceeding for the change and alteration of the boundaries of certain school districts in Mower county was brought before the board of county commissioners on the petition of school district No. 77, praying that certain land in an adjoining district be annexed to and made a part of the petitioning district, as authorized and provided for by G. S. 1913, $\S$ 2677. After due notice and hearing the prayer of the petition was granted, and an order attaching the land to district No. 77 made accordingly. Thereafter, on the application of certain tax-

payers and property owners residing and owning property in the affected districts, a writ of certiorari was issued by the district court in review of the order so made. On return of the writ the matter was duly brought to a hearing, and after consideration thereof the court made an order discharging the writ and in all things affirming the order of the county board. From that order the objecting property owners appealed to this court.

[1] The proceedings before the county board were instituted on the petition of school district No. 77, acting through its officers, under the authority conferred by the provisions of chapter 236, Laws 1919. The question presented by the appeal is whether that statute has any application to the particular relief sought, namely, to annex to district No. 77 certain adjacent land situated in an adjoining district. We answer it in the affirmative.

The statute provides as follows:

"The school board of any school district in the state desiring to have land adjacent to or projecting into such district, set off as and made a part of said district, may petition the board of county commissioners of the county in which such district is located, therein setting forth the name and kind of district involved, a description of the land in question, the name of the owner thereof, and the reasons for the request, which said board upon the receipt of such petition, shall give notice of a hearing thereon as in other cases, and upon proof of the allegations in the petition, may make its order granting the same, and like notice of such change in the boundaries of such district shall be given, as in other cases."

Although the statute on its face does not purport to be an amendment of or addition to the general statutes upon the same subject (G. S. 1913, $\S$ 2677 et seq.), its effect can be nothing other than supplementary thereto and to grant the right of petition to the school district to the same extent, within the limits of its express terms, as that statute grants and extends the right to the freeholders of the districts affected. The 1919 act clearly was not intended by the Legislature as a separate and independent enactment on the subject; it is entirely too incomplete as a workable statute to justify the inference that the intention was that it should stand alone. And, moreover, the act itself requires the same procedure where the proceeding is instituted by a school district as when commenced on the petition of freeholders, or, as expressed therein, "as in other cases." No other like cases are provided for except in section 2677. And as urged by counsel for respondent, the sole effect of the new statute was to authorize school districts to initiate proceedings for the additional coveted land to their authority and

jurisdiction. It is in effect supplementary to or an enlargement of section 2677.

[2] As so construed, the act is not open to the constitutional objections urged against it by appellant. The subject-matter of the statute is of purely legislative character, and no constitutional right of the citizen is thereby infringed. The prior statute has been sustained, and this must be also. *Common School District v. Renville County*, 141 Minn. 300, 170 N. W. 216. It is clearly competent for the Legislature to declare the method and by whom proceedings of the kind may be commenced; and the right of initiation may be granted to one or more interested districts, as well as to individuals residing therein.

This conclusion renders unnecessary a discussion of the numerous points urged in support of the contention that the act of 1919 is unconstitutional and void. The suggestion that the act was intended to cover a special situation, and to apply to a single tract of land, conditions not coming within the terms of the general statute, is not without force. But it should not prevail. The subject-matter of the act is substantially that of the general statute, and nothing materially new is found in the act of 1919. That the land here sought to be attached to district No. 77 comes within both enactments seems clear. *State v. Village of Gilbert*, 107 Minn. 364, 120 N. W. 528; *Hobart v. City of Minneapolis*, 139 Minn. 368, 166 N. W. 411; *State v. Village of Kinney*, 146 Minn. 311, 178 N. W. 815.

[3] This covers the case and all that need be said in disposing of the appeal, except to call attention to the fact that the order made by the county board could have been reviewed by appeal, as given by section 2677. With that remedy present certiorari is not available. The parties, however, treated the act of 1919 as an independent enactment and since no appeal is there given resorted to the remedy by certiorari. In this situation we have disposed of the case on the merits, but call attention to the existence of the right of appeal, as we construe the statute, for future guidance in similar proceedings.

Order affirmed.

FARMERS' CO-OP. EXCH. CO. v. UNITED STATES FIDELITY & GUARANTY CO.
(No. 22315.)

(Supreme Court of Minnesota. Oct. 21, 1921.)

(Syllabus by the Court.)

1. Principal and surety §250—Plaintiff's attorney's letters held admissible to prove notice, though stating amount of defalcation.

In an action on a fidelity bond which required plaintiff to give prompt notice whenever

a defalcation was discovered, letters from plaintiff's attorney to defendant were admissible for the purpose of proving such notice although they contained statements of the amount of the defalcation.

2. Evidence §250—Admission of principal in bond concerning his defalcation, made to plaintiff's officers, held admissible against surety.

The admissions of the principal in the bond concerning his defalcations, made to plaintiff's officers when they discovered and were investigating his misdoings and when he was still in plaintiff's employ, were admissible in evidence against defendant, his surety.

3. Principal and surety §161—Evidence held to sustain verdict against surety.

The evidence is sufficient to sustain the verdict.

Appeal from District Court, Blue Earth County; W. L. Comstock, Judge.

Action by the Farmers' Co-operative Exchange Company against the United States Fidelity & Guaranty Company. Verdict for plaintiff and from an order denying its alternative motion for judgment notwithstanding the verdict, or for new trial, the defendant appeals. Order affirmed.

See, also, 182 N. W. 1008.

Cray & Eaton, of Minneapolis, and C. J. Laurisch, of Mankato, for appellant.

Ivan Bowen and S. B. Wilson, both of Mankato, for respondent.

TAYLOR, C. Plaintiff operated an elevator at Good Thunder, Minn., and was engaged in the business of buying, shipping and selling grain. It employed one Emil O. Rosnow as manager and gave him full charge of the business subject to the instructions given him from time to time by the president and board of directors. It procured a bond, executed by Rosnow as principal and defendant as surety, in which defendant agreed to make good and reimburse to plaintiff any loss sustained through any act of dishonesty on the part of Rosnow amounting to larceny or embezzlement. Plaintiff brought suit on this bond and recovered a verdict. Defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial, and presents 16 assignments of error.

[1] Assignments 1 and 2 challenge the rulings of the court in admitting in evidence three exhibits, consisting of two letters written to defendant by plaintiff's attorney and a statement inclosed in the second letter showing the result of an audit of the books. These exhibits were offered for the purpose of showing that plaintiff had complied with a condition of the bond requiring it to give notice of any claim thereunder promptly after discovering the loss, and were

received for no other purpose. The court, when admitting them, carefully explained to the jury that they were not evidence of any default on the part of Rosnow, but merely of the giving of notice to defendant. They were competent and material for this purpose, and the rulings were correct.

Assignments 3 to 7, inclusive, challenge the rulings permitting plaintiff's president to testify to the market value of grain on the several dates on which Rosnow had shipped out grain that plaintiff claimed he had converted to his own use. These rulings were too obviously correct to require comment.

[2] Assignments 8 to 13, inclusive, challenge the rulings admitting in evidence the admissions of his misdoings made by Rosnow to plaintiff's president and board of directors. The objection urged to this evidence is that the admissions were not made at the time of the transactions to which they related but a considerable time thereafter.

Rosnow's admissions were to the effect that he had been speculating on his own account by buying and selling "futures" in grain on the board of trade; that these speculations had resulted in large losses; that he had conducted them in plaintiff's name without the knowledge of plaintiff's officers; that he had shipped out six carloads of plaintiff's grain and had wrongfully applied it in payment of these losses; and that he had concealed all these facts from plaintiff's officers as long as he was able to do so. These acts were committed in the course of his employment, and the losses of plaintiff resulting therefrom were losses for which defendant was liable under its bond. The admissions were made to plaintiff's president and board of directors while they were investigating what had become of this grain and its proceeds, and while Rosnow was still in plaintiff's employ as manager of its business. Proof of such admissions made by the principal under such circumstances is admissible as evidence against his surety. *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; *Capital Fire Ins. Co. v. Watson*, 76 Minn. 387, 79 N. W. 60, 77 Am. St. Rep. 657; *Hall v. U. S. Fidelity & Guaranty Co.*, 77 Minn. 24, 79 N. W. 590; 21 Ruling Case Law, 1092, § 131; 1 Ency. of Evidence, 586; 2 Wigmore, Ev. 1277. It is true that the period covered by plaintiff's bond expired about a month before Rosnow made these admissions, but they related to transactions which took place during the period covered by the bond, and were made to the proper officers of plaintiff when they first discovered his default and in the performance of a duty which he owed to plaintiff. We hold that they were admissible against defendant, his surety.

[3] Assignments 14 and 16 assert that the court erred in refusing to direct a verdict for

defendant, and in refusing to grant a new trial. We will treat these assignments as raising the question whether the verdict is sustained by the evidence. They are clearly insufficient to raise any other question. 1 Dunnell, Minn. Dig. §§ 361, 363.

Defendant contends that the transactions which entailed the loss were hedging transactions made by Rosnow on behalf of plaintiff in the ordinary course of business. The evidence was ample to warrant the jury in finding that they were purely speculative transactions, made by Rosnow wholly on his own account and for his own benefit, and without the knowledge of any of plaintiff's officers.

Defendant also contends that plaintiff failed to prove any loss resulting from Rosnow's wrongful doings, but we find ample evidence to justify the jury in finding that he disposed of six carloads of plaintiff's grain and wrongfully applied the proceeds thereof toward the payment of his losses, and that plaintiff never received any part of such proceeds. Defendant also contends that plaintiff failed to have its books audited as required by the bond, but the jury found the fact against it and the evidence is sufficient to sustain the finding. Defendant also contends that plaintiff was chargeable with notice of Rosnow's transactions from the entries in its books and records and by its conduct ratified them. Whatever may be the rule as to charging a corporation with notice of such transactions when they are entered in full on its books and the books are open for examination by its officers, it has no application here for the evidence was sufficient to justify the jury in finding that the only record of these transactions consisted in the reports transmitted by the company with which Rosnow was dealing and that he withheld these reports from plaintiff's officers. It is true that these reports, or at least a part of them, were found in the files by the auditor employed by plaintiff to audit the books, and that he included them in making his audits, but this was not sufficient to charge plaintiff as a matter of law with knowledge of facts of which Rosnow intentionally kept its officers in ignorance. Apparently it was the shortage either in grain or funds shown by the last audit that led to the investigation which disclosed the true state of affairs. And we find nothing in the record which required the jury to find that plaintiff had either consented to, ratified or approved these transactions. The evidence taken as a whole fully justified the verdict.

The fifteenth assignment calls in question certain portions of the charge to the jury. The charge was full, clear and eminently fair; and we find nothing therein of which defendant has any cause to complain.

Order affirmed.

LEVANDOWSKI v. LEVANDOWSKI.
(No. 4938.)

(Supreme Court of South Dakota. Oct. 19, 1921.)

1. Specific performance §120 — Parol evidence admissible to establish contract to convey real estate.

In an action to enforce specific performance of an oral contract to convey real estate, where plaintiff alleged and introduced evidence of full performance and that he had taken possession of and improved the land, oral evidence was admissible to establish the alleged contract.

2. Appeal and error §931(1, 6) — Presumed that evidence supports findings and that court did not consider immaterial evidence.

Where trial was before the court, it must be presumed on appeal until the contrary is shown that there was ample material evidence to sustain the findings of the trial court, and that immaterial evidence received was not considered and did not prejudice losing party.

3. Appeal and error §294(1) — Complaining party must specify in motion particulars wherein the evidence is insufficient to support findings.

To raise question of sufficiency of evidence, a statute and rule of the Supreme Court require specification of the particulars wherein the evidence is insufficient to support the findings, and such specifications cannot avail an appellant unless presented to the trial court on a motion for new trial.

4. Appeal and error §696(1) — To review evidence record must show that it contains all material evidence.

Specifications as to insufficiency of evidence to support the findings can avail an appellant nothing unless the printed record on appeal sets forth the fact that such record contains all of the evidence material to the questions raised upon the appeal.

5. Appeal and error §1078(1) — Assignment not discussed abandoned.

Appellant must be held to have abandoned an assignment of error where he failed to discuss it in his brief.

Appeal from Circuit Court, Day County; Frank Anderson, Judge.

Action by Michael Levandowski against Jacob Levandowski. Judgment for plaintiff, and defendant appeals. Affirmed.

Waddel & Dougherty and Lewis W. Bicknell, all of Webster, for appellant.

Woodworth & Coomes, of Webster, and Campbell & Walton, of Aberdeen, for respondent.

WHITING, J. This is an action brought to enforce the specific performance of an oral contract to convey real estate, plaintiff alleging the full performance of such contract

upon his part, and that, under said contract, he had taken possession of and improved the land. The cause was tried before the trial court without a jury. Such court made findings of fact and conclusions of law favorable to the plaintiff; and from the judgment entered thereon defendant has appealed.

Appellant sets forth some 20-odd assignments of error; but, for the purpose of the argument, he has grouped them into three groups.

[1] He assigns error in the receipt of oral evidence to establish the alleged contract. That such evidence was competent, especially where the party offering same has pleaded full performance of the contract upon his part, is fully established by the decisions of this court. *Jones v. Pettigrew*, 25 S. D. 432, 127 N. W. 538; *Gilfillan v. Schaller*, 32 S. D. 638, 144 N. W. 133. In the *Gilfillan* Case this court said:

"It is clear that, in order for respondent to show not only an oral agreement, but also such partial performance thereof as, under section 1311, C. C. [section 856, R. C. 1919], would entitle him to the specific performance thereof, it was competent for respondent to prove such agreement and everything that was done upon the strength thereof, and after such evidence was received it could not properly be stricken out unless, under all the evidence received, it did not appear that there was a sufficient 'part performance' to validate the otherwise invalid agreement."

In this case, according to the findings of the trial court, there must have been evidence proving, not only partial performance, but full performance by respondent.

[2] Appellant contends that certain objections interposed to the receipt of evidence should have been sustained because the evidence sought and received was immaterial for any purpose. We find it unnecessary to review the several questions and answers. As before noted, the trial was before the court; and, if it is a fact that immaterial evidence was received, this court must presume until the contrary is shown, that there was ample material evidence to sustain the findings of the trial court; if so, certainly the receipt of immaterial evidence was without prejudice.

[3, 4] The appellant contends that there was no proof of an oral contract sufficient to sustain the findings and judgment of the court. Certainly counsel must be familiar with the statute and rule of this court, both of which require specifications of error, specifying the particulars wherein the evidence is insufficient to support the findings, in order for any question of insufficiency of evidence to be raised either before the trial court or before this court; and such specifications can avail an appellant nothing unless they were presented to the trial court

upon a motion for new trial. Furthermore, even if there had been a motion for new trial based upon specifications of the insufficiency of the evidence to support the findings, an assignment specifying such insufficiency of the evidence can avail an appellant nothing unless the printed record on appeal sets forth the fact that such record contains all of the evidence material to the questions raised upon the appeal. The propositions above stated have been announced so frequently by this court as to require no reference to the numerous decisions announcing same. Under the record before us, this court must assume that the evidence was ample in every respect to support the findings. Appellant has nowhere in his brief attempted to point out where the findings are insufficient to support the judgment; and they certainly are sufficient.

[6] Appellant objected to the receipt of any evidence on the part of respondent, basing such objection on the ground that the complaint failed to state facts sufficient to constitute a cause of action. He has assigned error in the overruling of such objection. The complaint is clearly sufficient, especially when attacked in this manner rather than by demurrer. Furthermore, appellant must be held to have abandoned this assignment, because of failure to discuss same in his brief.

The judgment appealed from is affirmed.

SMITH and MCCOY, JJ., not sitting.

ONTJES v. THOMAS. (No. 4970.)

(Supreme Court of South Dakota. Oct. 19, 1921.)

1. Appeal and error ¶91(6)—Order refusing application to amend complaint after judgment not appealable.

An order, made after judgment for defendant, refusing an application to amend the complaint, is not an appealable order under Rev. Code 1919, § 3168; the order not affecting a substantial right.

2. Appeal and error ¶422—Reference in notice of appeal to nonappealable order mere surplusage.

A reference to an order denying plaintiff's motion to serve and file a proposed amendment to the complaint, giving a date subsequent to entry of judgment in favor of defendant, in a notice of appeal from a judgment, order refusing to vacate said judgment, and order overruling motion for a new trial, should be treated as mere surplusage and could not affect the validity of the appeal; such an order not being appealable under Rev. Code 1919, § 3168.

3. Appeal and error ¶91(8)—Order refusing to vacate judgment appealable.

An order refusing to vacate a judgment is appealable under Rev. Code 1919, § 3168, subd.

2, relating to appeals from orders affecting substantial rights.

4. Appeal and error ¶873(2)—Order refusing to vacate judgment not reviewed on appeal from judgment.

An appeal from a judgment cannot bring up for review an order refusing to vacate the judgment.

5. Appeal and error ¶873(3)—Order denying new trial may be reviewed on appeal from judgment.

The only order made after judgment that can be reviewed with such judgment, under one notice of appeal, is an order denying a new trial.

6. Appeal and error ¶22—No jurisdiction by estoppel to review order having no existence.

Supreme Court acquired no jurisdiction to review an order refusing to vacate a judgment from a notice of appeal, reciting that the appeal was from a judgment, from an order refusing to vacate said judgment, and from order overruling motion for a new trial, where the record disclosed that the trial court never made any order refusing to vacate the judgment, and it could not be contended on motion to dismiss the appeal, as being double, that appellant was estopped to question the correctness of the statements in his notice of appeal, since jurisdiction cannot be based upon estoppel.

Appeal from Circuit Court, Aurora County; Frank B. Smith, Judge.

Action by William Ontjes against G. J. Thomas. From a judgment for defendant, order refusing to vacate said judgment, order denying motion to file amended complaint, and order overruling his motion for a new trial, plaintiff appeals, and defendant moves to dismiss. Motion denied.

Porter & Bartlett, of Sioux Falls, for appellant.

Jones, Muller & Conway, of Sioux Falls, and Spangler & Wire, of Mitchell, for respondent.

WHITING, J. The notice of appeal herein recites that such appeal is from the judgment (giving the date of entry thereof), from the order refusing to vacate said judgment, from the order denying plaintiff's motion to serve and file his proposed amended complaint (giving the date of such order, which is subsequent to the entry of judgment), and from the order overruling the motion for new trial. Respondent moves to dismiss this appeal upon the ground that it is an attempt to take a triple appeal—respondent contending that an appeal from a judgment, from an order refusing to vacate a judgment, and from an order, made after judgment, denying a motion to serve and file an amended complaint, are three separate appeals and cannot be combined. Respondent concedes that an appeal from an order denying a new trial could

be combined with an appeal from a judgment.

[1,2] Appellant contends that an order made after judgment for defendant, which order refuses an application to amend the complaint, is not an appealable order, and therefore reference to such order in the notice of appeal is but surplusage and cannot affect the validity of the appeal. In such contention, appellant is correct, at least where the notice of appeal discloses that the order refusing the amendment was made after judgment, and that such judgment was in force when the order refusing the amendment was made. The only subdivision of section 3168, R. C. 1919—the statute declaring what orders are reviewable on appeal—under which respondent could claim such order to be subject to review on appeal—is subdivision 2, which specifies as so reviewable:

"A final order affecting a substantial right, made * * * upon a summary application in an action after judgment."

The order sought was in no sense an order affecting a substantial right—to allow a party against whom a judgment has been entered and remains in force, to amend his pleading would be to grant an empty privilege.

[3-5] But an order refusing to vacate a judgment is such an order as is contemplated by the above subdivision to said section 3168. *White v. White*, 167 Wis. 615, 168 N. W. 704. That an appeal from a judgment cannot bring up for review any order made after such judgment is clear. This court has held, and we must consider it the settled law of this state, that the only order made after judgment that can be reviewed with such judgment under one notice of appeal, is an order denying a new trial. *Gordon v. Kelley*, 20 S. D. 70, 104 N. W. 605. In *Gordon v. Kelley*, as in this case, the appellant attempted, by one notice of appeal, to appeal from a judgment and from an order refusing to vacate such judgment. A like holding was made by this court in *National Surety Co. v. Cranmer*, 27 S. D. 515, 131 N. W. 864.

[6] But the record herein discloses that the trial court never made any order refusing to vacate the judgment; and appellant contends that, because of such fact, there was no order to appeal from; that the erroneous reference, in the notice of appeal, to an order which had no existence was of no effect whatsoever; and that, therefore, there was no double appeal. Respondent contends that appellant cannot be heard to question the correctness of the statements in his notice of appeal, and that, therefore, for the purposes of this motion, it must be assumed that the trial court did make an order refusing to vacate the judgment. Let us suppose that the notice of appeal set forth

only that the appeal was from an order refusing to vacate a judgment, and that, as a matter of fact, no such order had been made. Would such a notice of appeal confer jurisdiction on this court, other than jurisdiction to dismiss the purported appeal? Clearly not. A notice of appeal cannot confer upon this court jurisdiction to review something having no existence. As an instrument creating a power of review, such a notice would be a nullity. This court could not acquire jurisdiction to review something having no existence, merely because a party erroneously asserted that it did exist; jurisdiction of that kind cannot be based upon estoppel or upon anything in the nature of estoppel. It follows that the reference, in the notice before us, to the alleged order vacating the judgment was, in the absence of such an order, of no effect whatever—standing alone it could confer no jurisdiction, it could effectuate no appeal, and, therefore, could not, in this notice, be the means of effectuating a double appeal.

The motion to dismiss is denied.

SMITH and McCOY, JJ., not sitting.

STATE v. GOODSTAR. (No. 4843.)

(Supreme Court of South Dakota. Oct. 19, 1921.)

1. Criminal law §429(1)—Memorandum of Indian agent held not admissible as public record to show age.

Memorandum made by Indian superintendent and special disbursing agent, relating to an annuity of an Indian girl, made under the authority of U. S. Comp. St. § 4063, was not a public record or document, which could be introduced in evidence to show the age of such Indian, notwithstanding an order of the President, under section 723, that agents should note on the pay roll date of birth of each child since previous payment.

2. Criminal law §921—No error in granting new trial in rape case.

In prosecution for statutory rape, where court erroneously admitted in evidence an annuity pay roll to prove the age of the Indian prosecutrix, and it was not shown that the parents or some other person who could have testified from personal recollection, could not have been called to testify, court did not err in granting a new trial.

Appeal from Circuit Court, Roberts County; Frank Anderson, Judge.

Jonah Goodstar was convicted of statutory rape. From an order granting a new trial, the state appeals. Order affirmed.

Byron S. Payne, Atty. Gen., Vernon R. Sickie, Asst. Atty. Gen., and Frank McKenna, of Sisseton, State's Atty., for appellant.

J. O. Andrews, of Sisseton, and Thomas Mani, of Milbank, for respondent.

POLLEY, P. J. This is an appeal from an order granting a new trial. The defendant was convicted of the crime of statutory rape upon one Clarista Ida White. The prosecuting witness is an Indian girl, and for the purpose of showing her age at the time of the alleged offense the state placed upon the stand the "superintendent and special disbursing agent" in charge of the prosecuting witness, and in connection with his testimony offered in evidence the following document or memorandum:

"Annuity Pay Roll 91. Last number ——. Present number 1789. Name, Clarista Ida White. Dau. Age 1; Sex F.; per capita \$10.00; amount paid \$20.00; marks and signatures, Agnes White; signatures of witness, J. H. Labelle, L. E. Jackson; date of receipt, Feb. 26, 1904. Remarks, born November 9, 1902; O. K. 158476. Erroneously omitted on last roll."

[1] This exhibit was not made by the witness, but presumably by some one in the office of his predecessor, and the witness did not purport to have personal knowledge of the matters contained therein. It was objected to by defendant on the ground that it was incompetent, that no proper foundation had been laid, and that it was hearsay. This objection should have been sustained. It is needless to discuss the rule, with which all are familiar, that public records and documents that are made and kept pursuant to law are admissible in evidence. This is not such a document. Section 4063, Comp. St. U. S., under authority of which the above record was made, reads as follows:

"Sec. 4063. *Rolls of Indians Entitled to Supplies*—Hereafter, for the purpose of properly distributing the supplies appropriated for the Indian service, it is hereby made the duty of each agent in charge of Indians and having supplies to distribute, to make out, at the commencement of each fiscal year, rolls of the Indians entitled to supplies at the agency, with the names of the Indians and of the heads of families or lodges, with the number in each family or lodge, and to give out supplies to the heads of families, and not to the heads of tribes or bands, and not to give out supplies for a greater length of time than one week in advance."

There is nothing in this law that requires the keeping of the annuitant's age, but by section 723, U. S. Comp. Laws:

"The President may prescribe such regulations as he may think best for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."

Pursuant to this latter section the Interior Department adopted and published the following regulation:

"Agents shall be careful to note on the pay rolls in the columns of remarks any matter which is unusual, such as, date of birth of each child since previous payment, and date of death of each annuitant."

While section 4063 does not require the Indian agents to keep a record of the birth and age of annuitants, it is the contention of appellant that the above instruction to the agents issued under authority of section 723 by one of the executive officers of the government is equal in rank and dignity to a treaty or a public proclamation by the President of the United States, and in support of such contention cites U. S. v. Beebe, 2 Dak. 292, 11 N. W. 505. But there is no analogy between that case and this. In that case the question at issue was one of territorial jurisdiction, and it was held that the court would take judicial notice of Indian treaties and executive proclamations, for the purpose of determining, that the place where the crime was committed was within the jurisdiction of the court.

In this case the age of the prosecutrix is one of the essential elements of the crime. There is nothing to show who made the entry stating the date of her birth, nor to show where or from whom the information was obtained. The only information sought by the statute is the names of all parties entitled to annuities. The only purpose of the execution of the order directing reference to the birth or death of annuitants is, apparently, to explain why a new name appears on the annuity pay roll or an old one is dropped. This is mere explanatory matter. Records cannot be used as evidence of facts therein stated which are merely explanatory of the ultimate facts to be covered by the record. No reason is shown why the party who made the entry was not called to testify; nor was it shown that the mother or father of prosecutrix, or some other person, who could have testified from personal recollection, could not have been called to testify.

[2] In *Hegler v. Faulkner*, 153 U. S. 100, 14 Sup. Ct. 779, 38 L. Ed. 658, a case on all fours with this, except that it was a civil case, it was held that an annuity pay roll, kept at an Indian agency, purporting to state an Indian's age, was not admissible for the purpose of proving such Indian's age. In the course of the opinion the court say:

"But neither the treaty, the act of Congress, nor the instructions of the department contemplated any special inquiry into the ages of the Indians. It is true that, in the letter of instructions, the agent was directed to record as well the age as the sex and tribal relations of the claimants. But this was merely to enable the agent, when he came to allot the lands, to identify the persons entitled to participate.

When the allotment was completed, and was followed, first by a certificate, and finally by a patent, the purposes of the inquiry were fulfilled, and the list used to aid the government functionaries in the task of allotting the lands cannot be regarded as a record to be resorted to afterwards, in disputes between other parties, to prove the age of the Indians. No provision was made, in either the act of Congress or the rules and regulations of the Indian Department, to preserve the list as a muniment of title, much less as a public record admissible to prove merely incidental recital based on hearsay. * * * It must be remembered that official registers are not in general evidence of any facts not required to be recorded in them, and which did not occur in the presence of the registering officer."

This rule is decisive of the question involved in this case. The court erred in admitting the annuity roll in evidence, and for that error alone a new trial was properly granted.

The order appealed from is affirmed.

SMITH and McCOY, JJ., not sitting.

PETRANEK v. BOHEMIAN FARMERS' MUT. INS. CO. (No. 4925.)*

(Supreme Court of South Dakota. Oct. 19, 1921.)

Insurance §668(9)—Whether giving of mortgage on realty increases hazard, question for jury.

Giving a mortgage upon real property, without the knowledge or consent of a fire insurer, does not, as a matter of law, avoid an insurance policy in standard form prescribed by Rev. Code 1919, § 9199.

Appeal from Circuit Court, Yankton County; R. B. Tripp, Judge.

Action by Peter Petranek against the Bohemian Farmers' Mutual Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Lars A. Bruce and H. A. Doyle, both of Yankton, for appellant.

French, Orvis & French, of Yankton, for respondent.

GATES, J. The sole question presented by this appeal is whether the giving of a mortgage upon real property, without the knowledge or consent of an insurer against loss by fire, avoided the insurance policy which was in the standard form prescribed by section 9199, Rev. Code 1919. More specifically, the question is whether the giving of the mortgage amounted to an increase of hazard within the meaning of that portion of said section which provides:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if * * * the hazard be increased by any means within the control or knowledge of the insured."

From a judgment favorable to the defendant insurer, the plaintiff, the insured, appeals.

In *Lawver v. Globe Mut. Ins. Co.*, 25 S. D. 549, 127 N. W. 615, this court construed the then standard form of fire insurance policy, viz., section 2, c. 126, Laws 1905, which provided:

"This policy shall be void * * * if without such assent the situation or conditions affecting the insured property shall be altered so as to materially increase the hazard, if such increase of hazard be occasioned by the act or agency of the insured."

It was there held that the giving of a mortgage upon the property increased the hazard as a matter of law.

Perhaps the meaning of the above quotations is not materially different if those provisions were the only ones which throw light upon the legislative intent in the adoption of the standard form of fire insurance policy, but the Legislature of 1909 materially altered the standard form of fire policy as it appeared in the act of 1905, and made it read as it now appears in Rev. Code 1919, § 9199. In that section there are two clauses by which the policy is avoided, which were not in the act of 1905, viz.:

"If the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

"If with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed."

Considering all of the clauses of the present standard form of policy together and applying the rule, "*Expressio unius est exclusio alterius*," we think it clear that the Legislature intended that the giving of a mortgage upon real property without the permission of the insurer would not necessarily avoid the policy, while the giving of a chattel mortgage upon personal property would do so, and that in the case of real property it is only the beginning of foreclosure proceedings, within the knowledge of the insured, that would necessarily avoid the policy.

For these reasons we conclude that the decision in *Lawver v. Globe Mut. Ins. Co.*, supra, is not applicable to the present form of standard fire insurance policy.

Under the present form of standard policy, we are of the opinion that the question whether the giving of a mortgage on real property increases the hazard is a question of fact for the jury to determine. *Critenden v. Springfield R. & M. Ins. Co.*, 85 Iowa,

652, 52 N. W. 548, 89 Am. St. Rep. 321; Collins v. Merch. & Bankers' Mut. Ins. Co., 95 Iowa, 540, 64 N. W. 602, 58 Am. St. Rep. 438; Tiefenthal v. Citizens' Mut. Fire Ins. Co., 53 Mich. 306, 19 N. W. 9; Clark v. Union, etc., Ins. Co., 40 N. H. 333, 77 Am. Dec. 721.

A mortgage small in amount relative to the value of the insured property might not increase the hazard, while a mortgage for the approximate value of the insured property might increase it. Other circumstances, either with or without the consideration of the amount of the mortgage, might influence the determination of the question of fact.

For the error of the trial court in determining as a matter of law that the giving of the mortgages increased the hazard, the judgment appealed from must be reversed, and the cause remanded for a new trial.

It will be so ordered.

SMITH and McCOY, JJ., not sitting.

SCANLAN v. HOLM. (No. 4850.)

(Supreme Court of South Dakota. Oct. 19, 1921.)

Mortgages $\Leftrightarrow$ 38(1)—Evidence held sufficient to sustain findings that a warranty deed and sheriff's deed under mortgage foreclosure constituted a mortgage.

Evidence held sufficient to sustain the findings of trial court that warranty deed and a sheriff's deed under mortgage foreclosure constituted mortgage, within Rev. Code 1919, § 1549.

Appeal from Circuit Court, Clark County; W. N. Skinner, Judge.

Action by John Scanlan against Tollef H. Holm. From a judgment for defendant, and an order overruling a motion for new trial, plaintiff appeals. Affirmed.

R. A. Dunham and J. M. Henderson, both of Clark, and Hall & Purdy, of Brookings, for appellant.

McFarland & Kremer, of Watertown, for respondent.

GATES, J. This action to determine adverse claims to three quarter sections of land in Clark county was begun in October, 1919. The defendant admitted the execution and delivery of a warranty deed of the premises by him to plaintiff, and admitted that plaintiff thereafter obtained a sheriff's deed of the premises under mortgage foreclosure, but alleged that the said warranty deed and sheriff's deed in reality constituted a mortgage. The trial court so found, and adjudged defendant to be the owner of the premises, sub-

ject to the lien of plaintiff thereon for moneys advanced, amounting, with interest to April 7, 1920, the date of the judgment, to the sum of \$15,604.73, and the defendant was given 90 days within which to repay plaintiff said sum of money with interest. Plaintiff has appealed from the judgment and order denying new trial.

Appellant concedes that the warranty deed was taken as security, and therefore by reason of the statute hereinafter mentioned it was in reality a mortgage, but contends that the sheriff's deed was not. The testimony offered on behalf of respondent tended to show that respondent entered into an agreement with appellant, a banker, in the spring of 1909 whereby appellant agreed to take up two certain certificates of mortgage foreclosure, and to take up a first mortgage of \$4,000 on the premises and to secure respondent a new loan; in consideration of which respondent conveyed the land as security. The two certificates of mortgage sale were taken up at that time, but the first mortgage was not taken up until November 1, 1915, a time near the end of the period of redemption from foreclosure sale, when appellant secured an assignment of the sheriff's certificate, and on November 10, 1915, he obtained a sheriff's deed. Appellant admitted that he had at all times until the latter part of the year 1918 intended to reconvey the premises to respondent upon repayment to him of his investment with interest, but that, because respondent failed to apply the proceeds of the 1918 crop upon the debts due plaintiff and plaintiff's banks, and applied them upon other debts, he (the appellant) changed his mind and decided to retain the premises. He did not, however, give respondent any notice of such change of mind until the bringing of this action. It is a significant fact that in 1918-19 there was a decided advance in the value of farm lands in that vicinity, as well as throughout the state. It is also significant that respondent had at all times been in possession of the lands and that appellant had not asked for the payment of rent, nor had respondent paid any rent.

Without going further into the multitude of details, we are of the opinion that the evidence was sufficient to sustain the findings of the trial court; that no prejudicial error was committed by the court in the reception of testimony; and that, upon the authority of Rev. Code 1919, § 1549, and of Wilson v. McWilliams, 16 S. D. 96, 91 N. W. 453, and McElroy v. Allfree, 181 Iowa, 112, 108 N. W. 116, 117 Am. St. Rep. 412, the judgment and order appealed from must be affirmed.

It will be so ordered.

SMITH and McCOY, JJ., not sitting.

HEGGE et al. v. HEGGE et ux. (No. 4909.)

(Supreme Court of South Dakota. Oct. 19, 1921.)

1. Deeds ¶19—May be rescinded for failure of grantee to furnish agreed support.

Under Rev. Code 1919, § 904, as to rescission for failure of consideration, where father and mother deeded land to their son in consideration of his supporting them until their death, taking back a note and mortgage to secure the performance of such agreement; they were not restricted, on the son's breach of the agreement to furnish support, to the remedy of foreclosing the mortgage, but could have the conveyance rescinded for failure of consideration.

2. Cancellation of Instruments ¶22—Suit to rescind conveyance not barred by absence of notice of intention to declare forfeiture.

Parents' right to equitable relief by way of rescission of their conveyance to their son because of failure of consideration, in that he failed to support them as agreed, would not be barred by the fact that no notice of intent to declare a forfeiture was given.

3. Cancellation of Instruments ¶37(4)—Offer to restore nonnegotiable note not condition of rescission.

Parents' right to equitable relief by way of rescission of their conveyance to their son, in that he failed to support them as agreed, would not be defeated by failure to allege that plaintiffs still retained a note given by the son as security for his agreement to furnish support, and that plaintiffs would deliver same to him, where there were such notations on the note as to the agreement that, if any third party had taken the note, he had taken it with full notice of the transaction.

Appeal from Circuit Court, Minnehaha County; L. L. Fleeger, Judge.

Action by Oluf Hegge, as administrator of the estate of Sivert O. Hegge, deceased, and another, against Alfred S. Hegge and wife. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

Robertson & Cloud, of Dell Rapids, for appellants.

Krause & Krause, of Dell Rapids, for respondents.

WHITING, J. This is an appeal from an order sustaining a demurrer to a complaint. The only ground of demurrer now relied upon by respondents, and therefore the only one which we feel called upon to consider, is that the complaint does not state facts sufficient to constitute a cause of action. Defendant Nettie Hegge is the wife of defendant Alfred S. Hegge.

The complaint confesses the following facts: July 3, 1912, one Sivert O. Hegge was the owner of three tracts of farm land, one

of which was occupied by himself and wife, Karen O. Hegge, as their homestead. Hegge and wife had a family consisting of some 11 children. The father, being in poor health and desiring to make a disposition of his property to his children and his wife, and also to provide for the support and maintenance of himself and wife during the balance of their lives, made a division of his property. To this end he took into consideration advancements which he had made to certain of his children, and undertook to make such a division of his property as, in connection with such advancements, would give to each one of his said children property of the net value of \$3,000. To accomplish this, he and his wife, on July 3, 1912, placed mortgages on these tracts of land, which mortgages secured the payment of a certain sum to each of eight of the children and to the mother; and he and his wife, on the same date, conveyed one of the three tracts of land, subject to the mortgage thereon, to each one of the other three children. The three grantees accepted the deeds, and afterwards made the payments secured by the mortgages. The father and mother deeded the homestead to the defendant Alfred S. Hegge for the stated consideration, named in said deed, of \$11,500. At the same time, and as part of this same transaction, and forming a part consideration for the deed to this defendant, defendant entered into the agreement and gave the note and mortgage hereinafter mentioned.

The deed to defendant Alfred S. Hegge was a warranty deed with ordinary covenants, and containing no reference therein to the agreement which formed a part consideration therefor. Making up the consideration of \$11,500, named in said deed, were notes and mortgage entered into by defendant, whereby he undertook to pay the sum of \$4,000 (being \$1,000 to each of three sisters and \$1,000 to his mother), which notes, as above stated, have been paid; his \$3,000 share of his father's property; and a \$4,500 note and mortgage which he entered into as security for the performance of his written agreement to support his parents. In this written agreement, he covenanted to care for his parents during their lifetime, to furnish them with necessary food and clothing, to care for them during sickness, to furnish them with rooms in the dwelling house located on the homestead, and to make to them certain cash payments—being the interest on the \$4,500 note above referred to. The mortgage provided that, in case of failure of defendant to fulfill the agreement or pay the \$4,500, the said mortgage, together with the note thereby secured, should become immediately due and payable, and that—

"The said mortgage may, at the option of the parties of the second part, be immediately foreclosed by the sale of the said premises as therein provided."

The note for \$4,500 was due in 15 years, and bore interest at 2 per cent. per year, and was conditioned that it should become void on the death of both payees. The agreement also provided that the note and mortgage should become null and void upon the death of the father and mother, and that, upon satisfactory proof of such deaths, they should be discharged of record by the proper officer. As a matter of fact, the land conveyed to this defendant, instead of being of the value of \$11,500, was of the actual and marketable value of at least \$20,000, and was, at the time of the commencement of this action, of a value greatly in excess of \$20,000. The reason why this land was treated as of a value so much below its real value was to give to the defendant Alfred S. Hegge more than an equal share of the property of his father, and this solely because of the agreement which he was entering into to care for his said father and mother. The father died soon after July 3, 1912. From the time when the agreement was entered into and possession of said land taken by the defendant, defendant failed and neglected, at all times, to comply with any of the terms and conditions of said note, mortgage, and agreement. He failed and neglected to maintain and support his mother as he had covenanted to do in said agreement. He has, at no time, contributed in any manner or form to her support and maintenance. He has failed to furnish necessary food and clothing, or any clothing for her. He has not at any time furnished or caused to be furnished any medical care or treatment for her, though she has, at times, been in need of same. His conduct has been such as to render it impossible for her to reside in the dwelling house and upon the premises mentioned in said agreement. He has neglected to make the payments provided for in said agreement.

It was alleged that, because of the above facts, "the consideration for the execution and delivery of said deed has already failed"; that the plaintiffs (who are the administrator of the father's estate and the mother) offer to return or restore to defendant all sums of money paid by him in satisfaction of the \$4,000 mortgage, together with interest thereon; that they will allow the defendant his distributive share in the estate of his father, or such amount as the court may determine to be fair and equitable as his portion or share in said distribution; that they offer to return or restore to the defendant all sums that the court may determine to be fairly and equitably due and owing defendant from the plaintiffs by reason of the facts hereinbefore stated; and that they

offer to pay the same to him or into court as soon as said amount may be determined.

Upon such facts, plaintiffs prayed a judgment and decree of the court requiring the reconveyance of these premises to the plaintiff Oluf Hegge, as administrator of the estate of the father, and the cancellation and rescission of the written agreement hereinbefore referred to; the determination of the amount which plaintiffs should return, restore, or pay to the said defendant upon such reconveyance; that defendant be required to render an account of the profits and revenues derived from the said lands during the time he has been in possession of the same; that the amount of said profits be taken into account, and plaintiffs or either of them have judgment therefor; and for such other and further relief as to the court may seem just in the premises, and as shall be agreeable to equity.

[1] No claim is made that the complaint is sufficient upon which to base the foreclosure of the \$4,500 mortgage. Appellants contend that the whole transaction should be considered together—the deed, the agreement, and the mortgage, and that, when so considered, the agreement should be treated as read into the deed as a condition subsequent, upon breach of which they had a right to treat the title conveyed by the deed as forfeited, and to ask the court to so adjudge, and to adjudge the title invested in the administrator in his representative capacity. Appellants contend that the agreement to care for the grantors should be treated as the chief consideration for the conveyance of title, that such consideration has failed, and that they are entitled to a rescission of the conveyance. Respondents contend that the parties elected to provide the remedy for a breach of the agreement, namely, foreclosure of the mortgage; that, having provided that remedy, the court cannot say that they intended the agreement to support to be a condition subsequent; that, if such agreement were to be considered as a condition subsequent, appellants' remedy would be through a notice that he had elected to declare the title forfeited and a demand of possession; that there is no offer to return the \$4,500 note, which note, so far as the complaint shows, may have been transferred; and that, without a tender of such note, appellant would not be entitled to any equitable relief.

If this transaction were other than one involving a contract between parents and child for the care of the parents, we should be inclined to hold that the provision for and the giving of security provided the only remedy for breach of whatsoever agreement may have been a consideration for the deed. But this whole transaction must be considered together, as though it was all evi-

denced by one writing; and, when so considered, the agreement of the son to care for his parents must be recognized as the chief end sought by the parents, and therefore entitled to chief consideration by the courts. In the case of *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458, a case where, as in this one, a note and mortgage had been given to secure the agreement for care and support, the court, after a careful review and analysis of its former decisions, made a declaration that fully meets with our approval:

"If any of the situations where equity, by construction, so called, may arbitrarily, if necessary, turn a transaction into something entirely different from what the parties thereto expressed in their writings in order to do justice, can be supported on principle, the one under consideration can. If courts of equity did not possess power to do that, they would be shorn of much of their efficiency to protect the weak, to prevent the realization of contemplated frauds, of unconscionable bargains, and, generally, of administering justice between man and man. Probably no situation can be named where the exercise of that important power is more needed than just such as the one before us—one where a confiding parent, in his old age, trusting largely to the affectionate regard of his son, conveys to the latter all his property to secure support and personal care for the balance of his days, and the consideration, by the wrongful conduct of his son, so far fails that there is no efficient remedy that can be applied to right the wrong other than to restore the parent to the ownership and possession of his property."

In *Bruer v. Bruer*, 109 Minn. 260, 123 N. W. 813, 28 L. R. A. (N. S.) 608, the court well said:

"Contracts and agreements of the kind are quite familiar to the courts. They are, as a rule, made by people well along in years with a child or other relative, and are intended to secure to the old people proper and suitable support and maintenance during their declining years, at the same time relieving them of the care and responsibility incident to the management of their affairs. They part with their property in the expectation and belief that their future necessities and comforts are fully provided for, and in an abiding faith that natural affection and filial duty will prompt and secure a faithful discharge of the obligations assumed by the child to whom they convey. There is in such transactions an element of confidence reposed by the old people in their grantee, sacred in its nature, a breach of which, and retention of the benefits, no court should tolerate by a refinement upon technical rules and principles of law. By the modern trend of authority these transactions are placed in a class by themselves, and enforced without reference to the form or phraseology of the writing by which they are expressed, or whether by the strict letter of the law a forfeiture of the estate is expressly provided for."

The Wisconsin court held that a conveyance made under the circumstances herein

presented should be deemed as made and intended to be made upon a condition subsequent, and it said:

"In such a case the court does not lend its jurisdiction to effect a forfeiture. The rule in that regard is not violated. The forfeiture, or rescission, as it is sometimes called, is effected by the acts of the grantor, by his re-entry, or its equivalent, for condition broken. Equity lends its aid to quiet the title, as said in *Knutson v. Bostrak*, supra. It lends its aid to 'set aside the conveyances.' Equity deals with the situation the same as with any other where a reversion of title has taken place by re-entry, or its equivalent, for condition broken. It establishes the title to the property in accordance with the facts and clears away all apparently interfering writings and records, giving such other relief as may be necessary to fully accomplish that end."

[2] We do not feel called upon to determine whether, under facts such as are presented here and were presented in the Wisconsin case, a court of equity might properly hold the agreement for care and support to be a condition subsequent to the conveyance of title, and that its breach entitled the grantee to a decree forfeiting such title and re-investing same in the grantor, or, in this case, in his representative. One thing, however, is clear—the fact that no notice of intent to declare a forfeiture was given would not bar equitable relief. If this were an action at law based upon a claim of forfeiture theretofore effected, proof of such a notice might be essential in order to establish the fact that forfeiture had been effected. The equitable action would be brought upon the theory that facts existed warranting the forfeiture and asking the court to declare that forfeiture had been accomplished by the bringing of the action.

The Minnesota court ruled that, in view of prior decisions of such court, it could not hold that the agreement constituted a condition subsequent; but it did say that "the court may grant such relief as the facts will in equity and good conscience justify"; and we say of the complaint before us, as the Minnesota court said of the complaint before it:

"For this relief the complaint is sufficient, and contains all necessary and essential allegations."

Our statute (section 904, R. C. 1919) provides that a contract may be rescinded by a party thereto:

"If through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part."

The failure of respondents to furnish the care and support constitutes a failure of the consideration for the deed. *Shepardson v. Stevens*, 77 Mich. 256, 43 N. W. 919. Cer-

tainly where, as in this case, the remedy by enforcement of the note and mortgage would, instead of ending in the vesting of title to this land in the mother, undoubtedly open up to respondents the very avenue of escape for which they have been hoping—the release of their agreement by the payment of money—it would be inequitable to deny a rescission of the deed.

[3] We cannot agree with respondents' contention that the failure to allege that the mother still retains the note and would deliver the same to respondents is sufficient to bar appellants' right to equitable relief. The note contains the provision, "Subject to contract and agreement of even date herewith," and has attached thereto the memorandum that—

"This note and mortgage securing same shall become null and void at the death of said Sivert O. Hegge and Karen O. Hegge."

If any third party has taken this paper, he has taken the same with full notice of this whole transaction, and can have no rights that need be considered in this action.

The facts pleaded entitle appellants to relief in a court of equity; therefore the order appealed from is reversed.

SMITH and McCOY, JJ., not sitting.

BOOKE & OLSON v. PAYNE, Agent.

(Supreme Court of North Dakota. Oct. 5, 1921. Rehearing Denied Oct. 29, 1921.)

(Syllabus by the Court.)

1. Carriers ⇨208—When furnishing facilities and utilities for reception of cattle carrier must have same suitable and reasonably safe.

It is the duty of a carrier, as an incident to its business of transporting live stock, when it tender facilities and utilities for the reception of cattle preparatory to shipment, to furnish the same in a suitable and reasonably safe condition.

2. Carriers ⇨230(2)—Carrier's breach of duty and contributory negligence as to stock lost in wandering into a reservoir before shipment held for the jury.

Where a carrier maintains stockyards and also a plot of ground upon which cattle are customarily held preparatory to shipment and where prospective shippers are directed by the carrier to feed, water, and hold their cattle upon such plot of ground preparatory to and while waiting shipment by reason of occupancy of the stockyards, and where, while there, 60 head of cattle wander through unprotected openings in spoil banks of an artificial reservoir there maintained by the carrier, and off steep banks into an open space of thin ice and

deeper water, occasioning the loss of 44 head, it is held that the carrier's breach of duty and the shippers' contributory negligence were questions of fact for the jury.

Appeal from District Court, Stark County; Crawford, Judge.

Action by Booke and Olson, copartners, against John Barton Payne, as Agent of the President of the United States, in charge of railroads. From an order granting judgment notwithstanding the verdict, the plaintiffs appeal. Reversed, and judgment ordered upon the verdict.

Simpson & Mackoff, of Dickinson, and S. Pomerance, of St. Paul, Minn., for appellants. Young, Conmy & Young, of Fargo, for appellee.

BRONSON, J. *Statement.*—This is an action against a common carrier to recover damages for negligence resulting in the loss of some 44 head of live stock. Upon trial, the jury returned a verdict in favor of the plaintiffs for \$2,640. Thereafter the trial court, upon motion made, ordered judgment notwithstanding the verdict for the defendant. From the judgment entered accordingly, and from the orders made therefor, the plaintiffs have appealed. The record discloses evidence as follows:

In November, 1919, the plaintiffs, as copartners, were engaged in the cattle business and were operating a ranch some 25 miles south of Belfield. On November 15, 1919, they made written order for six cars to the defendant carrier, then under federal control, for the shipment of cattle from Belfield, N. D., to Steele, N. D., to be furnished on November 25, 1919. On that day they called, over the telephone, the agent of the carrier at Belfield. They were advised that the cars were there. They told the agent that they would be there upon the 28th. The agent responded that this would be all right. On November 26, 1919, the plaintiffs, with two assistants, left the ranch with some 260 cattle. During the first two days they approached within 2½ miles of Belfield. On the morning of the third day, between 9 and 10 (November 28th), they arrived at Belfield. The railway facilities at Belfield for receiving and loading cattle consisted of stock pens and chutes along the right of way adjacent to the track. There was one large pen, having a capacity of about 100 head, for mixed cattle, and smaller pens. In the whole stockyards there could be placed and fed therein properly between 150 and 200 head of cattle. In order to drive into the smaller pens, it was necessary to drive through the large pen. Connected with these pens are two loading chutes. On the morning when the plaintiffs arrived there were 56 head of horses in the main pen of this stockyard.

They had been placed there by the owner, one Mullaney, about 8 a. m. of that day, and remained there throughout the day, excepting about 10 head, cut out in the afternoon. South of these stockyards and of the right of way the defendant carrier owned a considerable strip of land adjacent to the right of way, extending eastward some 1,000 feet to the townsite. Upon this strip and partly upon the right of way, eastward of these stockyards some 700 feet, it had constructed, and for several years had maintained, a reservoir for purposes of securing water for locomotives, etc. This reservoir was 648 feet long, 180 feet wide, and about 16 feet deep. It extends north and south; the north end being some 100 feet from the main railway track. The dirt excavated was thrown upon the sides about, forming so-termed "spill banks" 14 to 15 feet high. At the southern end there were two openings between these "spill banks," one where an inlet of a natural creek exists, and the other at the southwesterly corner. At the north end there are likewise two openings, one for an outlet or overflow into this natural creek, some 20 feet in width, the other a smaller opening on the north side.

These openings at the north end are upon the railway right of way. The "spill banks" set back so that there are about 5 feet of natural ground between them and the banks of the reservoir. The banks are constructed upon a 1 to 1 slope. The land about this reservoir is open ground. It was the custom for people who had live stock for shipment, awaiting shipment, to graze and hold them on the particular railway lands southeast of the reservoir. Likewise the agent of the carrier admitted, although otherwise testifying, that it was customary to put cattle brought in for shipment in the stockyards. When the plaintiffs came with their cattle near the stockyards they discovered the horses therein. The day was cold, about 15 degrees below, with a cold breeze from the northwest. It had been cold for several days. There was not room for all of their cattle in the yards. One of the plaintiffs saw the agent. He advised them that the cattle were there, that they wanted to ship out, and that there were horses in the corral. Thus he testified:

"Well he [the agent] says to keep them over there handy and just pointed out. He says to keep them handy; that he thought along about 12 or 1 o'clock there would be an engine along to load us." "I wanted to know where to go. It was a cold day. If I could have got them in the corral there would be some shelter, that shed on the west away from the wind; and he said to keep them over handy, so I took them right on the south just about where he directed me; on the southeast corner of the reservoir, there are some high dirt piles." "Just about where he pointed to keep them handy."

Then he testified that he took the stock over to the place where he was directed; that

the agent told him to take the cattle over on the east side of the reservoir where that little creek was and water them; that he could get water there and also there was a little shelter from the dirt piles; that then they proceeded to purchase hay, to dump it on the ground against the reservoir, and to feed it to the cattle; that they found water in this creek against the reservoir. They cut holes in the ice in several places so that the cattle could eat, walk down, and drink also. The ice on this creek was about one foot thick. The water in this creek in some places was two or three feet deep. They saw the openings in the "spill banks" in the southeast and southwest corners because they went that way and were right near. There were four of them in charge of the stock until about the dinner hour. Then three of them, leaving one La Due, a boy 16 or 17 years old, in charge, proceeded on horseback to town for dinner. The cattle were about four blocks west of Main street, about 30 or 40 rods from the main part of town, as one of the plaintiffs testified. They were gone about 20 minutes or so. On their way back from dinner they met La Due, proceeding on foot for his dinner. One of them hollered that something was wrong with the cattle; they went to the north end of the reservoir and discovered that some 60 head of cattle had gone through the opening there, and were in the water at the north end from the bank for a distance of 80 feet or so. Two boys, witnesses for the defendant, testified that the cattle went through the opening between the "spill banks" at the northeast corner, the overflow outlet. Help was summoned, and after some three hours effort the cattle were extricated from the water. Six were then dead; others died during the day. The cattle remaining were shipped to Steele on the following day. More of the inundated cattle perished, although given good care. In all, 44 were lost. These openings at the north end of the reservoir were not protected by any fence or barriers. They were situated upon the railway right of way. Prior to the loss of the cattle the plaintiffs did not know of these openings. Then (November 28, 1919), the reservoir was well covered with thick ice, excepting at this place where the cattle got in the water. There, as one witness testified, he never saw the water frozen over completely. He had lived about 300 feet from the reservoir for three or four years, and had helped pull these cattle. Another witness who assisted in taking out the cattle testified that the water in the reservoir freezes to the ordinary depth of water in creeks and open watering places in that locality, excepting that the northeast corner does not freeze as hard; that there was a thin scum of ice over that particular portion; that he thinks perhaps they tapped a spring (in constructing the reservoir) that came from the little stream there. He was familiar with the ground be-

fore the construction of the reservoir, and he remembers a large spring formerly to the north of the reservoir. The plaintiffs testified that there was not much ice where the cattle fell in the water, and that it was not possible for them to crawl out of such place.

The plaintiffs, in their pleadings and contentions upon the record, have predicated negligence of the carrier through its failure to have proper room and place for receiving and loading the stock, in directing and permitting the stock to be held in the vicinity of the reservoir, and in failing to properly safeguard the reservoir and the place where the cattle were held.

Decision.—The evidence in the record favorable to the plaintiffs has been so stated for the reason that the issues of fact involved have been determined by the verdict of the jury adversely to the testimony favorable to the carrier. *First State Bank v. Kelly*, 30 N. D. 84, 98, 152 N. W. 125, Ann. Cas. 1917D, 1044; *Dubs v. Nor. Pac.*, 171 N. W. 888; *Jackson v. Grand Forks*, 24 N. D. 617, 140 N. W. 718, 45 L. R. A. (N. S.) 75.

[1] The general rule undoubtedly is that it is the duty of the carrier, as an incident to the business of transporting cattle, to furnish suitable stockyards for receiving and delivering such cattle both at the point of shipment and of destination. 10 C. J. 79, and cases cited; *Hutchinson on Carriers* (3d Ed.) § 510. As Justice Harlan stated in *Covington Stockyard Co. v. Keith*, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73:

"When animals are offered to a carrier of live stock to be transported it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported." "In other words, the duty to receive, transport and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee."

In *Zakrzewski v. G. N. Ry.*, 125 Minn. 125, 145 N. W. 801, 802, it is stated:

"There ought to be no doubt upon the proposition that, at those shipping points of a common carrier where stock pens or yards are reasonably necessary, the duty rests upon the carrier to furnish the same in such condition and with such facilities for handling and caring for stock that the shipper can, with a reasonable degree of safety and convenience, assemble and attend to the wants of the animals so that when loaded they are in a fit condition to stand the hardships of the journey."

See *Id.*, 131 Minn. 175, 154 N. W. 966; *St. Louis & San Francisco Ry. v. Beets*, 75 Kan. 295, 89 Pac. 683, 10 L. R. A. (N. S.) 571; *Wt.*

Worth & G. R. Ry. v. Galton, 45 Tex. Civ. App. 67, 100 S. W. 166.

[2] This duty attaches although the control and management of the stock remain entirely with the shipper until loading begins. *Zakrzewski v. G. N. Ry.*, *supra*.

Upon this record the questions presented are (1) whether, as a matter of law, the carrier was free from negligence in the performance of this duty stated, and (2) whether, as a matter of law, the plaintiffs were guilty of contributory negligence.

The carrier contends that the carrier did not invite the plaintiffs to turn their cattle loose without a herder or to use the reservoir to water their cattle; that in permitting the cattle to get in the reservoir and using a portion of the carrier's premises where they were not invited the plaintiffs were trespassers or at best mere licensees. It further maintains that there is no proof that the carrier invited or directed the plaintiffs to use this particular spot adjoining the reservoir for holding the stock, and that the failure to fence the reservoir was not negligence.

Does the record sustain the contentions of the carrier, as a matter of law? The answer must be considered in connection with the duty of the carrier in the receiving of cattle for shipment. The carrier has neither considered nor discussed this duty. The negligence of the carrier does not turn upon the question whether the plaintiffs were licensees or invitees, as such, but rather upon the question whether the facilities and utilities tendered to the plaintiffs for the reception of the cattle preparatory to, and while awaiting, shipment, were furnished pursuant to its duty.

It is undisputed that the carrier did recognize the necessity of maintaining facilities and utilities at Belfield for the receiving of cattle prior to and while waiting shipment. It is admitted that the carrier did maintain there stockyards for such purpose. It is further undisputed that cattle were customarily held upon this plot of ground where the reservoir is situated preparatory to, and while waiting, shipment. There is evidence in the record that on November 28, 1919, the stockyards were not available for the use of the plaintiffs. There is further direct evidence that the agent of the carrier directed the plaintiffs to hold, feed, and water their cattle near the reservoir both for purposes of shelter and for water, all preparatory to and while waiting shipment.

The reservoir was an artificial creation. The water therein was deep; the banks were steep, almost precipitous. The "spoil banks," serving as a protection and barrier, also perhaps were a snare by reason of the unguarded and nonwarning openings through them. The water at a certain place in the north end remained unfrozen, or with a thin coating of ice, in cold weather, and so existed when the

cattle were drowned. There is evidence, although disputed, to that effect. If this reservoir were within the confines of the stockyards proper with no further protection than existed upon the adjacent ground of the carrier, it surely might not be said, as a matter of law, that the carrier had fulfilled its entire duty in providing for the receiving of cattle, if they should be drowned or be killed, as they were in this case. The question of the breach of this duty by the carrier must be similarly considered, although such reservoir was situated without the stockyards proper, if the facts warrant consideration by the jury of this duty. If the plaintiffs were directed and permitted by the carrier to take, hold, feed, and water these cattle near the reservoir, where they were by reason of the yards then being occupied and insufficient to contain plaintiffs' proposed shipment, if the reservoir, by reason of its proximity, the unguarded openings, and the open place in its water surface, was a dangerous utility to be so maintained at such place where such cattle were received and held for shipment, then, through loss resulting by reason thereof, a jury might find a breach of this duty of the carrier. Upon this record we are of the opinion that sufficient facts were presented to make this breach of duty a question of fact for the jury, and that the verdict of the jury determining the negligence of the carrier in that regard should not be disturbed. See *L. R. A.* 1918C, 540; *Heckman v. Evenson*, 7 N. D. 173, 182, 73 N. W. 427.

The carrier contends that the record discloses contributory negligence on the part of the plaintiffs; that the cattle were simply permitted to wander wild as they willed. In this connection a close question is presented, as a matter of law. The evidence is far from satisfactory in explaining how the cattle happened to get in the reservoir, whether during the presence of the herder or his temporary absence. There is evidence, however, that the plaintiffs did not know about these open and unguarded openings between the "spoil banks" in the north end; that they knew nothing about the open place in the water where the cattle were drowned. The plaintiffs were directed and permitted to hold, feed, and water their cattle near these openings. The openings, unguarded and not protected, were dangerous for cattle by reason of the open water place within the reservoir. If the ice upon the reservoir had been uniformly thick, like upon the creek without, a foot in thickness, and if there had been no open nor dangerous water hole within, little danger would have existed if the cattle should wander through such openings and upon the reservoir.

The unguarded openings and the open water space, concerning both of which the plaintiffs neither were informed nor knew, constituted the menace of danger and of injury.

Reasonable men might draw different conclusions from the evidence as to whether the plaintiffs would have known or investigated concerning the reservoir or should have more closely attended the cattle. Contributory negligence may not be charged to the plaintiffs because they accepted the facilities offered by the carrier. *Lackland v. Ry. Co.*, 101 Mo. App. 420, 74 S. W. 505. The question of contributory negligence therefore was primarily one for the consideration of the jury, and its findings should not be disturbed. *Jackson v. Grand Forks*, 24 N. D. 601, 617, 140 N. W. 718, 45 L. R. A. (N. S.) 75; *Haugo v. G. N. Ry.*, 27 N. D. 268, 273, 145 N. W. 1053; *Overpeck v. Rapid City*, 14 S. D. 507, 85 N. W. 990, 992.

The order is reversed, and judgment ordered upon the verdict, with costs.

ROBINSON, C. J., and CHRISTIANSON, BIRDZELL, and GRACE, JJ., concur.

WORLITZ v. MILLER.

(Supreme Court of North Dakota. Sept. 23, 1921. Rehearing Denied Oct. 29, 1921.)

(Syllabus by the Court.)

1. Appeal and error $\S$ 1058(3)—Exclusion of testimony as to plaintiff's chastity held not error, where witness did not know meaning of word and other testimony was introduced.

Certain rulings on the admission of evidence examined, and for reasons stated in the opinion held to be nonprejudicial.

2. Appeal and error $\S$ 1031(6)—Erroneous instruction ordinarily presumed prejudicial.

While the giving of an erroneous instruction ordinarily raises a presumption of prejudice, yet a case will not be reversed by reason thereof, where it is clear from the record that the complaining party could not have been prejudiced thereby.

3. Appeal and error $\S$ 1064(1)—Erroneous instruction does not require reversal where there could be no prejudice.

Certain instructions given in this case examined and for reasons stated in the opinion held to be nonprejudicial.

Robinson, J., dissenting.

Appeal from District Court, Kidder County; Coffey, Judge.

Action by Mary Worlitz against Max Miller. Judgment for plaintiff, and the defendant appeals. Affirmed.

Geo. Musson, of Steele, and E. T. Burke, of Bismarck, for appellant.

Cameron & Wattam, of Bismarck, and Arne Vinje, of Steele, for respondent.

CHRISTIANSON, J. This is an action for indecent assault. The plaintiff recovered a verdict of \$700, and defendant has appealed from the judgment entered upon the verdict. The defendant is the owner of a store in the village of Tuttle in Kidder county in this state. The plaintiff is a married woman, living with her husband and two children in said village of Tuttle. Her husband is a laborer. In the fall of 1920 the plaintiff and her husband rented from the defendant a small building which adjoins his general store, for the purpose of operating a cream station therein, and the plaintiff thereupon engaged in the business of buying cream in that place. The only method of closing or locking the cream station at night was by locking the door leading to the street from the inside and passing out through a door leading into the store. The complaint alleges, and the plaintiff testified, that on the evening of August 25, 1920, after turning out the electric lights in her place of business and on attempting to pass out through the door leading into the store as usual, the plaintiff was confronted by the defendant who had placed himself in the door and who solicited her to have sexual intercourse with him; that upon her refusal to accede to his demands he seized her violently and forcibly by the arms, leaving black and blue marks thereon; that he placed his hands on her breasts and lifted her dress, and placed his hand on her private parts; that after a struggle of some duration, during which the plaintiff slapped the defendant and kicked his shins, the defendant released the plaintiff, and she thereupon left the place and went to her home. The defendant denied the whole transaction as testified to by the plaintiff, except that he admitted that he was in the cream station with the plaintiff on the evening in question. He claimed, however, that she called him into the cream station for the ostensible purpose of having him help her prepare the report of the day's business, and that after he came in there, she placed her arms around his neck and kissed him, and told him that she wanted some loving and kisses, and that he repelled her advances. It is apparent therefore that there was a square conflict in the evidence, and that it was for the jury to say whether the version of the plaintiff or that of the defendant was the true one. The sufficiency of the evidence is not questioned. On the contrary, on the oral argument, appellant's counsel expressly stated that he did not question the sufficiency of the evidence; but contended that the evidence was of such unsatisfactory nature that the errors, which he asserted occurred during the trial of the cause, required the granting of a new trial.

Three assignments of error are specified and argued on this appeal.

[1] (1) It is contended that the court erred in refusing to permit one Amelia Hoher to testify regarding plaintiff's reputation for

chastity. An examination of the record bearing upon this feature of the case leads us to the conclusion that no error was committed. The record shows that shortly before the witness Amelia Hoher was called another witness, Lenofred Elliott, was permitted to testify, and did testify, that the reputation of the plaintiff, Mary Worlitz, for chastity was bad. The witness Amelia Hoher was asked the following questions, and gave the following answers thereto:

"Q. When I ask you this question, answer yes or no; do you know the reputation of Mrs. Worlitz for chastity? A. Yes.

"The Court: Where, and when?

"Q. Do you know the reputation of Mrs. Worlitz for chastity, on August 25, 1920, in Tuttle? A. Yes.

"Q. What was that reputation? A. Bad."

On cross-examination she stated that she did not know what the word "chastity" meant and "had never heard the word before." The court thereupon directed that her testimony to the effect that Mary Worlitz's reputation for chastity was bad be stricken. Defendant's counsel in effect conceded the correctness of this ruling, because when another question relating to this matter was put and objection thereto sustained defendant's counsel stated:

"We don't want to insist upon this, your honor; we understand that the witness cannot be asked in regard to this word 'chastity' again, as she has already made the statement she does not know what it means."

Immediately following this statement defendant's counsel made the following request:

"The defendant would ask a few minutes' recess at this time, as there are some new witnesses that have just come in and we would like to interview them."

The court thereupon directed that a five-minute recess be had. Immediately following the recess the witness Amelia Hoher was recalled, and she was again asked if she knew the reputation of Mrs. Worlitz for chastity on August 25, 1920. Plaintiff's counsel objected to the question on the ground that the witness had already admitted that she did not know what the word meant. Thereupon, in answer to questions propounded by defendant's counsel, she testified that during the recess she had consulted a dictionary and ascertained the meaning of the word "chastity." Plaintiff's counsel asked for permission to cross-examine before the question was put, and upon asking her what the word "reputation" meant she refused to testify, and from answers given to questions formerly propounded it appeared that she did not know the meaning of the word "reputation." The court sustained an objection to the question on the ground that the witness had not shown herself qualified to answer. No request was

made that the witness be given an opportunity to consult a dictionary or otherwise inform herself as to the meaning of the word "reputation." And as already stated, it also appears that one other witness did testify that the reputation of the plaintiff for chastity was bad. The plaintiff offered no testimony tending to contradict the testimony offered by the defendant on this point, so that so far as the record is concerned the testimony adduced by the defendant that plaintiff's reputation for chastity was bad was uncontradicted. It would also seem that if the plaintiff's reputation for chastity was bad must have been a matter of such common comment that other witnesses could readily have been procured to testify to that fact. Under all the circumstances we cannot say, upon the record before us, that the trial court abused the judicial discretion with which it was vested in ruling as it did.

[2] (2) It is next contended that the trial court erred in instructing the jury as follows:

"A woman has a right in pursuit of her walk of life to be free from molestation and assaults; whether they be physical assaults, or indecent assaults, as alleged in this case, and she has such a right to be free from these assaults, and any violation of this right that would cause her humiliation, pain, and suffering, or mortification such as charged in this complaint, would entitle her to damages for such violation of her rights. It would be the province of the jury, if they find that such rights have been violated, to award damages, such as would compensate her for injuries sustained."

The argument is made that under this instruction the jury might have awarded damages to the plaintiff merely for molestation, even though no assault was committed at all. We do not believe that the instruction is susceptible of such interpretation. The instruction refers to assaults "as alleged in this case." Under the evidence in this case the jury could not, in our opinion, possibly have found a verdict for the plaintiff under this instruction, unless they believed plaintiff's story that defendant actually committed an assault upon her such as she testified to. If her story was true he did commit such assault; if defendant's story was true he did not, and was wholly blameless. In our opinion the instruction given was in no manner prejudicial to the defendant.

[3] (3) The defendant also predicates error upon the following instruction:

"If any witness has willfully testified falsely, in your judgment, you are at liberty to wholly disregard the testimony of such witness, except in so far as the same is corroborated by other credible evidence in the case; by other evidence which you have confidence in and believe. That would be as to material points."

It is contended that it is only where a witness has willfully testified falsely as to any

material fact in the case that the jury is justified in disregarding his testimony, and that the instruction in this case is erroneous because it did not so inform the jury. In appellant's brief it is stated that defendant's counsel called the trial court's attention to this omission, and that the trial court thereupon added the sentence at the end of the instruction, to wit, "That would be as to material points." Conceding, without deciding, that the instruction is erroneous, it does not follow that the cause must be reversed.

It is true that ordinarily, where an erroneous instruction is given which might operate to the injury of the party who assails it, a presumption of prejudice arises; but it is equally true that when the error could work no injury to the complaining party the case will not be reversed by reason thereof. In other words, a cause will not be reversed because an erroneous instruction has been given, where it appears from the record that the instruction could not have prejudiced the complaining party. See *National Bank v. Lemke*, 8 N. D. 154, 159, 54 N. W. 919, and authorities therein cited. The record in this case shows that the defendant could not possibly have been prejudiced by the language in which the instruction was couched, for whatever conflict there was in the evidence was upon material facts. Hence, the jury could not have found that any of defendant's witnesses testified falsely upon any fact, unless it was upon a material fact. So, upon the record in this case, the instruction could in no event be prejudicial. This disposes of all the errors assigned and argued on this appeal, and it follows from what has been said that the judgment appealed from must be affirmed.

BIRDZELL, BRONSON, and GRACE, JJ., concur.

ROBINSON, J. (dissenting). In this case the majority decision is strictly in accordance with the law as commonly administered. However, I am inclined to dissent from a decision which makes it unsafe for a man of means to be alone with a needy or adventurous woman. I also dissent from any verdict when it appears beyond doubt that it is clearly and grossly untrue. The verdict in this case is, for actual damages, \$500, for punitive damages, \$200. Now, on the testimony of the plaintiff herself it cannot be truly said that her actual damages amounted to \$10, nor half of \$10. She does testify that defendant pinched her arms so as to make black and blue spots, but on that she has no corroboration, and it is probably untrue. She does testify, in effect, that defendant forced his presence on her for half an hour from 8 to 8:30 p. m. by the watch. That is not true. If the defendant had been an

intruder in her room she could have dismissed him in a moment with a few sharp words. If he was in her room half an hour, it was with her assent and dalliance. Her complaint avers that on August 25, 1920, at Tuttle, the defendant assaulted her with intent to ravish her. That is false, and she knew it to be false. There is not in the record a thing to indicate that defendant ever thought of ravishing the plaintiff. As a place to buy cream the plaintiff rented from defendant a 10x12 shack at the rear of his store. It had two windows; it had two doors. One door opened out to the street, and one opened into the store. She swears she paid defendant two \$10 bills for two months' rent in advance. That is not true. She paid only one month in advance, and it seems that the trouble commenced when the defendant demanded rent in advance for the second month. Plaintiff swears that defendant made advances to her. He swears that she made advances to him. The truth of the matter cannot be determined. But this is certain: defendant kept a general store which was well lighted by electricity, and the light shone into the 10x12 shack at the rear end of the store. The store was open for customers. If the defendant remained in the shack half an hour, then it must have been a case of dalliance, a mutual courtship. The plaintiff was not hurt. She swears her dress was not torn. She does not swear to any injury except the pinching of her arms.

As we read in scripture, when Joseph met Potiphar's wife, all the advances were made by her, though he was the slave of her husband. There was no gentle dalliance or half-hour courtship. When Joseph said "No," it was said in a way to indicate that he meant it, and that was the end of it. But she was persistent, and at last, after several denials, she caught Joseph by his garment, and he left his garment in her hand and fled and got out. Then she took the garment with her and said unto her husband:

"The Hebrew servant, which thou hast brought unto us, came in unto me to mock me; and it came to pass, as I lifted up my voice and cried, that he left his garment with me and fled."

Then, of course, the husband believed her, and Joseph was taken and put in prison, where he remained until he interpreted the dreams of Pharaoh, which made him ruler of all the land of Egypt. From such evidence as Mrs. Potiphar gave, the Tuttle jury would doubtless have convicted Joseph, and assessed heavy damages against him. What fools we mortals be! In cases of this kind it is high time for the courts to get away from the habit of washing their hands like Pilate and throwing the blame on the jury.

W. J. DYER & BRO. v. BAUER.

(Supreme Court of North Dakota. Oct. 11, 1921.)

(Syllabus by the Court.)

1. Sales $\S$ 441(1)—In an action on note for price, evidence held to sustain verdict for defendant for breach of warranty.

The plaintiffs sue to recover the balance due on a \$3,000 promissory note, given for a secondhand fotoplayer. The defense is a warranty of quality and fitness, express and implied, and a breach of the same. The jury found a verdict for defendant for \$1. *Held*, that the plaintiffs have had a fair trial and that the verdict is well sustained by the evidence.

(Additional Syllabus by Editorial Staff.)

2. Sales $\S$ 273(3)—Where buyer relies on seller's representation of fitness for purpose, warranty of fitness implied.

Where plaintiffs sold a fotoplayer to defendant, who had never seen one, and relied on express warranty of quality and fitness, and plaintiffs knew he bought it for a particular purpose, relying on their representations, there was an implied warranty that it should be fit for such purpose, under Laws 1917, c. 202, $\S$ 15.

Appeal from District Court, Burleigh County; J. A. Coffey, Judge.

Action by W. J. Dyer & Bro. against Arthur Bauer. Judgment for defendant, and plaintiff appeals. Affirmed.

F. E. McCurdy, of Bismarck, for appellant.

Newton, Dullam & Young, of Bismarck, for respondent.

ROBINSON, J. In November, 1918, the plaintiffs, dealers in musical instruments in St. Paul, sold defendant a secondhand fotoplayer, to be used as an orchestra in his moving picture theater at Bismarck. For the player defendant gave a note for \$3,000. To secure the note he gave a chattel mortgage on the player. The purpose of this action is to recover the balance due on the note and to foreclose the mortgage. The defense is a breach of warranty. The jury found in favor of defendant and against the plaintiffs, and assessed defendant's damages at \$1.

[2] The evidence was conflicting. The jury heard it all and found, in effect, that defendant had paid for the old player all it was worth, and more, too. The payments and freight amounted to about two-thirds of the purchase price. The answer avers that at the time of contracting to purchase the player defendant was the proprietor and manager of a picture theater at Bismarck, as the plaintiffs well knew; that to induce defendant to purchase the instrument plaintiffs represented and warranted that it would

play several musical instruments and furnish good orchestral music for the theater; that it was in all respects suitable for use in the theater and that its use would make the theater a success; the defendant knew nothing of such instruments, and he bought the same relying on the representations and warranty; that the player was not suitable for theatrical purposes; it easily got out of order, did not give satisfaction, and was not worth over \$500. Now it appears that defendant had never seen a fotoplayer, and knew nothing of such an instrument, and that he relied on the warranty of quality and fitness, express and implied. He bought the player for a particular purpose, known to the plaintiffs, and he bought it relying on their representations and judgment. The deal is covered by the Sales Act (Laws 1917, c. 202, § 15):

"* * * Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for that purpose."

[1] The testimony showing the defects and the failure of the player is oral, and is quite extensive. The player represents a variety of musical instruments. It is a complicated machine. The testimony is that after it was installed by the expert it ran well enough for a while, and in about two or three weeks it started to get out of order. The expert from St. Paul was called. He overhauled it and for a time it ran along, and then got out of order, so the expert had to be called again and again to overhaul the player, and it kept going from bad to worse. The result was a continual discord. "It was awful," says Mr. Bauer. "We could not use the instrument, and we played the piano by hand without the attachments." The machine was installed in January, 1919, and in about a year and a half defendant ceased attempting to use it. Mr. Bauer testifies that during the first year it was used about four or five months, and the rest of the time was out of order. He says the machine is of no value only the piano part, which is worth about \$500. The testimony of Mr. Bauer is well corroborated by his wife and by Mr. Hoffman, a piano tuner who worked on the player trying to put it in order.

Mr. Roth, the expert who installed the player, and who overhauled it four times, testifies that on each occasion he left it in good working order and mechanically perfect. He attributes the failure of the player to defects in its operation, and doubtless there were defects in the operation as well as in the complicated machine. Defendant and his help were fairly able to operate the machine till it got badly out of order, and

then he had to send for the expert to overhaul it. So it is with a farmer of ordinary skill; when he buys a new machine it commonly runs well and he finds it easy to operate, but as it commences to get badly out of repair the operation becomes more and more difficult. The machine in question was secondhand. It is probable that because of some failure in operation the plaintiffs had taken it back from the first purchaser. But, to induce the defendant to buy it, they assured him that they were going to build in their own shops important missing parts of the player, and promised him the same guaranty as with an entirely new instrument. The player was sold with both an express and an implied warranty of fitness for use in a theater.

Here is a copy of two letters written to induce the defendant to purchase the player:

St. Paul. Nov. 6, 1918.

Mr. A. J. Bauer, % Orpheum Theater, Bismarck, N. Dak.—Dear Sir: We are very much surprised to learn through our Mr. Hough that you have entirely given up the idea of purchasing a fotoplayer because of your desire to dispose of your theater.

We honestly believe, Mr. Bauer, if you were to install one of the genuine fotoplayers in the Orpheum Theater, it would prove a sensation that would be the talk of the country for miles around and would, undoubtedly, result in increasing your business and your profits. We trust that you will reconsider this matter and let us get together on a proposition. We have known of cases where business was so poor that the owner of the theater could not meet his current bills. After the installation of a fotoplayer business improved to such an extent that the increased patronage took care of the payments on the fotoplayer and left a nice profit besides. We are sure that if you put the thing over right, you will have the same results. Cannot we get together at this time?

We are inclosing a stamped and addressed envelope, and awaiting your favor, we are

Yours very truly,
ALB*HR

W. J. Dyer & Bro.

St. Paul, Dec. 17, 1918.

Mr. A. J. Bauer, % Orpheum Theater, Bismarck, N. D.—Dear Sir: We are sorry to report to you that we are still unable to make shipment of your fotoplayer. Upon receipt of the new parts from the factory, we discovered that one of the most important parts was missing and as it would take at least two weeks to get this by express from the factory, we concluded to go ahead and build it in our own shops. This has delayed matters longer than we had anticipated, but we have promised you the same guaranty with this instrument as we would with an entirely new one, and for this reason, the writer has insisted that the foreman of our repair department should have this instrument in just as good condition mechanically as a new one before it is boxed for shipment.

Of course, this means that the instrument will not be set up until after Christmas and while it may be a disappointment to you not to have the instrument sooner, you really are

way ahead of the game for it means a saving of several hundred dollars to you on the instrument.

Regretting exceedingly that we have not been able to make shipment up to this writing, and with compliments of the season, we are

Yours truly,

ALB:AS

W. J. Dyer & Bro.

P. S.—Inclosed please find copy of your order which has been accepted by us.

1:INC.

On the whole it appears that the plaintiffs have had a fair trial. They have received good value for their player. The verdict does them no injustice. It is well sustained by the weight of the testimony.

Judgment affirmed.

BIRDZELL, J., concurs.

GRACE, J., concurs in the result.

CHRISTIANSON, J. (concurring). All the errors assigned and argued on this appeal relate to the defense interposed by the defendant. It is contended:

(1) That there is no evidence justifying the application of subdivision 1, § 15, c. 202, Laws 1917, which provides:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for that purpose."

(2) That the evidence in this case does not show a breach of such warranty (if one exists) for the reason that it does not appear that the musical instrument was not reasonably fit for the purpose for which it was purchased, but on the contrary that the evidence shows that it was fit for such purpose.

(3) That the contract of sale was for a specified article, under its patent or trade name, and, hence, that (under subdivision 4, § 15, c. 202, Laws 1917) there was no implied warranty as to its fitness for any particular purpose.

(4) That there is no evidence from which the jury could compute the amount of damages to which the defendant is entitled, in event a warranty and breach thereof were shown.

1 and 2. So far as the first two contentions are concerned. I am of the opinion that the evidence, considered as a whole, justified the submission to the jury both as to whether an implied warranty existed, and also whether there was a breach of such warranty. In other words, the evidence was such that it could not be said, as a matter of law, either that there was or was not an implied warranty; neither could it be said, as a matter of law, that the warranty (if one existed) had not been broken. Inasmuch as the find-

ings of the jury upon these two questions have substantial support in the evidence, they are, of course, not subject to interference by this court.

3. The contention that the contract involved in this case was for the sale of a specified article, under its patent or trade name, has in my opinion no real basis in the evidence. The evidence shows that the defendant was solicited by the plaintiff to purchase an instrument of the character involved in this controversy. When the defendant called upon the plaintiffs with respect to the matter, he was not at all interested in the purchase of an instrument of any particular make. He did not come to the plaintiff saying that he desired to purchase a fotoplayer manufactured by some particular firm. What he wanted and finally agreed to buy was an instrument which could be utilized for a particular purpose; and he relied upon plaintiff's representations and superior skill or judgment as to what that instrument should be. In any event, the record discloses that the contention that the contract of sale was for a specified article under its patent or trade name was not advanced in the trial court, and it cannot be urged for the first time on appeal.

4. I am also of the opinion that the contention that the evidence furnished no proper basis for a computation of damages may not be raised at this time. It is true that the questions propounded to the witnesses as to the value of the instrument were couched in the present tense; that is, the witnesses were not asked as to the value of the instrument at the time of the purchase, but were asked as to the then value. The defendant testified that the instrument could be used as a piano, but that the attachments were of no value, and that, used as a piano, it was worth \$500. Another witness for the defendant testified that the instrument in its then condition was valueless. These witnesses were both present at the time of the installation of the instrument, and had more or less to do with its operation and repair during the entire period it was in the hands of the defendant. Their testimony was not objected to on the ground now urged. The only objection urged to the testimony of either witness in the trial court was that the witness had not been shown to be qualified to testify as to value. No objection was made on the ground that the evidence related to the value of the instrument at the time of the trial, and that it should relate to the value of the instrument at the time of the purchase. The objection now made could readily have been obviated, if it had been presented at the time of the trial, and manifestly the plaintiff cannot at this time object to the evidence on grounds different from those raised in the trial court. It would also seem that no particular harm could result from

the questions as propounded. Whether a particular article is fit for a specified purpose can generally be determined only after trial or an attempt to apply it to the intended use. While the questions propounded to the witnesses as to the value of the instrument in controversy were in the present tense, and the answers related to the then value of the instrument, it would seem that this testimony, if true, also tended to prove that the instrument, at the time of its installation, was fit only for the same purpose which the testimony showed it to be fit for at the time of the trial.

Upon the record as a whole, I find no reason for disturbing the verdict or the judgment entered thereon. Hence I agree that the judgment appealed from should be affirmed.

BRONSON, J., concurs.

PETERS TRUST CO. v. DOUGLAS COUNTY. (No. 21556.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Banks and banking §312½, New, vol. 6A Key-No. Series—Shares of stock in trust company are distinct from capital stock or property and assets.

Shares of stock in a trust company are a distinct entity from the capital stock or property and assets of the corporation.

2. Taxation §128—Act relating to trust companies contemplates tax on stock in hands of stockholders and not on corporate property.

The tax contemplated by section 6343, Rev. St. 1913, as amended by chapter 108, Laws 1915, relating to the taxation of trust companies, is a tax upon the shares of stock in the hands of stockholders, and is not a tax upon the property of the corporation.

3. Taxation §127—"Capital stock," used in act taxing trust companies, held not to mean such in the aggregate, but shares in stockholders' hands.

The words "capital stock," as used in section 6343, supra, does not mean capital stock in the aggregate, but shares of capital stock in the hands of stockholders which are subject to taxation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capital Stock.]

4. Taxation §386(2)—When tax is laid on trust company's stock in hands of stockholders, no deduction of its securities is required.

When the tax is laid upon shares of stock of a trust company in the hands of the stockholders, no deduction of securities exempt from taxation, owned by the trust company, is required to be made by the laws of this state or by the laws of the United States.

Appeal from District Court, Douglas County; Sears, Judge.

Application by the Peters Trust Company to the taxing authorities of Douglas County to deduct for assessment purposes bonds of joint-stock land banks and certain United States Liberty Bonds. Application denied, and on appeal the action of the taxing authorities was affirmed by the district court, and the Trust Company appeals. Affirmed.

Stout, Rose, Wells & Martin, of Omaha, for appellant.

A. V. Shotwell and W. W. Slabaugh, both of Omaha, for appellee.

Heard before LETTON, DEAN, and DAY, JJ., and RAPER and GOOD, District Judges.

GOOD, District Judge. This is an appeal from the assessment for taxation of the shares of stock of the Peters Trust Company, appellant herein. Appellant requested the taxing authorities of Douglas county to deduct from the valuation for assessment purposes certain bonds of joint-stock land banks, organized under the laws of the United States, and certain United States Liberty bonds, which were at the time of the assessment owned by appellant. The request was denied, and on appeal the action of the taxing authorities was upheld by the judgment of the district court. This appeal is lodged to review that judgment.

It is conceded that both series of bonds are not subject to taxation as property in the hands of their owners. Appellant insists that including these bonds in the valuation of the shares of stock for assessment purposes, as required to be done under section 6343, Rev. St. 1913, as amended by chapter 108, Laws 1915, does in effect lay a tax on the bonds in the hands of their owners, and is contrary to the laws of the United States declaring such bonds exempt from taxation in the hands of their owners.

[1-4] The solution of the question presented depends on the interpretation given to said section 6343, as amended, which provided the same method and procedure for the assessment of the shares of stock of trust companies that are provided for the assessment of shares of stock of banking corporations. In the case of State v. First Nat. Bank, 103 Neb. 280, 171 N. W. 912, this court, after a thorough and elaborate presentation by able counsel, and after full investigation and careful consideration, construed said section in so far as it relates to the assessment of shares of stock of banking corporations. The reasons for the interpretation and authorities sustaining the conclusions reached are therein set forth and will not be repeated here. The principles therein stated and the conclusions reached are appli-

cable to and control the decision in this case. Following the rules laid down in *State v. First Nat. Bank*, supra, we hold that shares of stock in a trust company are a distinct entity from the capital stock, or property and assets of the corporation; that the tax contemplated by section 6343, Rev. St. 1913, as amended by chapter 108, Laws 1915, relating to the taxation of trust companies, is a tax upon the shares of stock in the hands of stockholders, and is not a tax upon the property of the corporation; that the words "capital stock" as used in section 6343, supra, does not mean capital stock in the aggregate, but shares of capital stock in the hands of stockholders which are subject to taxation, and that, when the tax is laid upon shares of stock of a trust company in the hands of the stockholders, no deduction of securities exempt from taxation, owned by the trust company, is required to be made by the laws of this state or by the laws of the United States.

The judgment of the district court is Affirmed.

CANIGLIA v. VACANTI. (No. 21561.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Appeal and error $\S$ 1003—Verdict supported by sufficient evidence not set aside because against weight of evidence.

A verdict of a jury, based upon sufficient evidence to support it, and which cannot be said by the court to be clearly wrong, will not be set aside merely because it appears to be against the weight or preponderance of the evidence, as the weight of the testimony is for the jury and not for the appellate court.

2. Appeal and error $\S$ 1001(1)—Verdict held supported by sufficient evidence.

Verdict held to be supported by sufficient evidence, and not a verdict which a reviewing court could say was clearly wrong.

(Additional Syllabus by Editorial Staff.)

3. Appeal and error $\S$ 969—That interpreter could not speak English well, resulting in confusion, will not warrant reversal where all matters were entirely cleared up.

An exception that the interpreter used by plaintiff and defendant without objection then to his qualifications could not speak English well and that confusion resulted is not sufficient for reversal where it appears that all difficulties and misunderstandings were entirely cleared up in taking the evidence and the final answers were intelligent and responsive.

Appeal from District Court, Douglas County; Sears, Judge.

Action by Joe Caniglia against Cirino Vacanti. Judgment for plaintiff, and the defendant appeals. Affirmed.

Platti & Wear and John F. Moriarty, all of Omaha, for appellant.

Switzler & Switzler, and Claudio Delitala, all of Omaha, for appellee.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETTON and ROSE, JJ.

FLANSBURG, J. On rehearing. Former opinion by Commissioner Cain.

This was an action at law by the plaintiff to recover money deposited with the defendant. The plaintiff recovered the full amount claimed. Defendant appeals.

[1, 2] The only question presented is the sufficiency of the evidence to sustain the verdict. The testimony discloses that the plaintiff arranged with the defendant to deposit moneys with the defendant, and it was agreed that the plaintiff could draw upon the deposit without previous notice and at any time that he pleased. Plaintiff claimed to be entitled to interest at 4 per cent., but whether or not there was an agreement for interest is one of the controverted issues between the parties. The record of deposits was kept in an ordinary bank passbook, and as each amount was given by plaintiff to the defendant for deposit a record of it was entered by the defendant in this book. The book was retained by the plaintiff. Defendant claims payment of \$1,000, made on December 29, 1918. The only issues of fact presented are the question of credit of \$1,000 for the cash payment claimed by defendant, and the question of whether or not it was agreed that the deposits should bear interest. The jury found in favor of the plaintiff on the issue of the \$1,000 payment, and also found that the plaintiff was not entitled to interest on deposits.

Plaintiff's testimony is a flat denial that the \$1,000 payment was ever made. It is admitted by all parties that no receipt was taken by the defendant to evidence such payment. The defendant points out that in another instance, where defendant had made a payment to plaintiff of \$380 out of the deposit fund, no receipt was taken, but in that instance the payment was made through the transfer of a bank check, and it was explained, and plaintiff says it was mentioned at the time, that no receipt was therefore necessary. The defendant, defendant's son, defendant's wife and her two sisters all testified, in direct contradiction to the plaintiff's testimony, to the effect that the \$1,000 payment had been made. The testimony of these several witnesses, however, as to the particulars of the transaction was not in entire accord. Thus there is a direct issue of fact, the solution of which depends entirely upon the credibility

of these witnesses. This issue was passed upon by the jury. It is impossible for the court to determine which witnesses told the truth. That was a matter within the peculiar province of the jury, and it cannot be said by this court that the decision of the jury is clearly wrong. *Plath v. Brunken*, 102 Neb. 467, 187 N. W. 587.

[3] The defendant lays particular stress upon the fact that the interpreter, used by the plaintiff, and also later used by the defendant without objection then to his qualifications, could not speak the English language well, and that confusion resulted. However, we have carefully read the record, and, though there seems to have been some difficulty at times in getting some questions or answers understood, it appears that in each instance the matter was entirely cleared up and that the final answers were intelligent and responsive to the questions made. There is nothing to impeach the interpreter, nor to show that, in any particular instance, he did not, in the end, accurately and truthfully interpret each of the matters presented to him.

We attach little significance to the fact that the jury refused to allow the plaintiff interest on the money. It does not follow, where the jury refused to allow a claim in one instance, based on plaintiff's testimony, that the jury must be held to have disbelieved plaintiff's testimony given to substantiate the other claim.

The former decision in this case, entered upon the opinion by the Supreme Court commission, is set aside, and the judgment of the lower court affirmed.

SHURTLEFF et al. v. SCHOENLEBER et al.
(No. 22012.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Corporations $\S$ 819—Directors of dissolved corporation whose duties as trustees are fixed by statute not entitled to instructions from equity court.

Where, by operation of law, the directors of a dissolved corporation are made trustees for its creditors and stockholders, and the statute specifically points out and designates their duties as such, they are not entitled to instructions from a court of equity.

2. Trusts $\S$ 271½—Rule that equity court will construe instrument creating trust and advise trustee held not applicable to statutory trust.

The rule that when the meaning of a will, deed, contract or other instrument which relates to or creates a trust, is doubtful, so that by reason thereof the trustee is embarrassed or exposed to danger in the execution of his trust, a court of equity will construe the instrument, declare its legal force and effect and give advice and instruction in regard to carrying

out of said trust, *held* not to apply in a case where the trust is created by statute and the duties imposed specifically stated.

3. Corporations $\S$ 819—Before equity assumes control of trustees of dissolved corporation, neglect, omission of duty, or abuse of trust must appear.

Under section 559, Rev. St. 1913, before a court of equity will assume control of the trustees of a dissolved corporation, it must appear from the petition of some person interested that they have been guilty of some neglect, or omission of duty, or abuse of trust. The petition examined and *held* not to state a cause of action under this section of the statute.

Appeal from District Court, Lancaster County; Morning, Judge.

Suit by W. Bruce Shurtleff and others, trustees of the Federal Building & Investment Company, a dissolved corporation, against L. K. Schoenleber and others. Demurrer to petition sustained, and on refusal to plead, case dismissed, and the plaintiffs appeal. Affirmed.

C. C. Flansburg, of Lincoln, for appellants.
G. H. Kisser, C. S. Wilson, Albert S. Johnston, and W. T. Stevens, all of Lincoln, for appellees.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., and DICKSON and TROUP, District Judges.

DICKSON, District Judge. This is a suit in equity begun in the district court for Lancaster county. The court sustained a demurrer to the petition, and appellants, plaintiffs below, stood on their petition, refusing to plead further, and the case was dismissed.

The petition alleges that prior to January 26, 1918, the Jen-Lan Company was a corporation engaged in buying, selling and exchanging real estate, with an authorized capital of \$50,000; that on January 26, 1918, the stockholders changed the name to Federal Building & Investment Company, and the articles of incorporation were amended increasing the capital stock to \$300,000, 2,400 shares being preferred and 600 shares being common, of the par value of \$100. Among other things there was a provision relating to the preferred stock, as follows:

"The holders of preferred stock shall be entitled to receive, when and as declared by the board of directors from the surplus or net profits of the corporation, yearly dividends at the rate of 7 per cent. per annum, payable semiannually on July and January 1st of each year. The dividends on such preferred stock shall be cumulative and shall be paid before any dividends on the common stock shall be paid or set apart, so that if in any year the dividends amounting to 7 per cent. shall not have been paid upon the preferred stock the deficiency shall be payable before any dividends shall be paid upon or set apart for the common stock.

"The holders of common stock shall be entitled to receive, when and as declared from the surplus or net profits of the corporation, yearly dividends at the rate of 7 per cent. per annum, payable semiannually on July and January 1st of each year, and such dividends shall likewise be cumulative, but shall not be payable until all dividends on the preferred stock for all previous years have been fully paid, or the company shall have set aside from its surplus or net profits a sufficient sum to meet the payment thereof.

"After all such cumulative dividends on the preferred and common stock have been fully paid and provided for, the board of directors may set aside such additional amount of the net surplus of profits of the corporation as they may deem proper as additional dividends. Of such amount so set aside 25 per cent. shall be paid to the holders of the preferred stock, 50 per cent. shall be paid to the holders of the common stock, and the remaining 25 per cent. shall be carried as reserve which is to be used to pay the 7 per cent. dividends on the preferred stock should said corporation during any one year fail to earn sufficient out of which to pay the 7 per cent. dividend on the preferred stock. Should said surplus fund accumulate it may be reduced and distributed by the order of the board of directors; and upon any distribution of said surplus fund, 50 per cent. thereof shall be distributed to the preferred stockholders and the remaining 50 per cent. shall be distributed to the common stockholders.

"In case of the dissolution of this corporation, the preferred stock shall be preferred to the extent of the par value together with any earned and unpaid dividends due thereon at the rate of 7 per cent. per annum. After such amounts have been paid to the preferred stock, the common stock shall then be paid its par value together with any earned and unpaid dividends due thereon at the rate of 7 per cent. per annum. Any surplus remaining thereafter shall be divided pro rata among the shares of the preferred and common stock."

The common stock merely certified that the holder was the owner of a given number of shares of stock, without any provision with regard to dividends. Under the amended articles of incorporation, 785¼ shares of preferred stock and 603 shares of common stock were issued, which were fully paid for at the time of the issuance. The purpose of the corporation was to build apartment houses, store buildings, including garages and dwelling houses. From the money derived from the sale of stock, property was purchased, repaired and remodeled, only two new buildings being constructed.

On January 20, 1920, the properties held by the corporation were appraised at \$382,500, with incumbrances of \$113,975.28. There were other assets at that time estimated at \$65,464.36, with liabilities, including corporate stock outstanding, of about \$157,855.66. At the annual meeting of the stockholders held March 2, the financial condition of the company was discussed, and the president was authorized to sell properties of the company for the purpose of liquidating outstanding obligations. Failing in this, a spe-

cial meeting of the stockholders was called for June 26 to consider the manner of dissolving and liquidating the corporation. At this meeting the stockholders voted to dissolve the corporation, and to assist in the liquidation two stockholders were elected to act in conjunction with the directors. At a meeting of the liquidating committee held September 11, 1920, it was agreed that the property could not be reduced to cash without great sacrifice, and it was proposed to divide the properties into groups and offer to permit the stockholders to surrender stock for same—the groups being composed of properties that had been handled as units by the company—and notice was then given to each stockholder that they could bid on said property, or make an offer to exchange stock therefor on the basis of \$200 a share for an equal interest in the groups of properties based on the appraised value.

It is further alleged in the petition that the appellants are mandataries of the court, created trustees by operation of law upon dissolution, holding the properties of the corporation in trust for the benefit of the creditors and stockholders; that they have been advised they have the right to divide and distribute the property of the corporation in specie under the terms of the statute, but have been unable to fix upon a definite plan or exact terms of liquidation in the exchange of stock for property; that the value of the two classes of stock depends upon what is to be treated as surplusage or earnings and the value of the property, and are in doubt as to the meaning of the trust and duties imposed upon them.

By supplemental petition it is alleged that, since the filing of the original petition, a special meeting of the stockholders was held; at this meeting the property was estimated to be of the value of \$151,850, and the company's indebtedness at about the sum of \$10,000; that since this special meeting which was held on November 20, 1920, an offer was made to appellants to exchange 176 shares of preferred stock for the equity in the property owned by the company and known as the Lincolndale property, subject to \$30,000 incumbrance thereon; and an offer of 100 shares of common stock for the Sewall street lots owned by the company, subject to \$10,000 incumbrance; and that 170 shares of preferred stock was offered for the equity in the Rollins building owned by the company, the incumbrance thereon being \$33,000; that the appellants desire the assistance of the court in making distribution and liquidation of this stock and transfer of this property, if the same can, in the judgment of the court, be done without prejudice to the rights of the other shareholders. It is alleged that parties owing notes given for stock desire to liquidate their stock by surrendering the same for the notes on the basis of the par value of the stock. And the ap-

pellants pray the aid of the court to take testimony and fix and ascertain the value of all the real estate and properties held and owned by the company at the date of its dissolution; that the court, by decree, fix and determine the method of liquidation; that the court authorize and empower the trustees to make the exchange of property for said stock, each transaction to be reported to the court and confirmed by the court; and that the court direct, by its decree, the method of meeting the obligations of said dissolved corporation; and for such other and further instructions as the court may deem necessary in discharge of the trust imposed upon them by law.

[1] The sole issue presented is whether the petition states a cause of action. To determine this question it is necessary to examine several provisions of our statutes.

Section 558, Rev. St. 1913, provides that the title to all real estate belonging to a dissolved corporation shall, at the time of the dissolution of the same, pass to the trustees of such corporation, who shall have full power and authority to sell and dispose of any such real estate in such manner and upon such terms as may be thought best for the interest of the creditors and stockholders; and upon such sale to make a good and sufficient title therefor.

By section 555, Rev. St. 1913, it is provided that, upon the dissolution of any corporation, the directors or managers of the affairs of such corporation shall be trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same, collect and pay the outstanding debts, and divide among the stockholders the moneys and properties that shall remain in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses.

By section 559, Rev. St. 1913, it is provided the trustees of any such dissolved corporation shall be subject to the control of the court, and be liable to be sued by petition in equity on behalf of any person interested on account of any neglect or omission of duty or abuse of trust.

[3] By statute it is made the duty of the appellants to settle the affairs of the corporation, and imposes upon them the duty of deciding every proposition that they, by their petition, seek to have the court determine. In bringing this action appellants evidently relied upon section 559 to give the court jurisdiction. That this section gives the court jurisdiction over the trustees of a dissolved corporation cannot be disputed. But when and how will it be exercised, and at whose instance? The statute specifically points out the duties of the appellants, and, if they fail in that regard, they are subject to the control of the court, and not otherwise. A careful analysis of the petition fails to show that the appellants have done or propose do-

ing that which is a neglect or omission of duty or an abuse of the trust imposed upon them by law. And until they have done or propose doing some such act, they are not subject to the control of the court. Besides the action must be on the petition of some person interested, and because of some neglect or omission of duty or abuse of the trust imposed upon them by law. The statutory right to sue by some person interested precludes the appellants from bringing the action authorized by this section. It therefore follows that the petition does not state a cause of action under this section.

[2] The appellants seek to invoke the rule that when the meaning of a will, deed, contract or other instrument which relates to or creates a trust is doubtful, so that by reason thereof the trustee is embarrassed or exposed to dangers in the execution of his trust, a court of equity will construe the instrument, declare its legal force and effect, and give advice and instruction in regard to carrying out of said trust. The statute creating the trust imposes no duty upon the appellants that is doubtful or that will embarrass them in the exercise of the duties devolving upon them. True, the petition recites that certain stockholders propose to surrender stock in exchange for certain properties, and others to surrender stock for notes given in settlement for stock and not paid, and that they have been advised by counsel that as trustees and by operation of law they have the right to divide and distribute the property of the corporation in specie under the terms of the statute, and that the value of the two classes of stock depends upon what is to be treated as surplus or earnings and the value of the property, and that they are in doubt as to what they should do, and pray that the court fix and determine the method of liquidation. In other words, that the court shall relieve the appellants of the duties and responsibilities imposed upon them by law, some of which are mandatory and others discretionary. We are of the opinion that the facts stated in the petition do not bring them within this rule. To follow such a rule in this case would be the discharging by the court of the duties imposed upon appellants by law and relieve them from responsibility in the liquidation of the affairs of the corporation. This the court will not do. The appellants are, by statute, made trustees of the dissolved corporation. Their duties are specifically pointed out, fixed and determined by law, and they are not entitled to apply to the court for instructions. To instruct them would be to direct that they follow the plain and explicit direction of the statute.

The petition does not state a cause of action, and the trial court properly sustained the demurrers thereto.

The judgment of the lower court is Affirmed.

SCOTT v. HABINCK. (No. 34267.)

(Supreme Court of Iowa. Oct. 25, 1921.)

1. Pleading $\S$ 433(2)—Pleadings showing that plaintiff had cause of action for damages for illegal detention or possession of land, and that sole controversy relates to the amount of damages, held sufficient.

Where the petition, answers, amendments, and substitutes made it clear that plaintiff had a good cause of action for unlawful detention or possession of land, and that the sole controversy related to the amount of the recovery, and all the parties in interest were before the court, recovery will be affirmed.

2. Damages $\S$ 1—Definition of term "damages."

"Damages" as used in discussing liability for violation of contract rights and obligations is but another word for compensation, an equivalent in money for loss sustained by the complaining party by reason of violation of such right or obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Damage—Damages.]

3. Vendor and purchaser $\S$ 196—Purchaser of land who resold before date for giving possession cannot recover rents and profits during time land was unlawfully kept by vendor.

Where purchaser of land resold before the date for giving possession, he cannot recover rents and profits during time the land was unlawfully kept by his vendor.

4. Vendor and purchaser $\S$ 351(1)—Purchaser who resold land may recover of vendor only what he had to pay to his vendees for unlawful detention of possession.

In an action for damages for withholding possession, where a purchaser resold land before the date for giving possession, he is limited in recovery to the amount which he paid his vendees because of the unlawful detention of the land by the vendor.

5. Assignments $\S$ 137—Evidence held insufficient to show an assignment of claim for damages.

In an action for damages against vendor for withholding possession by a purchaser who resold before date for giving possession, evidence held insufficient to show an assignment by the vendee of the purchaser of a claim for damages for unlawful detention of land by the vendor.

6. Vendor and purchaser $\S$ 215—On resale by purchaser before date for giving possession, vendee of purchaser acquired no right against the vendor for unlawful detention of possession.

Where purchaser of land resold before date for giving possession, his vendee, who had taken no assignment of the contract with the vendor, acquired no right against the vendor for unlawful detention of possession.

7. Vendor and purchaser $\S$ 345—Vendor cannot counterclaim for improvements on land, in action by purchaser for damages because of unlawful detention of possession.

In an action by the purchaser for damages on account of unlawful detention of possession, having resold before date for delivery, the vendor cannot counterclaim for expenses incurred in building sheds and feed boxes on the land.

Appeal from District Court, Monona County; O. O. Hamilton, Judge.

Action to recover damages for the use and occupation of land sold to plaintiff by appellant, who is alleged to have wrongfully refused to yield possession of the property for a period of two years. Plaintiff also demanded recovery on certain items more particularly mentioned in the opinion. By order of court or agreement of parties the cause appears to have been tried as in equity. There was a judgment for plaintiff for the sum of \$5,081.06 and defendant appeals. Modified and affirmed.

C. E. Underhill, of Onawa, and Sims & Kuehnle, of Denison, for appellant.

Prichard & Prichard, of Onawa, for appellee.

WEAVER, J. The pleadings in the case are voluminous, and we shall not attempt their extended statement. So much of the claims, defenses, and counterclaims as are material upon this appeal will readily be comprehended from the foregoing preliminary statement and the recitals hereinafter found.

On March 16, 1917, the plaintiff entered into a written contract with the defendant Barney Habinck, by which Habinck undertook to sell and convey to plaintiff a certain farm of 480 acres in Monona county, Iowa, on terms and conditions which need not here be set out, except to say that defendant thereby agreed to surrender possession on March 1, 1918. Litigation ensued between the parties, in which Habinck sought to avoid and set aside the contract, and, pending those proceedings, he remained in possession of the property. The suit resulted in a judgment sustaining the validity of the sale, and Habinck finally gave way and quit the premises about March 1, 1920, and thereupon plaintiff brought this action to recover the damages which he alleged he had suffered by reason of defendant's wrongful detention of the property; such damages specified in the petition being the rents and profits of the premises at the rate of \$4,800 per year. Plaintiff further alleged he had suffered other damages, in that defendant refused to unite with him in procuring or renewing a loan on the land as he had agreed in the contract, thereby putting the plaintiff to additional expense and increased interest. He also asked to recover the amount of a promissory note of \$280 and interest.

The defendant admits the making of the contract, the litigation resulting therefrom, its unfavorable termination, and his retention of the possession for the period of two years after the date prescribed therefor in the contract. He also admits the giving of the promissory note, and that it is unpaid. Among other defenses the defendant alleged in his answer that within a few days after the execution of the contract in March, 1917, and while defendant was still in rightful possession of the land, plaintiff resold the property to Peter Lamp, who in turn has since sold and transferred the same to O. M. Patrick, and by reason thereof plaintiff's damages recoverable from the defendant on account of the retention of possession by the latter are not to be measured by loss of rents and profits during that time, but by plaintiff's liability, if any, to his grantees, Lamp and Patrick, to whom he had been unable to deliver possession. It is further alleged that on February 23, 1920, the plaintiff settled and adjusted the claim and demand of said Lamp and Patrick for damages for the loss of the use and possession of the land during the two years in question, and received full release and discharge thereof from them by payment of the sum of \$2,500, which, it is insisted, is the limit of defendant's liability to plaintiff on any theory, but is not recoverable in this action.

Thereafter, and apparently to avoid the defense so pleaded, plaintiff amended his petition, alleging that after obtaining the contract with defendant, he (plaintiff) resold the land to Lamp, agreeing to deliver possession March 1, 1918, but by reason of defendant's refusal to surrender the premises plaintiff was unable to comply with his contract, and thereby became liable to Lamp or to Lamp and Patrick for damages, and to release himself from such obligation he was compelled to pay said purchasers the sum of \$2,500. He further alleges that in making said settlement it was orally agreed with Lamp that—

"Plaintiff should have all the right of said Lamp in and to any claim he might have had or did have against the said defendant or any other person by reason of his failure to secure possession of said premises."

The pleadings set up other claims and counterclaims as to which we shall not extend this opinion for particular statement. They relate to the item of extra interest, already mentioned, and to certain credits or counterclaims asserted by defendant for taxes paid for money expended for a few minor improvements, for interest paid and for damages for wrongful attachment. Except as hereinafter noted we discover nothing in the findings of the trial court in these respects to warrant our interference with its conclusions thereon. The only really debatable question presented by the record is upon the

measure of plaintiff's damages because of the defendant's refusal to give up possession as he had agreed. The appellant does not argue that he is under no legal liability to plaintiff for this failure to perform his contract. He in effect concedes that the result of the former litigation leaves him charged with such liability, but his contention here is: First, that a recovery of such damages cannot be had in this action; and, second, that if a recovery upon that item can be had herein, it is limited to the amount the plaintiff was compelled to pay, and did pay, to Lamp. We shall therefore address ourselves to these issues.

[1] I. The question whether the plaintiff's damages in this respect may be recovered in this action would be difficult to affirm under a more technical or more scientific system of pleading than such as prevails in this jurisdiction, where liberality of amendment before trial, pending trial, and after trial is the rule, and denial of amendment the exception makes it possible to keep the pleader of ordinary ingenuity from being turned out of court if his pleadings in their final form state a claim or defense of which the court may properly assume jurisdiction. Now in the instant case the pleadings, petition, answer, amendments, and substitutes do make it clear that plaintiff has a good cause of action, and that the sole controversy relates to the amount of the recovery. Such being the case, and all the parties in interest being before the court, there appears to be no sufficient reason why the dispute should not be here adjudicated. There should be an end to litigation somewhere. These parties have been clenched in legal combat now nearly four years; they have had their day in both trial and appellate tribunal; and we are not disposed to prolong the quarrel by dismissing the plaintiff out of court simply to have him re-enter with the same bone of contention at another door. We therefore overrule the objection to the sufficiency of the pleadings, and proceed to consider what is the proper measure of plaintiff's damages.

[2, 3] II. "Damages" as that word is used in discussing liability for violation of contract rights and obligations is but another word for compensation, and, generally speaking, compensation is an equivalent in money for loss sustained by the complaining party by reason of violation of such right or obligation. Plaintiff's original petition was a simple ordinary demand for the recovery of rents and profits alleged to have been lost to the plaintiff by the defendant's failure to surrender possession of the land which had been the subject of controversy between them. Had the case proceeded to trial upon the claim so pleaded, it is manifest he could not have been awarded a recovery thereon; for upon his own showing he was not entitled to the possession or use of the land at

any time during the period specified by him. Whatever right he might otherwise have acquired to such use and possession, he parted with by his resale to Lamp. The contract was still valid in his hands, giving him the right to enforce specific performance and compel a conveyance of title which would inure to the benefit of Lamp, but rents and profits as such are recoverable only by the person or persons in whom was the right of possession at the time they accrued. *Hall v. Hall*, 150 Iowa, 277, 129 N. W. 960.

[4] Though not entitled to rents and profits, plaintiff doubtless could under proper allegations recover from defendant for any loss or expense reasonably incurred by him in satisfying the just claims of Lamp on account of his being kept out of possession pending the former litigation. Such allegations appear to have been supplied by the amendment to the petition. It is there averred, and is shown by the evidence without serious dispute, that plaintiff did settle with Lamp and Patrick for their failure to get the possession and obtained release of their claims for their damages so sustained at an expense to him of \$2,500. That this entitles plaintiff to a recovery for the amount so expended by him there is no room for doubt. Is he entitled to anything more? We think not. This is an action to recover damages, an award of a money recovery sufficient to compensate the plaintiff for what he has lost by reason of defendant's retention of the possession of the land for the two years beginning March 1, 1918. Conceding, as it must be, that defendant's retention of the possession of the land after March 1, 1918, was in violation of his contract, and further conceding that before said date and at a time when defendant's possession was still rightful, plaintiff resold the land to Lamp with right of possession from and after said date, and that Lamp, being kept out of the possession for the period of two years, made claim against plaintiff for the damages so sustained, and that plaintiff settled said claim and was released therefrom in consideration of his payment of \$2,500, what has the plaintiff lost by reason of the breach of defendant's contract in this respect? What amount of money is required to make the plaintiff whole with respect to the injury done him by defendant's violation of his agreement? If the answer to this inquiry be not that his loss or injury is measured by what it reasonably cost him to satisfy the claim of Lamp, on what theory is he to be allowed more?

[5] Plaintiff answers the inquiry by saying that defendant was liable to Lamp (if not to plaintiff) for the full amount of the rents and profits of the land for two years, and that in the settlement between plaintiff and Lamp, the latter assigned his claim therefor to the plaintiff, and that by said assignment he (plaintiff) acquired a right to recover dam-

ages on that basis. It is true that plaintiff in amendment to his petition alleged his resale of the land to Lamp, and that by reason of defendant's violation of his agreement to surrender the premises on March 1, 1918, Lamp was kept out of the possession, and that plaintiff settled Lamp's claim for damages on that account by payment of \$2,500, and that in said settlement it was orally agreed the plaintiff "should have" all the right of Lamp in or to any claim he might have or did have against defendant or any other person by reason of his failure to secure possession of said premises. While this allegation is not without some evidence in its support, the record as a whole we regard as insufficient to establish it. The settlement referred to was reduced to writing in the following form:

"Contract of Settlement. We, the undersigned, hereby acknowledge full, complete and satisfactory settlement with J. E. Scott by reason of any damages we may have suffered by failure on his part to deliver to us possession of premises purchased by the said J. E. Scott from Barney Habinck and by him sold to Peter Lamp and by Peter Lamp to O. M. Patrick. This, however, is not to be considered as a settlement of any matters of settlement between the said Peter Lamp and O. M. Patrick concerning their transactions in this matter with each other, but is merely a settlement between these said parties and J. E. Scott and his associates. Dated this 23d day of February, 1920, at Onawa, Iowa. [Signed] Peter Lamp. O. M. Patrick."

It would seem strange that if the agreement in fact made contained such a stipulation or condition, or if plaintiff supposed he was to acquire from Lamp any right to recover from defendant anything more than reimbursement for the damages paid Lamp he would have been careful to have it expressed in the writing. Not that an oral assignment, if Lamp had then any assignable right or cause of action against defendant, would not have been valid, but that its omission from the writing is a significant circumstance, indicating that the claim now asserted was an afterthought. Lamp himself, answering a leading question by plaintiff's counsel concerning the alleged understanding with plaintiff, answered, "Yes; he should have all the right, entitled to all that." Patrick as a witness does not mention the matter. Plaintiff's counsel, testifying as a witness, says that—

In the negotiation for this settlement "the question then arose as to whether or not there might be some trouble on the part of Mr. Scott in bringing this action, provided that he settled with these parties. We did not think that it would be a legal objection, but I wanted to save any objection, and it was agreed that part of the consideration for the \$2,500 was that Mr. Scott should have all of the rights of Mr. Patrick and Mr. Lamp, and was to have

an assignment of all the rights of Mr. Lamp and Mr. Patrick against Habinck, so that if any question arose Mr. Scott would have been entitled to maintain this action in his own name. After this was agreed upon I asked Mr. Underhill to have Mr. Lamp make this assignment. Mr. Lamp had gone out, and Mr. Underhill said that he would get the assignment in writing, and it was the agreement at that time between myself, Mr. Lamp and Mr. Patrick and Mr. Jacobson that Mr. Scott was to have all of the rights of action against Mr. Habinck that they would have, or did have."

Mr. Underhill, who represented Mr. Lamp in that transaction and was called as a witness for plaintiff, testified:

"Q. Do you remember at that time what the agreement was between Mr. Lamp and myself acting for Mr. Scott and Mr. Jacobson as to Mr. Scott's having all of the rights of the defendant Lamp and Patrick against Mr. Habinck in relation to these matters? A. Well, I do not know that part exactly. I remember some of the things; I could state; I know it was talked over at the time that Mr. Lamp—I think that Mr. Scott joined in the case against Mr. Habinck for damages; and I think it was also talked that Mr. Lamp asked upon my advice, for this settlement, and that they could then recover for all of the damages they were entitled to from Mr. Habinck; that is my understanding of the substance of the talk. Q. Isn't it true that after this oral agreement was made I spoke to you about getting an assignment from Mr. Lamp, and that you said you would try and do so, or that you would do so? A. No; I don't remember about that. If you say so, you probably did. I don't remember that."

It will be seen at once that the substance of the entire showing, giving it its most natural construction, is that the question then in the minds of the parties was whether if plaintiff settled with Lamp and paid him the damages demanded, he (plaintiff) would thereby acquire a right to reimburse himself by a recovery from defendant, and the suggestion discussed was whether that right would be more effectually guarded by an assignment. The parties to the settlement were both represented by experienced lawyers, who, we must assume, knew that no assignment was necessary to sustain such right of action and let the subject pass without that formality.

[8] Again it is a pertinent inquiry what right of action was then vested in Lamp to recover the rents and profits from defendant which he could assign to plaintiff. Lamp's purchase was direct from plaintiff. He had

taken from plaintiff no assignment of the contract with the defendant. There was no privity of contract between him and defendant. He looked to plaintiff alone to deliver him the possession, and to plaintiff alone he looked for damages occasioned by its non-delivery. That claim he settled, and gave plaintiff a full and effective discharge, and by so doing the latter became at once vested with a right of action against defendant for the recovery of compensation, and nothing more.

[7] III. The plaintiff has taken a counter appeal from so much of the decree below as gives the defendant credit for expense incurred by him in constructing certain sheds and feed boxes on the farm. These items total the sum of \$471.60. Although these expenses were incurred without the knowledge or consent of the plaintiff, yet if made in good faith a credit therefor in an accounting for rents and profits would not be inequitable. But as we find plaintiff not entitled to recover rents and profits as such, and we confine his recovery to compensation for the damages he has sustained in making good his sale to Lamp, we think his recovery should not be diminished by charging with these items.

It follows from what we have said that the findings of the trial court should be modified, as follows:

1. The item numbered 2 for rental value of the land is set aside, and in lieu thereof the defendant will be charged with damages for failure to deliver possession in the amount of \$2,500, with interest thereon at 6 per cent. from February 23, 1920, the date of the payment of damages by plaintiff to Lamp.

2. The finding numbered 6 will be modified by striking therefrom the items of credit allowed the defendant for constructing a shed, \$298, and for cement boxes, \$173.60.

The foregoing modifications being made, and all other findings of the trial court in favor of plaintiff being sustained, all as of the date when the judgment was entered below, the record indicates a recovery for plaintiff, as we compute it, in the sum of \$2,284.31. The judgment of the district court as thus modified will stand as of the date of its entry, January 21, 1921. Costs of this court will be apportioned and taxed one-half to each party.

Modified and affirmed.

EVANS, C. J., and DE GRAFF and PRES-
TON, JJ., concur.

CAMARAS v. SIOUX CITY et al.
(No. 34345.)

(Supreme Court of Iowa. Oct. 25, 1921.)

1. Statutes $\S$ 121 (1)—Section of act as to jitney licenses held not unconstitutional as not embraced in title.

Const. art. 3, $\S$ 29, requiring the subject of a statute to be expressed in its title, does not render unconstitutional section 4, c. 115, Acts 39th Gen. Assem.; the title of the act dealing with the licensing, regulating, and limiting the operation of so-called jitney busses, and section 4 thereof authorizing the city or town council to grant or reject an application for license to operate a jitney bus.

2. Constitutional law $\S$ 48—Acts not held invalid except in clear case.

The judicial power to declare an act of the Legislature unconstitutional and void will not be used unless in a clear case.

3. Constitutional law $\S$ 48—Acts construed to uphold validity.

The court should so construe an act as to avoid the necessity of declaring it unconstitutional.

Appeal from District Court, Woodbury County; C. C. Hamilton, Judge.

Action in equity to enjoin defendants from interfering with his operation of a so-called jitney bus on the streets of Sioux City, and to enjoin defendants from prosecuting him for the violation of an ordinance passed pursuant to chapter 115 of Acts 39th Gen. Assem. Appellant's contention is that section 4 of that act is unconstitutional, for that the subject thereof is not expressed in the title to the act as required by section 29, art. 3, of the Constitution of Iowa. Appellant also asks that the city authorities be required to issue to him a license to operate his bus. He claims this right under what he alleges to be the valid provisions of the act. The matter was first presented to the district court for a temporary writ. After a hearing plaintiff was denied the relief asked. Thereafter defendants filed an answer, reciting the conditions existing in Sioux City in regard to a controversy between the City and the public and the street cars, and in regard to congestion of the streets, public safety and welfare, and so on, and set up its defenses. The plaintiff has appealed. A stipulation has been made by which this court is to finally pass upon the question presented as though the hearing had been on the merits. Affirmed.

Carlos W. Goltz, of Sioux City, for appellant.

Fred H. Free and E. G. Smith, both of Sioux City, for appellees.

Kindig, McGill, Stewart & Hatfield, of Sioux City, amici curiæ.

PRESTON, J. Several questions were raised in the district court, and some of them have been argued in this court. In a general way, these questions, outside the question raised in regard to the title of the act of the Legislature, are that section 4 of the act, giving to the city council power to accept or reject all applications, is void because contrary to public policy. Appellant questions the motives of the council in rejecting appellant's application, and argues that the council cannot arbitrarily reject. Appellant also contends that the words "licensing," "regulating," and "limiting" the operation, as used in the act, do not mean prohibition. On the other hand, it is contended by appellees that the power to regulate is so broad that it includes the power to prohibit, under some circumstances, and further that a discretion is lodged in the city council as to whether an application for license shall be granted or rejected, and that therefore the question as to the motives of the council in rejecting may not be questioned. Appellees also contend that, irrespective of the provisions of section 4 of the act in question, it has authority, under the provisions of the Code, and under section 2 of the act in question, and under the police power, to reject the application of appellant to use the streets for commercial purposes as a common carrier for hire. Appellees also contend that the act of the Legislature in question is valid as a whole, and that under it the council had the right to reject appellant's application. In a general way these are the questions at first argued. There may be others, but counsel for appellant has stated in oral argument that all questions except the one before stated, in regard to the title of the act, are waived. That seems to be the question most relied upon in the printed argument. In so far as the argument at this point involves a construction of the act in that respect, we need not, in view of the situation as it now exists discuss that question. The words referred to may properly be considered as bearing upon the one question now in the case.

It appears that appellant duly filed in the office of the clerk of the district court a bond, and that he filed his application for a license with the city clerk, stating the type of motorcar or jitney bus to be used by him, the license number thereof, and the other matters required, and that such application for a license was rejected by the city council. The application also stated the streets upon which he intended to operate, and in his application stated that, if the routing stated was not acceptable to the council, he would accept any other reasonable routing which the council might prescribe. It is conceded by appellant that for the purposes of this case he has no vested right in the streets or in their use to carry on the business contem-

plated. It seems to be conceded by appellant that, if section 4 of chapter 115 is valid, it gives the city council a discretion to grant or reject an application for license, and, if such discretion has been properly exercised, mandamus will not lie to control such discretion. The council has acted, by rejecting appellant's application. This brings us back to the one question in the case.

[1] 1. Appellees call attention to the Constitution of 1846, article 3, § 26, which reads that every law shall embrace but one object, which shall be expressed in the title. This was changed later and now reads (article 3, § 29):

"Every act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

As said, it is appellant's contention that under this section 4 of the Acts of the Thirty-Ninth General Assembly, before cited, is invalid, and that the balance of the act is valid. Appellees also point out that the statutory provision in regard to ordinances (section 3575, Compiled Code) provides that—

"No ordinance shall contain more than one subject, which shall be clearly expressed in the title."

It was pointed out in *Town of Cantril v. Sainer*, 59 Iowa, 26, 12 N. W. 753, a case cited by appellant, that the law requiring the subject of an ordinance to be clearly expressed in the title is more explicit than the constitutional requirement in regard to the acts of the Legislature. The title to the legislative act in question reads:

"An act repealing section seven hundred fifty-four a (754a) Supplemental Supplement to the Code 1915 (C. C. sec. 3814) and enacting in lieu thereof provisions for the licensing, regulating and limiting the operation of so-called jitney busses and all motor vehicles operating and engaged in carrying passengers for hire on a plan similar to that followed by street railway companies, upon the streets and avenues of cities," etc.

Section 1 contains the power granted to regulate and license. Section 2 provides that the city or town council may prohibit jitney busses from operating on streets upon which are operated street car lines, etc. Section 3 provides that no such license shall be granted unless and until the applicant therefor shall file a bond and an application for such license, stating certain things. Section 4 reads:

"*Rejection or Granting of Application.*—That the city or town council may grant or reject the said application and if the said application is rejected other applications may be made and likewise the city or town council may grant or reject the same."

Section 5 provides a penalty for operating a bus upon the streets without said license. To sustain the contention that section 4 of chapter 115 is unconstitutional appellant cites *Town of Cantril v. Sainer*, supra, *Rex Lumber Co. v. Reed*, 107 Iowa, 111, 77 N. W. 572, and *Henkle v. Town of Keota*, 68 Iowa, 334, 27 N. W. 250. The *Sainer* Case had to do with an ordinance the title of which had reference to regulating the use and sale of intoxicating liquors, but did not refer to the entire prohibition of such use and sale, whereas the body of the act did entirely prohibit. The question of prohibition was not referred to in the title, and it was held that the ordinance was invalid because the subject of prohibition was not clearly expressed in the title, and for the further reason that the ordinance went further than the statute then authorized. In the *Rex Lumber Co. Case* the title of the act was to amend a certain section of the statute relating to the lien of taxes between vendor and vendee, which section made taxes on real estate a lien on the real estate, and it was held not sufficient to support a provision to aid in collection of taxes where a stock of goods was sold and authorizing the auditor on notice to change the name as to the owner, because the title did not indicate that additional means of collection are given to public officers, though the statute in fact did that; in other words, there was an attempt to amend a specific section of the statute. To comply with the statute the amendment would necessarily be confined to the scope of the section which it purported to amend; otherwise the amendment would embrace matters not germane to the matters covered by the original section. A somewhat similar situation arose in the *Henkle Case*, and in *Des Moines National Bank v. Fairweather*, 181 N. W. 459. Concededly the purpose of the constitutional provision is to prevent surprise in legislation. The argument of appellant for claiming that section 4 is invalid is substantially this: The only purpose of the act as expressed in its title is to license, regulate, and limit the operation of busses, and not to exterminate or prohibit them. It may be more a question of granting or rejecting a license or an application for a license than prohibiting the operation of busses. If the application is rejected, that would, in a sense, prohibit. But that has to do with the question of the construction of section 4. The question is: Is the subject of the act expressed in the title or "properly connected therewith"? Clearly the question of licensing busses is expressed in the title, and section 4 relates to an application for a license referred to in section 3 of the act. It is true, as contended by appellant, that section 4 does not use the word "prohibit." Whether that is the meaning of section 4 will be determined when the time comes to pass upon that question. When that time comes we may hold that section 4

gives the council a discretionary power to grant or reject an application for a license. The title refers to the subject of licensing busses. Section 4 refers to the same thing. Clearly there was no concealment or ambush in regard to the matter referred to in section 4. No member of the Legislature or any one else could, by reading the title to chapter 115, be misled into thinking that section 4 referred to something else not connected with or germane to the question of licensing so-called jitney busses.

[2, 3] The courts are slow to exercise the power of declaring an act of the Legislature unconstitutional and void, and the power will not be used unless in a clear case. It is the duty of the court to give such construction to an act, if possible, as will avoid this necessity and uphold the law. State ex rel. Weir v. County Judge, 2 Iowa, 280; Wise v. Palmer, 165 Iowa, 731, 743, 147 N. W. 167; State v. Hutchinson Ice Cream Co., 168 Iowa, 1, 147 N. W. 195, L. R. A. 1917B, 198. It is not practicable and wholly unnecessary to review the numerous cases on this subject. As sustaining our conclusion on the main point, we cite a few of the many cases. State v. Forkner, 94 Iowa, 733, 62 N. W. 683; Cook v. Marshall County, 119 Iowa, 384, 396, 93 N. W. 372, 104 Am. St. Rep. 283; City of Newton v. Supervisors, 135 Iowa, 27, 30, 112 N. W. 167, 124 Am. St. Rep. 256; Schultz v. Parker, 158 Iowa, 42, 52, 139 N. W. 173, Ann. Cas. 1915D, 553; State v. Hutchinson Ice Cream Co., supra; Huston v. Des Moines, 176 Iowa, 455, 467, 156 N. W. 883; State v. Hill, 177 Iowa, 270, 273, 158 N. W. 518; Stajcar v. Dickinson, 185 Iowa, 49, 53; 169 N. W. 756; Johnson v. Harrison, 47 Minn. 575, 50 N. W. 923, 28 Am. St. Rep. 382; Walter v. Town of Union, 33 N. J. Law, 351; Montclair Township v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431; Cohn v. People, 149 Ill. 486, 37 N. E. 60, 23 L. R. A. 821, 823, 41 Am. St. Rep. 304, 25 R. C. L. 843-849.

The judgment of the district court is affirmed.

EVANS, C. J., and WEAVER and DE GRAFF, JJ., concur.

CITY OF DES MOINES (COTTAGE GROVE AVE, PRESBYTERIAN CHURCH et al., Interveners) v. MANHATTAN OIL CO. et al. (No. 33971.)

(Supreme Court of Iowa. Oct. 27, 1921.)

1. Municipal corporations §621—No abuse of discretion in rescinding permit to build filling station in restricted residence district.

Where a lessor, to whom was granted a permit to build a gasoline and oil filling station, had not acquired title to the land leased

for such purpose, the station had not been constructed, and, when application for permit was made, there was pending before the city council, as the applicant knew, a petition for a restricted residence district, the council did not abuse its discretion in rescinding the permit with reasonable promptness.

2. Constitutional law §81—Gasoline and oil filling station may be enjoined in exercise of police power, though not nuisance per se.

While the prevention of nuisances is a proper ground for the exercise of the police power in the interest of the public welfare, that is not the limit of such power.

3. Constitutional law §81—"Police power" defined.

The "police power" is that reserve element of sovereignty from which is demanded such reasonable supervision and regulation as the state may impose to insure observance by the individual citizen of the duty to use his property and exercise his rights and privileges with due regard to the personal and property rights and privileges of others.

4. Constitutional law §81—Subject of police regulation need not be inherently wrong, nor does fact it restricts individual citizen's rights render it void.

The state, through its Legislature, may select the subjects of and prescribe rules for the enforcement of police regulations, and to justify the exercise of such authority, it is not necessary that the subject thereof be inherently wrong, nor does the fact that such regulations may restrict the individual citizen in the use of his own property, or even in his liberty, render them void.

5. Constitutional law §70(3)—Courts cannot interfere with police regulation unless clearly unconstitutional, or not within legislative jurisdiction.

Since the power to designate the subject of police regulation rests in the state alone, if a given statute is not clearly repugnant to some constitutional guaranty, the courts cannot interfere, unless the subject of such regulation is not within the legislative jurisdiction, or the statute has no substantial relation to the public welfare.

6. Constitutional law §81—Police power extends to public convenience and prosperity as well as health and morals.

The police power extends to the promotion of the public convenience and general prosperity, as well as to the promotion of the public health and morals.

7. Municipal corporations §601—Ordinance reasonably in accord with statute authorizing building restrictions in exclusive residence districts held valid.

In view of the breadth and character of the powers delegated by the Legislature to cities and towns under Code, §§ 680, 695, 696, 698, 699, 710, 711, 714, 715, with respect to the safety, health, prosperity, etc., of their inhabitants, an ordinance in reasonably strict accord with Acts 37th Gen. Assm. c. 138, authorizing the creation of restricted residence districts, and the prohibition of the erection of buildings oth-

er than residences, schoolhouses, churches, etc., therein is valid, unless the act itself is void.

8. Constitutional law §60, 206(1), 212, 253—Eminent domain §2(1)—Constitutional guaranties and restrictions not designed to limit police powers.

The constitutional guaranties against deprivation of liberty and property without due process of law, taking private property for public or private use without compensation, abridging the privileges and immunities of citizens of the United States, denying them the equal protection of the law, and prohibiting delegation of legislative power to private persons, were not designed to limit the police powers of the state except in so far as they implicitly forbid the doing of certain things.

9. Eminent domain §2(1)—Prohibiting other than certain kinds of buildings in restricted residence districts does not take property for public use without compensation.

Acts 37th Gen. Assem. c. 138, authorizing cities to create restricted residence districts and prohibit the erection therein of buildings other than residences, schoolhouses, churches, etc., is not objectionable as taking property of owners desiring to erect a gasoline filling station to public use without compensation, nor as taking private property for private use.

10. Constitutional law §60—Act requiring cities to create restricted residence districts on petition of owners held not to delegate authority to private persons.

Acts 37th Gen. Assem. c. 138, requiring cities on petition of 60 per cent. of the property owners in a given area to create a restricted residence district, is not objectionable as delegating legislative authority to private persons.

11. Municipal corporations §625—Notice to property owners not prerequisite to creation of restricted residence district.

Acts 37th Gen. Assem. c. 138, authorizing cities to create restricted residence districts and prohibit and abate as nuisances buildings other than residences, schools, churches, etc., therein, without a permit, is not so clearly unreasonable as to be held void because of the absence of any requirement for notice to property owners affected, the division of the city into districts for any lawful purpose, such as voting precincts, sewer districts, city wards, fire limits, and restricted areas subject to peculiar police regulations, not being a matter requiring notice.

12. Constitutional law §39—Municipal corporations §625—Law or ordinance not void or unreasonable because forbidding acts theretofore innocent and lawful.

A statute, city ordinance, or police regulation is not void or unreasonable because it forbids acts theretofore innocent and lawful.

13. Municipal corporations §626—Police regulation not objectionable because applicable to segregated area.

It is not a valid objection to a police regulation that it is made applicable to a segregated area or district.

14. Municipal corporations §600—State, directly or through municipalities, may regulate use and occupation of real estate in cities.

A state may, directly or through delegation of authority to municipalities, adopt and enforce reasonable regulations concerning the use and occupation of real estate in cities and towns.

15. Municipal corporations §601—Establishment of restricted residence districts without permit held within police power.

An ordinance establishing a restricted residence district and prohibiting the erection of buildings therein other than residences, schoolhouses, churches, etc., without a permit from the city council, being a regulation, and not a prohibition, is a legitimate exercise of the city's police power.

16. Constitutional law §48—Statute not held unconstitutional unless clearly so.

All presumptions being in favor of the validity of an act of the Legislature, a statute will not be held unconstitutional unless its contravention of constitutional guaranties is so clear, plain, and palpable as to leave no reasonable doubt, and, where the language is reasonably susceptible of different meanings, the courts will lean to that construction which is consistent with its validity.

Appeal from District Court, Polk County; Lawrence DeGraff, Judge.

The opinion sufficiently states the case. Reversed and remanded.

C. W. Lyon, Edwin J. Frisk, Chauncey A. Weaver, and Russel Jordan, all of Des Moines, for appellants.

Blake & Blake, of Des Moines, for interveners.

N. E. Coffin and D. Cole McMartin, both of Des Moines, for appellees.

Stipp, Perry, Bannister & Starsinger, of Des Moines, amici curiæ.

WEAVER, J. Suit in equity by the city of Des Moines to enjoin the defendants from the erection and maintenance of a gasoline and oil filling station upon certain property owned by the defendant Macomber, and leased by him for that purpose to his codefendants, Manhattan Oil Company and J. P. Howe. In support of plaintiff's demand for injunctive relief, it is alleged that the property in question is within a restricted residence district, established by the city under authority of chapter 138, Acts 37th G. A., and the further allegation that the maintenance of such gasoline and oil filling station and the carrying on of said business will be detrimental to the health, comfort, and general welfare of the people making their homes in said district, and, unless enjoined as prayed, will constitute a nuisance.

The defendants deny the constitutional validity of the statute above cited, as well

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as of the city ordinance purporting to establish the restricted district, and deny that the maintenance and operation of the proposed station will create a nuisance. Other matters are pleaded which will have our attention in the progress of this opinion.

Before the cause came on for trial, the Cottage Grove Avenue Presbyterian Church, together with several other owners of property in the district, intervened, and united with the plaintiff in its prayer for an injunction. There was a trial to the court, which found for the defendants and dismissed the petition, and plaintiff appeals.

It appears without controversy that on or about September 8, 1919, a movement was begun by resident property owners within the area bounded by Twenty-Fourth street, Twenty-Fifth street, School street, and Kingman avenue in the city of Des Moines to have the same made a restricted residence district as provided in the statute already mentioned. A petition addressed to the mayor and council of the city was prepared, signed by 12 of the 14 property owners within the specified area, asking to have the district established. The petition was filed with the city clerk on September 10, 1919, was in due course read to the council, and by it was referred to the street department of the city government. While the matter was thus pending before the council, the defendant Macomber, having acquired some sort of contract or arrangement for the purchase of the lot now in question, entered into a tentative agreement with his codefendants herein to lease the lot to them for the site of a gasoline and oil station, such agreement being conditional upon Macomber's procurement from the city of a building permit for that purpose. Macomber, with knowledge of the pendency of the application to establish the restricted district, made application for the desired building permit, and thereafter on September 19, 1919, the council, without having yet acted upon the petition of the property owners, passed a resolution granting the permit, but on September 24, 1919, adopted another resolution rescinding it. On October 1, 1919, the council enacted the following ordinance:

"An ordinance designating and establishing a restricted residence district, and providing a penalty for the violation thereof.

"Whereas, the General Assembly of the state of Iowa has authorized cities under the commission form of government upon petition of sixty (60) per cent. of the owners of real estate in a given district residing in said city, to establish restricted residence districts; and whereas, on the 10th day of September, 1919, a petition with the requisite number of signers was duly filed with the city clerk and presented to the city council, asking that certain territory between Kingman Boulevard and School streets on the north and south, and between Twenty-fourth and Twenty-fifth streets on the east and

west, be established as a restricted residence district:

"Now therefore, be it ordained by the city council of the city of Des Moines:

"Section 1. That the block bounded on the north by Kingman Boulevard, on the west by Twenty-Fifth street, on the south by School street, and on the east by Twenty-Fourth street, be and the same is hereby designated and established as a restricted residence district.

"Section 2. That no buildings or other structures, except residences, schoolhouses, churches and other similar structures shall be hereafter erected, reconstructed, altered, repaired or occupied within said district without first securing from the city council a permit therefor; nor shall any such permit be granted when sixty (60) per cent. of the owners of real estate in said district residing in said city object thereto.

"Section 3. Any building or structure erected, altered, repaired or used in violation of any of the provisions of this ordinance, is hereby declared to be a nuisance, and it is hereby made the duty of the city prosecutor to prosecute all persons violating the provisions of this ordinance with respect to the erection, reconstruction, altering, repairing or occupying any building or other structure in said district without a permit, and in all cases where the punishment by fine fails to abate the nuisance, he shall cause to be brought in the district court in and for Polk county an action for the abatement thereof. All such prosecutions shall be in the name of the city of Des Moines.

"Section 4. Any person, firm or corporation violating any of the provisions of this ordinance shall be guilty of misdemeanor, and upon conviction shall be subject to a fine of not less than one dollar, nor more than one hundred dollars for each offense."

There is no dispute concerning the facts thus far related. It further appears in evidence that at the date of the application to the city council for the establishment of the restricted district, the area included therein was occupied and used exclusively for residence purposes, and was quite generally improved with substantial and comfortable homes. The corner lot in question is at an intersection from which streets radiate in five directions. Over and upon these streets is a large amount of travel, and the street traffic at this point is often congested to a considerable degree, and collisions and accidents resulting therefrom have occurred on several occasions. On one corner is a small public park frequented by children and others for purposes of recreation. Here also is the site of the Cottage Grove Church which has a new and valuable house of worship where its congregations and subsidiary organizations and societies gather for worship and instruction. The district is located at a considerable distance from the main business section of the city, but, as is not unusual in towns of considerable size, there are nearer at hand small business establish-

ments or shops scattered here and there where they can find lodgment in or around residential neighborhoods. Of these the only one which can be said to closely approach the district in question is a building used as a telephone exchange one block south of the street intersection already described.

The business of maintaining the proposed filling station involves the keeping of large quantities of gasoline and oil, and dispensing it in retail quantities to owners and drivers of auto cars. The gasoline is stored in steel tanks of about 1,000 gallons capacity each, which are set in the ground with tops or covers a little below the surface. The oils are kept in containers above the surface. The method of drawing these articles from their containers and transferring them to the cars of the buyers is a matter of common observation. As is also well known, gasoline is highly inflammable, and a violent explosive. The characteristic smell of gasoline when exposed is familiar to every one. The same is true, though perhaps in less noticeable degree, of lubricating oils. It is the claim of the appellees that their methods of storing, keeping and handling these substances is not only safe, but is such as to suppress or prevent all disagreeable odors, and that the business may be carried on without becoming a source of inconvenience or discomfort to the inhabitants of the neighborhood, or creating a nuisance in any proper sense of the word. On the other hand, the testimony on part of appellants tends to show that the offensive odors created by the conduct of a filling station of this character contaminates and pervades the air in their neighborhood to marked degree, while the drip of stale oil from motor-cars being filled and from others waiting their turn to be served befouls the streets and driveways.

Plaintiffs also contend that the maintenance of the station and the carrying on of such business will serve to increase the congestion of travel and vehicles at that point, and accentuate the noise and confusion of ordinary street traffic to the disturbance of the inhabitants, as well as of the church congregations.

Other matters are mentioned in the testimony, but the foregoing is sufficient to indicate the nature of the controversy and give point to the arguments of counsel on either side. The trial court found for the defendant, and dismissed the petition.

For the appellee, counsel have directed their principal argument to the proposition that the city ordinance establishing the restricted residence district and the statute purporting to authorize such action are void, as being in violation of the guaranties of the Constitution of our state and of the Constitution of the United States. It is also con-

tended that the city council, having once adopted a resolution granting a building permit, is without power or authority to rescind it.

[1] I. Referring first to the last proposition above mentioned, we are disposed to hold that the adoption of the resolution to grant the building permit did not have the effect to confer upon the property owner or his lessees a vested right which could not be canceled or recalled, under the circumstances here shown. The lessor had not yet acquired title to the property, and did not acquire it until after the permit had been rescinded. The proposed filling station had not been constructed, though it is claimed certain material intended for that use had been deposited there. When the application for permit was made, there was then pending and undisposed of before the council, as the applicant well knew, the petition of the property owners within this area to make it a restricted residence district, and if the council, having adopted the resolution to grant the permit under such circumstances, concluded it had acted inadvertently or improvidently, or without proper regard for the rights of the petitioners for a restricted district, rescinded the resolution with reasonable promptness, we are of the opinion it did not exceed its authority or abuse its discretion. *Salem v. Maynes*, 123 Mass. 372.

[2] II. Considerable attention has been given by counsel to the proposition that a gasoline and oil filling station is not at common law a nuisance per se. For the purposes of this case the point thus made may be conceded, but it is by no means decisive of the appeal. Neither the plaintiff city nor the interveners base their claim of right to the relief demanded upon an alleged right to condemn or abate or enjoin a nuisance as at common law, but upon a police regulation authorized and provided for by act of the Legislature and city council. The validity of such legislation is the one question upon which the rights of the parties must turn, and while the prevention of nuisances is a proper and well-recognized ground for the exercise of the police power in the interest of the public welfare, it does not bound or limit the scope of such power as will be seen by reference to the authorities cited in the following paragraph.

[3] III. We shall not undertake any comprehensive definition of the police power of the state. No such definition has yet been accomplished by any court, nor is it possible or desirable that it should be accomplished. With the changing conditions necessarily attendant upon the growth and density of population and the ceaseless changes taking place in method and manner of carrying on the multiplying lines of human industry, the greater becomes the demand upon that re-

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serve element of sovereignty which we call the police power for such reasonable supervision and regulation as the state may impose, to insure observance of the individual citizen of the duty to use his property and exercise his rights and privileges with due regard to the personal and property rights and privileges of others. See *Carr v. State*, 175 Ind. 241, 93 N. E. 1071, 32 L. R. A. (N. S.) 1190; *State v. Timber Co.*, 75 Wash. 588, 135 Pac. 645, L. R. A. 1917D, 10. Such duty, even though it involves restrictions upon the so-called natural rights of every individual, is the first and most imperative obligation entering into what we call the social compact. Without it there can be no such thing as organized society or civilized government.

[4] Naturally what regulations may reasonably be required or imposed for that purpose by the constituted authorities varies with the varying conditions with which our lawmakers have to deal and subject only to constitutional limitations, the state, acting by its Legislature, has the right to select the subjects of regulation and prescribe rules for making such regulations effective. To justify the exercise of such authority it is not necessary that the subject thereof shall be inherently wrong; nor is the fact that such regulation may operate to restrict the individual citizen in the use of his own property, or even in his liberty, is not of itself sufficient to render the regulation or restriction void. *Dillon Mun. Corp.* (4th Ed.) 141; *Lawton v. Steele*, 152 U. S. 136, 14 Sup. Ct. 490, 38 L. Ed. 385; *Barbler v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; *Welch v. Swasey*, 214 U. S. 91; *N. W. Laundry v. Des Moines*, 239 U. S. 486, 36 Sup. Ct. 206, 60 L. Ed. 396; *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623.

[5, 6] The power to designate the subject of police regulation rests in the state alone, and if a given statute is not clearly repugnant to some constitutional guaranty, the courts are without power to interfere. Such interference, if tolerated at all, must be on the theory that the subject of the regulation is not within the legislative jurisdiction; or, if the subject be one within such jurisdiction, it must appear to the court that, looking through mere forms and at the substance of the matter, it can say that the statute enacted professedly in the interest of the public or general welfare has no "substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth v. Illinois*, *supra*; *Overton v. Harrington*, 126 Md. 32, 94 Atl. 324. The Legislature, acting within these limits, is the sole judge as to all matters pertaining to the public policy, wisdom, and expediency of the police regulations which it prescribes (*State v. Packing Co.*, 124 Iowa,

823, 100 N. W. 59, 2 Ann. Cas. 448; 12 O. J. 982), and while the police power is familiarly exercised in regulations to promote the public health and morals, it extends as well to the promotion of "public convenience and general prosperity" (*C. & Q. Ry. Co. v. Illinois*, 200 U. S. 592, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175).

[7] Bearing these principles in mind, we turn to the question immediately before us—the validity of the establishment of the restricted residential district heretofore mentioned. Among the powers which have been delegated by the Legislature of this state to cities and towns are the enactment of such ordinances as "shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof" (Code, §§ 680, 695); to prevent injury or annoyance from anything dangerous, offensive, or unhealthy and to cause any nuisance to be abated (Code, § 696); to cause the filling or draining of lots (Code, §§ 698, 699); to require the repair, removal, or destruction of any building which is dangerous or liable to fall (Code, § 710); to establish fire limits and prohibit within such limits the erection of any building, unless the outer walls be made of noncombustible material (Code, § 711); to regulate the keeping and transportation of gunpowder, and inflammable oils, and to provide or license magazines for storing the same and prohibit their location or maintenance within a given distance of the corporate limits (Code, § 714); and to prohibit the piling or depositing of wood, lumber, or timber upon any lot within 100 yards of any dwelling house (Code, § 715). There are also many other Code provisions of the same general nature, but the foregoing are sufficient to indicate the breadth and character of the authority conferred upon our municipal corporations.

To these general powers a recent Legislature added the specific authority to cities to establish restricted residential districts. See chapter 138, Acts 37th G. A. This act, omitting the enacting and publication clauses, is in the following words:

"Section 1. *Restricted Residence Districts.—Petition.*—Cities of the first class, including cities under commission form of government, and cities under special charter may, and upon petition of sixty per cent. of the owners of the real estate in the district sought to be affected residing in such city shall designate and establish, by appropriate proceedings, restricted residence districts within its limits.

"Sec. 2. *Ordinance, Scope of.*—In the ordinance designating and establishing such restricted residence district, every such city is hereby empowered to provide and establish reasonable rules and regulations for the erection, reconstruction, altering and repairing of buildings of all kinds, within said district, as well

¹ 29 Sup. Ct. 567, 53 L. Ed. 923.

as the use and occupancy of such buildings; and to provide that no building or other structure, except residences, schoolhouses, churches, and other similar structures shall thereafter be erected, altered or repaired, or occupied without first securing from the city council of such city a permit therefor, such permit to be issued under such reasonable rules and regulations as may in said ordinance be provided.

"Sec. 3. *Ordinance—Violations.*—Any building or structure erected, altered, repaired or used in violation of any ordinance passed under the authority of this act, shall be deemed a nuisance, and every such city is hereby empowered to provide by ordinance for the abatement of such nuisance, either by fine or imprisonment or by action in the district court or municipal court of the county in which such city is located, or by both; such action to be prosecuted in the name of the city."

[8] Following this statute, the city council adopted the ordinance which we have already quoted in full. This ordinance (with a single possible exception hereinafter noted) appears to be in reasonably strict accord with the provisions of the act, and its validity must be conceded, unless we are compelled to hold that the act itself is void. Counsel for the appellees very strongly urge the unconstitutional character of the act because it is said to offend against the guaranties of our fundamental law, in that it operates to deprive the defendants of their liberty and property without due process of law; takes private property for public use without compensation; abridges the privileges and immunities of citizens of the United States, and denies them the equal protection of the laws; attempts to make legal the taking of private property for private use without compensation; and assumes to delegate legislative power to private persons. The questions thus raised are of grave importance, and demand careful consideration. The constitutional guaranties invoked by counsel lie at the very foundation of all those rights of person and property which are the heritage of a free people associated in a republican form of government, rights which the courts have no disposition to ignore or fritter away. Nor can the court properly ignore that other settled rule that neither the Constitution nor its amendments were designed to limit the police powers of the state. As was said by Field, J., in *Barbier v. Connolly*, *supra*, speaking of the Fourteenth Amendment to the Constitution of the United States:

"Neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed the police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

[9] This is not to say that under the guise of police power the state may do or authorize that which the Constitution expressly or impliedly forbids, but with that reservation the authority of the state is supreme. Among those prohibitions is the one which makes private property immune against seizure or condemnation to public use without compensation. It may be taken for that purpose by exercise of the power of eminent domain only upon making due compensation, but the power of eminent domain is quite distinct from the police power, and for the incidental loss or injury which the individual member of the public may sustain by reason of valid police regulations, no compensation is recoverable. There is in such cases—

"no divesting of property rights by the operation of the statute, and the regulation to which the exercise of such rights is thereby subjected is not prevented by any limitation upon the authority of the Legislature prescribed by the federal or state Constitution. The interests of the individual are subordinate to the public good, and the constitutional guaranties of the security of private property were not designed and do not operate to prohibit the reasonable restriction of its use by legislation enacted within the sphere of the police power for the promotion of the general welfare." *Overton v. Harrington*, *supra*; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

Says Judge Dillon:

"Every citizen holds his property subject to the proper exercise of this power either by the state Legislature or by public or municipal corporations to which the Legislature may delegate it. * * * It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance." 1 Dillon's Mun. Corp. 212.

See, also, *Thorpe v. Ry. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *In re Goddard*, 16 Pick. (Mass.) 509, 28 Am. Dec. 645.

In *Comm. v. Alger*, 7 Cush. (Mass.) 53, Chief Justice Shaw uses the language:

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. * * * Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing * * * power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain."

Along the same line it has been said by the Maine court:

"Police regulations may forbid such use and such modifications of private property as would prove injurious to the citizens generally. * * * It may sometimes occasion an inconvenience to an individual, but he has a compensation in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power, without impairing any constitutional provision. It does not appropriate private property to public uses, but merely regulates its enjoyment." *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188.

Without further pursuing this phase of the case in hand, we think it must be said that the statute in question is not open to the objection that it takes or appropriates the property of the defendants to public use without compensation.

[10] IV. Still less is the act open to the objection that it takes the private property of the defendants for the private use of others. As we have already said, it does not deprive the defendants of their property or assume to give any right or interest therein to any one. It does assume to regulate its use in the interest of the public, and unless it be found obnoxious to the objection that it is clearly unreasonable, and without any substantial relation to that subject, but is a clear and unmistakable infringement of some constitutional guaranty, it must be upheld. Its alleged unreasonable character will be considered in a later paragraph of this opinion. Nor is there merit in the further objection that it attempts to delegate legislative authority to private persons. While the right is conferred upon the inhabitants of a proposed district to initiate the project by petition to the city council, the power of the private citizen ends there. The legislation, if any is had, is by the council which is the recognized legislative body of the municipal government.

[11] V. Is the restriction upon the use of the property within the established district so clearly unreasonable that it should be held void? This is affirmed by the appellees on various grounds, among which are (1) absence of any requirement for notice to property owners; (2) absence of any provision for compensation; (3) it makes a nuisance of an act or condition otherwise lawful; (4) it gives the power of initiative to a possible minority of the inhabitants; (5) it makes a punishable misdemeanor of acts hitherto innocent and lawful; and (6) the area and boundaries of the district are left to the whim of the council, or of 60 per cent. of the resident owners. Aside from those objections, which are but a repetition of those we have already considered based upon constitutional guaranties, and do not call for further discussion, the points here stat-

ed pertain to mere incidentals, and do not go to the jurisdiction or power of the state to authorize or of the city to enact the ordinance. The division of the city into districts for any lawful purpose, such as voting precincts, sewer districts, city wards, fire limits, and restricted areas made subject to peculiar police regulations, has never been regarded as a matter requiring notice to property owners, nor is there any sound reason for making such notice a prerequisite to authorized action by the council. It is necessarily committed to the council, which is charged with the duty of administering the affairs of the city; and to make it an essential condition of official action that notice be served on every citizen who may be affected thereby would tend to confusion, delay, and excite controversy.

[12] That a statute or city ordinance or police regulation forbids acts theretofore innocent and lawful affords no ground for holding such legislation either void or unreasonable. A very large proportion of all our laws, both state and municipal, are of that character. As we have before said, when people are brought together in increasingly crowded masses, it is essential to peace, good order, and general welfare that the individual shall submit to reasonable restrictions upon his natural rights for the public good, and it is not at all strange or unusual that he often finds himself forbidden under penalty to do things which but for some police regulation would be his unquestionable right.

[13] Nor is it of itself a valid objection to the police regulation that it is made applicable to a segregated area or district. This has been frequently held to be the law. To this point we need only cite the case of *N. W. Laundry Co. v. Des Moines*, 239 U. S. 486, 36 Sup. Ct. 206, 60 L. Ed. 396. There it will be remembered the city adopted an "anti-smoke" ordinance, making it applicable to designated parts of the city only. Much of the argument by appellant in that case is quite in line with the contentions of the appellees in this action. The court held that there was no doubt of the authority of the state to "declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment are not valid constitutional objections." It also overruled the objection to the ordinance as providing for an arbitrary classification.

[14] That the state may directly, or through delegation of authority to municipalities, adopt and enforce reasonable regulations concerning the use and occupation of real estate in cities and towns, is too well established to admit of serious dispute. In

Salem v. Maynes, 123 Mass. 373, a statute authorizing cities to prohibit the erection of wooden buildings anywhere in the entire municipality or in any district thereof was held valid, as a legitimate exercise of police power. In *State v. Houghton*, 142 Minn. 28, 170 N. W. 853, application for permit for erecting a cereal mill in a residential district, to be approved by the building inspector, and made in the most modern manner, and furnished with proper appliances to make it dust-proof and noise-proof, was refused, and petition for mandamus to compel a permit was denied. On appeal this ruling was sustained, the court saying that, while the restricted area was sparsely settled and the site of the proposed mill was well adapted to use for industrial purposes, yet there was no reason why the area might not be suitable for residential purposes, and it had been so designated by the proper tribunal.

A statute that no person shall hereafter erect, occupy, or use in any city a stable for more than four horses unless first licensed to do so is sustainable as an exercise of police power. *Newton v. Joyce*, 186 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385. An ordinance making it unlawful to move a blacksmith shop to a residence street without the written consent of a majority of the property owners is valid. *Patterson v. Johnson*, 214 Ill. 481, 73 N. E. 761. The court there says that cities and towns organized under the statute "have the power to declare what shall be considered as nuisances, and to prevent and remove the same, and to regulate the police of the town, and to make such ordinances as the good of the inhabitants of the town may require."

So, also, under general authority to a city to adopt appropriate ordinances and regulations, an ordinance prohibiting any person from erecting any building within the corporate limits without obtaining a building permit is not void or unenforceable. *Easton v. Covey*, 74 Md. 262, 22 Atl. 266. The court there remarks that—

"The main purpose of the ordinance is to give the commissioners power to control the erection of new buildings, so that whenever such building, either by the character of the materials out of which, or the manner in which, it is proposed to be built, its location in the town, or the character of the business proposed to be carried on therein, would, in their judgment, be detrimental to the town, they may prevent its erection by refusing a permit. In each case the granting or refusal * * * is confided to their discretion."

The city may prohibit the blasting of rocks within its limits without the written consent of the board of aldermen. *Com. v. Parks*, 155 Mass. 531.¹ In this case the language of *Holmes, J.*, is in point where he said:

"It is settled that, within constitutional limits not exactly determined, the Legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use or value of property."

See *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900. An ordinance prohibiting the operation of laundries during the night in a certain city district is not open to constitutional objection. *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923. In *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, 23 L. R. A. (N. S.) 1160, the court had to consider a regulation limiting the height of buildings in the city of Boston. By its terms, a certain limit was fixed for buildings in one district and a different limit in other districts, and this was held valid. On appeal to the Supreme Court of the United States the ruling was affirmed. See *Welch v. Swasey*, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923. To like effect is *Cochran v. Preston*, 108 Md. 220, 70 Atl. 113, 23 L. R. A. (N. S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048, sustaining a limitation upon the height of buildings in a residential neighborhood. The operation of a brickyard in an open field, the chief value of which is in the brick clay there found, may be prohibited by a city. *Hada-check v. Sebastian*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 848, Ann. Cas. 1917B, 927. The location of garages and the storing of oil and gasoline are proper subjects of police regulation. See *Whitemore v. Baxter*, 181 Mich. 564, 148 N. W. 437, 52 L. R. A. (N. S.) 930, Ann. Cas. 1916C, 818; *People v. Ericson*, 263 Ill. 368, 105 N. E. 315, L. R. A. 1915D, 607, Ann. Cas. 1915C, 183; *Standard Oil v. Danville*, 199 Ill. 50, 64 N. E. 1110. In the last-cited case the ordinance prohibited the storing of oils and gasoline within 1,000 feet of any dwelling house, and the court held it not unreasonable. It is there said:

"The General Assembly * * * conferred upon the city power to adopt the ordinance. All presumptions are in favor of its reasonableness, and such presumptions must prevail, nothing to the contrary appearing upon the face of the ordinance or from the proofs."

In *People v. Oak Park*, 266 Ill. 365, 107 N. E. 636, an ordinance making it unlawful to build or maintain a public garage at any place in the city where two-thirds of the buildings within a radius of 500 feet are used exclusively for residential purposes, without the written consent of a majority of the property owners within such radius, is held to be a valid exercise of municipal power. The same rule is sustained in *Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325, and in *People*

¹ 30 N. E. 174.

(184 N.W.)

v. *Ericson*, 263 Ill. 368, 105 N. E. 315, L. R. A. 1915D, 607, Ann. Cas. 1915C, 183. To the same general effect is *State v. Taubert*, 126 Minn. 371, 148 N. W. 281. In *Little Rock v. Reinman*, 107 Ark. 174, 155 S. W. 105, and same case on appeal to the Supreme Court of the United States, an ordinance prohibiting the maintenance of a livery stable in a certain part or district of the city was held open to no constitutional objection. The Supreme Court of Maine, answering an inquiry by the Legislature, holds it within the police power of the state to regulate and restrict the cutting of trees on wild and uncultivated land without compensation to the owner. In *re Opinions of Justices*, 103 Me. 506, 69 Atl. 627, 19 L. R. A. (N. S.) 422, 13 Ann. Cas. 745. On like principle the state may prohibit landowners from removing stones, gravel, or sand from their own premises, such restriction being for the public benefit in protection of a harbor adjacent to such premises. *Comm. v. Tewksbury*, 11 Metc. (Mass.) 55. A somewhat similar holding is found in *Comm. v. Alger*, 7 Cush. (Mass.) 53. Further application of the principle is found in the more recent but familiar cases which sustain the authority of the state to prohibit the waste by the owner of land of gas, oil, and artesian water produced on his premises.

[15] The appellees in the present case place large reliance upon the decision found in *Eubank v. Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192. A careful reading of the opinion and of the material facts in that case readily demonstrates the inapplicability of the precedent so established to the question we are here considering. Stated briefly, the ordinance there held invalid provided for the establishment of a building line to which all buildings thereafter erected must conform. It provided that whenever the owners of two-thirds of the property abutting upon any street shall in writing request the street committee of the city council to establish a building line, the committee shall proceed to establish such line, so that the same shall not be less than 5 feet or more than 30 feet from the street line, and that thereafter no permit shall be granted for the erection of any building on such front, except it be within the limits of such line. This was held to be invalid because:

It "leaves no discretion in the committee * * * as to whether the * * * line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize."

It will be further noticed that the ordinance there set aside makes no provision whatever for the exercise of any supervision discretion, or control of the subject by the city council, but makes the establishment of the line absolute and final upon the action of the committee, which in turn has no discretion except to comply with the request of two-thirds of the property owners and fix the line somewhere within the prescribed limits of 5 feet and 30 feet from the street boundary. The decision goes no further than to hold this kind of regulation is not within the police power. In thus disposing of the case, the court is careful to say:

"We need not consider the power of the city to establish a building line or regulate the structure or height of buildings."

The ordinance upon which we are now called to pass is in marked contrast with the one in the *Eubank Case*, supra. Nothing is left to the uncontrolled discretion of a committee, or of private persons. It does not prohibit the erection within the restricted district of business buildings, shops, factories, gasoline stations, or any other class of buildings. It does provide, however, that the described area shall constitute a residence district, and that no buildings shall thereafter be erected therein except residences, schoolhouses, churches, and similar structures, without first procuring from the city council a permit therefor. In other words, the provision so made is a regulation, and not a prohibition. That the regulation is, to this extent, a legitimate and reasonable exercise of the city's police power is supported by a practically unbroken array of authority. The argument by appellees that the growth of the city and the expansion of its business area may or will, in the course of time, crowd upon this restricted district and demonstrate the desirability, if not the need, of lifting or modifying the restriction is to be conceded; but it must be presumed that when such conditions arise the city council will exercise its discretion in the matter of building permits fairly and impartially. It may as well here be said that the validity of the final clause in the second section of the ordinance reading, "nor shall any such permit be granted when 60 per cent. of the owners of said real estate residing in the city object thereto," is not here directly in issue. No such provision is found in the statute authorizing the creation of residence districts, nor does the statute in terms or by implication so fetter the council's discretion. By the terms of the act, the council in its ordinance creating such district may provide reasonable rules and regulations under which permits may be issued. Whether this rule as to the effect of objections by property own-

ers to an application for a permit is reasonable, we need not now inquire, and it will be time enough to decide that question when it arises.

Quite in point here is the case of *Storer v. Downey*, 215 Mass. 273, 102 N. E. 321. There the ordinance provided that no building should be erected or used as a garage unless such use is previously authorized by the board of aldermen. A petition was duly presented to the board for a permit to erect a garage, and the board passed an order granting the request. This action was vetoed by the mayor, giving as a reason that he thought some policy respecting garages in residential districts should be adopted, and because he was opposed to their establishment in residential districts. Thereupon the applicant sued for a writ of mandamus for the issuance of a permit. The action of the mayor was sustained, and writ denied. The court there says that the ordinance is a valid exercise of the police power, and adds:

"Oil and gasoline, almost inevitably stored and used in them, are so highly inflammable and explosive that they may increase the danger of fire, no matter how carefully the building be constructed nor how noncombustible its materials. Although lawful and necessary buildings, they are of such character that regulation of the place of their erection and use is well within settled principles as to the police power."

The foregoing citations and quotations have perhaps been unnecessarily extended, but the question presented by this appeal is one of great and growing importance, and we have felt justified in noting the trend of the authorities with more than ordinary fullness of detail. With the wealth of precedent cited by the appellee as upholding the sacredness of constitutional guaranties of life, liberty, property, due process of law, and equal protection of the laws, we have no quarrel; but, construing the statute in question, as we do, as one of police regulation, it is entirely consistent with those guaranties. The statute being constitutional, the ordinance adopted pursuant thereto cannot be held invalid. The power of regulation is not confined to the suppression of vice or promotion of health. In the language of McKenna, J., in *Bacon v. Walker*, 204 U. S. 318, 27 Sup. Ct. 289, 51 L. Ed. 499:

"It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people."

For a discussion of the nature, scope, and effect of a city's authority to "regulate," see opinion by Marshall, J., in *Madison v. Ry. Co.*, 156 Wis. 352, 146 N. W. 492.

[16] There is no presumption against the validity of an act of the Legislature. On the contrary, all presumptions are in its favor,

and a statute will not be held unconstitutional unless its contravention of constitutional guaranties is so clear, plain, and palpable as to leave no reasonable doubt on the subject; and where the language is reasonably susceptible of different meanings, the courts will lean to that construction which is consistent with its validity. *State v. Hutchinson*, 168 Iowa, 1, 147 N. W. 195, L. R. A. 1917B, 198; *Barr v. Cardell*, 173 Iowa, 18, 155 N. W. 312; *McGuire v. Ry. Co.*, 131 Iowa, 340, 108 N. W. 902, 83 L. R. A. (N. S.) 706; *State v. Express Co.*, 164 Iowa, 112, 145 N. W. 451; *Brady v. Mattern*, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291; *Rodemacher v. Ry. Co.*, 41 Iowa, 297, 20 Am. Rep. 592.

We find nothing in this statute, when reasonably and properly construed, which denies to the appellees the benefit of their constitutional rights, privileges, and immunities, and upon the conceded and well-proven facts we find the appellant city entitled to the relief prayed for in its petition. The decree below is therefore reversed, and cause remanded to the trial court for a decree in harmony with the views expressed in this opinion.

Reversed and remanded.

EVANS, C. J., and PRESTON and FAVILLE, JJ., concurring.

ZEMBOL v. CROWN IRON WORKS CO. et al. (No. 22456.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

(Syllabus by the Court.)

Municipal corporations — 706(5)—Evidence in action for personal injuries from automobile collision on street held to sustain finding of defendants' negligence; damages held not excessive.

The evidence is sufficient to sustain the jury's finding that a collision which caused injury to plaintiff was caused by the negligence of the defendants. The damages are not excessive.

Appeal from District Court, Hennepin County; C. S. Jelley, Judge.

Action by Frank Zembol, as father of Helen Zembol, an infant, against the Crown Iron Works Company and others, for personal injuries. Judgment for plaintiff, and the defendants appeal from an order denying a new trial. Order affirmed.

A. B. Darelius, of Minneapolis, for appellants.

A. A. Tenner, of Minneapolis, for respondent.

HALLAM, J. Helen Zembol, whom we will designate as plaintiff, was injured January 14, 1920, by collision of an automobile, in which she was riding, with a truck belonging to the defendant Crown Iron Works Company and driven by defendant Nyman. This case is brought by Frank Zembol as father of Helen, and in her behalf, to recover damages. The jury found a verdict in favor of plaintiff for \$4,000. The contention made on this appeal is that the verdict is not justified by the evidence.

The action is predicated on the negligence of the driver of the truck. The testimony in behalf of plaintiff is that she was riding in a car driven by Isadore Butkevitz, and going south on Central avenue in Minneapolis. When they arrived at the intersection of Tenth street Northeast and Central avenue, Butkevitz found the road very bad on account of accumulations of snow and ice and conceived the idea of turning around and going back. At this time the defendant's truck was approaching from the south and was on the right side of the street. As to just what happened then the testimony is in conflict. Defendant's witnesses testified that the car "all of a sudden jumped out of the road—ran into the front wheel of the truck." The testimony on behalf of plaintiff, however, is that Butkevitz started to turn around and that in doing so his car became stalled; that at this point of time the defendant's truck was about 150 feet away, but that the truck continued on and struck the Butkevitz car while it was standing still. If this testimony on behalf of plaintiff is true, the jury might find negligence on the part of the driver of the truck. We think the testimony presented an issue of fact for the jury.

Defendant's counsel strenuously contend as we understand it, that the physical facts make it appear that the accident could not have happened as plaintiff claims. The evidence is that plaintiff was thrown forward through the wind shield, and it is contended that this would be impossible if plaintiff's testimony as to the position of the Butkevitz car is true. We are at a disadvantage in understanding some of the testimony as to the accident by reason of the fact that a plat, not returned to this court, was used on the trial, and a good deal of the testimony was given by way of indications referring to the plat or marks upon the plat. The testimony is also confusing by reason of inaccurate references of the witnesses to names of streets and also to directions. But the testimony on behalf of plaintiff is quite clear that at the time the Butkevitz car was standing still it was facing toward a building described as the "Franklin Company building." From what we can gather from the testimony as to

the location of the car it seems not impossible that the collision might occur as plaintiff has described it and in such manner as to throw plaintiff through the windshield of the car in which she was riding.

Defendant contends that the direct cause of the accident was the inexperience of the driver of the automobile and the absence of chains on the wheels and the negligence of the driver in attempting to turn in front of a heavy truck. The negligence of the driver, if merely contributory, would not be a defense, and we think the question as to whether his negligence or his conduct was the sole cause of the collision was a question for the jury.

Defendant contends that the damages are excessive. The testimony is that the injuries were severe and clearly they are sufficient to warrant a verdict in the amount found.

Order affirmed.

LARSON et al. v. TRAGESER. (No. 22340.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

(Syllabus by the Court.)

1. Master and servant §358—Compensation Act provides method for avoiding status created.

Section 8205 of the Workmen's Compensation Act (Gen. St. 1913) creates a definite and fixed status of employer and employé with reference to the act, not a mere rebuttable presumption of evidence, and provides a method by which either may avoid the same.

2. Master and servant §358—Statutory method of rejection of Compensation Act exclusive.

The method so prescribed for avoiding the status thus created, and keeping without the act, is exclusive of all others, and must be in writing, as there required.

3. Master and servant §358—Parol rejection of Compensation Act unauthorized.

Evidence of a parol agreement or understanding between the employer and employé that either or both should be excluded from the act and not bound thereby is inadmissible, because not the form of exclusion permitted by the act.

Certiorari to District Court, Lyon County; I. M. Olson, Judge.

Proceeding by Laura Larson and others against Steven A. Trageser under the Workmen's Compensation Act. Judgment for plaintiffs, and the defendant brings certiorari. Judgment affirmed.

Mathews & Mathews, of Marshall, for appellant.

James H. Hall, of Marshall, for respondents.

BROWN, C. J. Certiorari to review a judgment in proceedings under the Workman's Compensation Act (Gen. St. 1913, c. 84a).

The facts are not in dispute. Christ N. Larson was in the employ of defendant at his gasoline filling station located in the village of Cottonwood, this state, and while engaged in the work of his employment was instantly killed by the explosion of a gasoline tank situated on the premises. He left surviving as his next of kin two minor daughters who were dependent upon him for support. The proceeding was instituted in their behalf to recover the compensation given by the statute in such cases. The sole defense interposed at the trial below was that the decedent was not within the protection of the Compensation Act; therefore that no recovery could be had. In support of the defense defendant offered to show a parol understanding between defendant and decedent that the Compensation Act should not apply to decedent under the employment; that decedent at the time the contract of employment was entered into expressly declared that it was against his religion to accept insurance or indemnity of the kind and would not enter defendant's services if the statute applied. The evidence so offered further shows an acquiescence in decedent's position and the acceptance of his services on the conditions imposed. There was no writing of any kind expressing that understanding, or other compliance with the pertinent provisions of the statute on the subject. The trial court rejected the evidence to which exception was noted.

[1-3] In our view of the question the ruling of the learned trial court was right. Section 8205, G. S. 1913, the section of the Compensation Act relating to and dealing with the subject, is definite and specific as to what employers and employes shall be bound by the act, and includes all contracts of employment entered into subsequent to the enactment of the statute. It declares that all contracts of employment thereafter made shall be presumed to have been made with reference and subject to the provisions of part 2 of the act, unless otherwise expressly stated in the contract in writing, or unless written or printed notice is given by either party to the other as therein provided that he does not accept the provisions of the act. The pertinent provisions as relating to the employé who desires to keep without the act, where he is not excluded by a written contract of employment, are as follows:

"The employé shall give written or printed notice to the employer of his election not to be bound by part 2 and file a duplicate with proof of service attached thereto with the labor commissioner."

These provisions make it clear that the Legislature intended to establish one definite and certain method of removing either employer or employé from the act, or indicating a purpose or intention not to be bound thereby, and the requirement that the intention be expressed in writing must be construed, in furtherance of the legislative intent, as furnishing the exclusive method of accomplishing that end. The contention of counsel for defendant, urged with much ingenuity, that the statute merely creates a presumption applicable to all employes and employers not expressly excepted, subject to rebuttal and to be overcome by the ordinary methods of proof, is out of harmony with the purpose of the law and cannot be sustained. To permit a parol exclusion or withdrawal by employer or employé would be destructive of the act, open the door to untold litigation involving parol controversies as to its application, and throw the administration thereof and of the rights of parties thereunder into confusion; conditions and situations it was the manifest purpose of the Legislature to guard against and prevent by requiring all elections not to be bound by the act to be in writing. We so construe and apply the statute. The case of *Thorpe v. Pennock Mercantile Co.*, 99 Minn. 22, 108 N. W. 940, 9 Ann. Cas. 229, is not in point. There a rebuttable presumption of fact was involved, with no statute, as in the case at bar, declaring in what manner or form it might be overcome. Here the statute creates and presumes a particular status of employer and employé with reference to the Compensation Act and declares a definite method of withdrawing therefrom. In that situation the statutory remedy is exclusive. *City of Faribault v. Misener*, 20 Minn. 396 (Gil. 347); *Abel v. Minneapolis*, 68 Minn. 89, 70 N. W. 851. This view is supported by the general rules of law on the subject and expressly by the decision in *Dusha v. Virginia & Rainy Lake Co.*, 145 Minn. 171, 176 N. W. 482. There the statute prohibited the employment of children under 16 years of age in dangerous employments, and imposed a penalty for a violation thereof, with the express exception that the employer should not be deemed to have violated the statute, though he in fact may have employed a child under age, if he obtained and kept on file an affidavit of the parent or guardian to the effect that the child when employed was not under the prohibited age. It was there held that the affidavit was the exclusive defense to the charge of a violation of the statute, and that parol declarations of the parents that the child was over 16 were inadmissible. The rule no doubt would be different in the absence of a specific statute prescribing a definite method of relief.

Judgment affirmed.

LINNEHAN v. SHEERAN. (No. 22283.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

(Syllabus by the Court.)

Libel and slander §104(6)—Evidence of slander uttered against third person admissible to show malice, where implying joint crime by third person and plaintiff.

Evidence of a slander uttered by defendant against a third person in no way connected with the suit is generally inadmissible, but it is admissible to show malice, if the defamatory words contain the same implication as those sued upon, relate to a transaction in which plaintiff and the third person were equally concerned, and by innuendo charge both with the crime of larceny committed by them jointly.

Appeal from District Court, Waseca County; Arthur B. Childress, Judge.

Action by Michael Linnehan, Jr., against Martin J. Sheeran. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Order affirmed.

Henry M. Gallagher, of Waseca, for appellant.

Moonan & Moonan, of Waseca, for respondent.

LEES, C. This is an action for slander, which resulted in a verdict for plaintiff. Defendant has appealed from an order denying his motion for a new trial. The defendant and the plaintiff and his brother Dan are neighboring farmers. The Linnehan brothers live on and work their father's farm. In the fall of 1916 they lost some calves. Hearing there was a stray calf on the premises of a neighbor named Bluhm, they went there to see whether it was theirs, and were directed by Bluhm to go to his pasture, where he said they would find a stray calf running with his own. They went, found a calf, which they picked out from the others, and took with them, claiming it belonged to them. Bluhm consented to their taking it. Defendant had likewise lost some calves, and he too went to Bluhm's place in search of them, and learned that the Linnehans had been there and taken a calf away. Thereupon he went to their farm to see it. Plaintiff had marked it by splitting or clipping its ear. Seeing this, defendant told him that he had his calf, and had stolen it, and went to the county attorney to have him arrested. The county attorney refused to issue a criminal complaint, and the defendant commenced a replevin action in the municipal court of Waseca to get possession of the calf. The animal was rebanded, and the Linnehans retained possession. While the replevin action was pending, defendant's brother-in-law and one of his neighbors inter-

ceded to bring about a settlement. Their efforts were successful, defendant dismissing the action and leaving the calf with the Linnehans, on condition that they pay the costs he had incurred. Plaintiff paid \$29 as such costs. The value of the calf, according to the defendant, was only \$13.

After that defendant met the Linnehans from time to time and twitted them about the calf. On one occasion at the village store he said to Dan Linnehan, "Did you see any calves to-night?" At another time he said to plaintiff, "This is a pretty cold night to be clipping ears," and at another, "Hello, old calf clipper!" This last remark provoked a fight between the two men. Defendant admitted that he had made the remarks above set out, and that they referred to the calf incident. He also admitted that he had no love for the Linnehans, and intended to charge plaintiff with having taken his calf. A witness for plaintiff testified that at the village of Waldorf, in May, 1917, following the fight between the parties, he heard defendant say to plaintiff that he was a calf thief, and he could prove it, and that there were quite a number of persons present at the time. Dan Linnehan was a witness for his brother, and was asked this question on his direct examination:

"Did you meet him [defendant] at any time * * * subsequent to the settlement, when he referred to * * * calf-nipping or calf-picking?"

Objection was made and overruled, and defendant excepted. The answer was, "Yes." When asked what defendant said, the witness replied, "He called me a calf-picker." Before cross-examining the witness defendant's counsel moved that this evidence be stricken, on the ground that the language, if used, did not refer to plaintiff, but to one not a party to the action. Plaintiff's counsel stated that it was offered to show defendant's state of mind as to both brothers; that they had gone together to get the calf, and were working the farm together where it was taken and kept. The motion to strike was denied. No exception was taken, but in his motion for a new trial defendant specified as error the court's refusal to strike this evidence. Solely because of alleged error in these rulings the defendant asks us to reverse the order denying him a new trial.

There is some doubt whether the state of the record and the assignments of error are such as to present the question raised, but we will treat it as before us for determination on the merits. Counsel for defendant is undoubtedly correct in saying that it is error to permit the plaintiff in a slander case to prove that defendant slandered third persons, whether or not the defamatory language

used was similar to that spoken of the plaintiff. The rule is thus stated in Newell on Slander and Libel, § 972:

Evidence of slanders uttered by defendant against third persons in no way connected with the suit is inadmissible, for the reason that it is contrary to the established rule of the common law that one cannot be proved guilty of the offense for which he is on trial by showing that at another time he committed the same offense.

Cochran v. Butterfield, 18 N. H. 115, 45 Am. Dec. 363, and Sullivan v. O'Leary, 146 Mass. 322, 15 N. E. 775, are cited as, and are ample, authority for the statement in the text, if a proposition so plain needs support by adjudged cases. But if the slander relates to a person connected with the plaintiff in the identical transaction which gave rise to defendant's defamatory statements, a different situation is presented. Defamatory language may be used with reference to two persons, as for example, partners or members of the same family, and may relate to a subject with which both were connected. If an action is brought by one, although the language was addressed to or spoken of the other, may it not be put in evidence as tending to show the animus of defendant toward both? Here defendant was repeating the charge that he had been deprived of his property by the joint acts of plaintiff and his brother. If one was a thief, so was the other. Without discriminating between them, he directly or indirectly accused each of stealing. His utterances referred to the same transaction in which both were equally concerned. The defamatory words contained the same implication as those sued upon, related to the same subject, and were repetitions of the same accusation. In defendant's mind the two brothers were joint wrongdoers, and the jury might well find that the ill will manifested by his remarks to and concerning one extended equally to the other. In no proper sense was Dan Linnehan a third person in no way connected with the slander which was the basis of the action, and hence we conclude that the evidence under consideration does not fall within the scope of the general rule above stated. Our conclusion is supported to some extent by the following cases: Gribble v. Pioneer Press, 34 Minn. 842, 25 N. W. 710; Larrabee v. Minnesota Tribune Co., 38 Minn. 141, 30 N. W. 462; Fredrickson v. Johnson, 60 Minn. 337, 62 N. W. 388; Fullerton v. Thompson, 123 Minn. 136, 143 N. W. 260. See also Newby v. Times-Mirror Co. (Cal. App.) 188 Pac. 1008-1016; Meriwether v. Publishers: George Knapp, 211 Mo. 199, 109 S. W. 750, 16 L. R. A. (N. S.) 953-959.

The order appealed from is therefore affirmed.

BONDERSON v. BONDERSON. (No. 22402.)

(Supreme Court of Minnesota. Oct. 23, 1921.)

(Syllabus by the Court.)

1. Assault and battery §=40—Verdict of \$4,000 for assault and battery held excessive.

A verdict of \$4,000 for assault and battery held so excessive, in view of the evidence, as to demonstrate that the jury gave it under the influence of passion and prejudice.

2. Appeal and error §=1140(1)—Where record indicates available testimony for proper basis of damages, new trial ordered, rather than reduction of verdict.

In such a case and where the record indicates the existence of available testimony to furnish a proper basis for the assessment of damages, a new trial should be ordered, rather than a reduction of the verdict.

Appeal from District Court, Chisago County; J. N. Searles, Judge.

Action by Margaret Bonderson against Nels Bonderson. Verdict for plaintiff and from an order denying a new trial the defendant appeals. Order reversed and new trial awarded.

Barrows & Metcalf, of St. Paul, for appellant.

H. D. Blanding, of St. Croix Falls, Wis., and W. T. Kennedy, of Amery, Wis., W. S. Ervin, of Minneapolis, for respondent.

HOLT, J. Plaintiff recovered a verdict against defendant, her brother-in-law, of \$3,500 compensatory and \$500 punitive damages for assault and battery. Defendant moved for a new trial on the ground of excessive damages given under the influence of passion and prejudice, and for errors in the admission of evidence and also in the charge.

The defendant lived with his father and mother upon a farm leased by him to his brother, plaintiff's husband. They all lived in the same house, but certain rooms were set apart for plaintiff and her family. Defendant worked for plaintiff's husband on the farm. On March 6, 1920, near 6 o'clock in the evening, plaintiff and her husband were in the barn milking, and defendant came in to care for the stock, as the former were having some dispute. Plaintiff claims that defendant mixed in, accused her of wrongs, and finally dragged her out of the barn, threw her down against some stones, and beat her. The version of defendant is radically different, claiming that plaintiff commenced the verbal assault and when that grew so vicious as to accuse his aged mother of crime, he took hold of plaintiff and merely led her out of the barn. Were his account true, the damages should have been nominal only.

[1] On this appeal we must accept plaintiff's version of the affray and also, as far as possible, of the effect upon her. But an examination of the record with this rule in mind compels the conviction that the verdict is so excessive that the jury must have given it under the influence of passion and prejudice.

We shall only touch on one or two matters which might have affected the jury and incited passion and prejudice. The failure of plaintiff's husband, her natural protector, to interfere in her behalf, and the fact that the jury were permitted to find an operation attributable to the assault. For an injury which requires a serious or major operation very substantial damages may undoubtedly be awarded. But upon this record there is no evidence that defendant's conduct produced the condition that required the operation, except plaintiff's bare uncorroborated statement that within a day or two after the fracas she felt a sore spot and a lump in her side, and that this continued to pain her until the operation, some time in June following. The surgeon who operated was not called. The jury had no means of knowing what was removed, if anything, or whether the ailment which required the operation could be at all ascribed to an injury received in the altercation. Nothing as to an operation was intimated in the complaint, and although we are of opinion that its allegations of injuries are broad enough to permit proof of one that had to be operated, still it is readily seen how defendant's attorneys may not have known of the operation or have surmised that it would ever be claimed that it resulted from the assault, and were therefore not prepared with testimony to combat such claim first made at the trial.

Plaintiff went direct from the altercation to a neighbor to telephone for the sheriff, and the second day she walked six miles to lodge a criminal complaint against defendant. No person who saw plaintiff immediately after the occurrence was called to testify to any bruises or evidence upon her of rough handling or beating. Defendant is a large, strong man, and if he had so viciously struck as plaintiff claims, there surely would have been marks which others noticed. However, the only testimony came from her children, one 9 and the other 11 years old, that they saw two small black spots on her back just below the shoulder the day after the assault. She testifies to backache, and a different sort of headache since the fracas, and inability to labor. All are subjective indications, and so invariably appear in exaggerated form in the testimony of all plaintiffs in personal injury cases, that large awards should not be predicated thereon, unless there be some corroboration or corroborative circumstances. Especially ought that to be

so where, as in this case, the record indicates that plaintiff has within reach other evidence than that produced at this trial bearing upon her condition after the trouble and the cause of the operation. Again there is no proof whatever of permanent injuries.

There are many cases where, without the aid of medical experts, the jury may draw the inference that a blow or a fall produced a condition that appears at some subsequent time. Such was the case of *Plonty v. Murphy*, 82 Minn. 268, 84 N. W. 1005, where a miscarriage was claimed to have been caused by fright, and where the damages awarded were \$300. In the case of *Elvidge v. Stronge & Warner Co.*, 181 N. W. 346, there was medical expert testimony on both sides of the proposition.

[2] We refrain from a further discussion of the evidence, for we think there ought to be a new trial, rather than an attempt by this court to reduce the verdict, for we are persuaded that testimony exists bearing upon the extent of the injuries, if any, which, when properly presented, may enable a jury to find a tangible basis for a verdict, and so as not to disclose the influence of passion and prejudice by its excessiveness.

The order is reversed, and a new trial awarded.

LUCAS et al. v. CASE. (No. 22305.)

(Supreme Court of Minnesota. Sept. 16, 1921.)

(Syllabus by the Court.)

1. Payment $\S$ 89(5) — In purchaser's action for overpayment, evidence held to sustain counterclaim.

In an action by a purchaser to recover an alleged overpayment on a sale of ice, defendant counterclaimed, alleging loss of ice through fault of plaintiffs. The evidence sustains a verdict for defendant on this counterclaim.

2. New trial $\S$ 108(2) — Newly discovered evidence held insufficient.

The showing as to newly discovered evidence is not sufficient to warrant a new trial.

3. Trover and conversion $\S$ 9(3) — Demand essential.

The evidence is not sufficient to sustain a verdict on a counterclaim for conversion of certain ice tools. Plaintiffs came by the tools rightfully. There was no demand for their return. This was essential to establish conversion.

4. Payment $\S$ 89(5) — In purchaser's action for overpayment, evidence held to sustain verdict that purchasers had damaged icehouse.

The evidence sustains a verdict that plaintiffs did not leave the icehouse in the condition it was in when they took possession in that a platform and certain lumber had been removed.

Appeal from District Court, Hennepin County; E. A. Montgomery, Judge.

Action by James A. Lucas and another, copartners as Lucas & Ingenhutt, against Frank Case. Verdict for the defendant, and the plaintiffs appeal. Order modified by reduction of amount of verdict.

Stevens & Stevens, of Minneapolis, for appellants.

Youngdahl & Halls, of Minneapolis, for respondent.

HALLAM, J. 1. In April, 1917, defendant sold to plaintiffs the ice in a certain icehouse. It was estimated that there were 1,400 tons of ice. The price fixed was \$2.50 per ton. One thousand dollars was paid down and plaintiffs agreed to pay installments of \$2.50 per ton as the first 400 tons were removed and \$1.50 per ton thereafter. Plaintiff removed 843 tons and having made payments as provided by the contract claimed an overpayment and sued to recover the amount alleged to have been overpaid. Defendant counterclaimed, claiming that much of the ice was lost by the negligence of plaintiffs, claiming conversion of certain tools and the negligent loss of a loading platform and certain lumber. The jury found a verdict for defendant on his counterclaim in the sum of \$400.56. Plaintiffs appeal.

[1] We are of the opinion that there is evidence sufficient to sustain the verdict as to the negligent loss of ice.

[2] 2. Plaintiff asks a new trial on the ground of newly discovered evidence bearing on this question. The alleged newly discovered evidence is largely cumulative and there is not sufficient showing that it could not have been procured on the trial.

One item of alleged newly discovered evidence is not cumulative. It is to the effect that defendant himself took a large quantity of ice from the icehouse after the sale. Defendant in an affidavit denies this. He admits receiving a small quantity of ice after the sale but avers that he paid for it. This is not denied. The showing on this point is not sufficient to warrant a new trial.

[3] 3. We are of the opinion that the evidence as to conversion of tools is not sufficient. The tools had been used by defendant in his ice business. He loaned them to plaintiffs for use in the removal of the ice and testified he told plaintiffs to return them when

they were through with them. With the last load of ice, the tools were taken to plaintiffs' premises. Defendant was present and assisted in the loading and removal of this load of ice. No demand was made for the tools and apparently nothing was said about them. Nor was demand made at any time. Plaintiffs exercised no dominion over them. Since plaintiffs came by them rightfully, this want of a demand is fatal to an action for conversion. *Boxell v. Robinson*, 82 Minn. 27, 84 N. W. 635.

Defendant cites authority to the effect that proof of an agreement to return and failure to return according to agreement constitutes conversion. 38 Cyc. 2082; *Durell v. Mosher*, 8 Johns. (N. Y.) 445; *Lay's Ex'r v. Lawson's Adm'r*, 23 Ala. 377. Whether this constitutes conversion has not been decided in this state. Under some circumstances perhaps it may. We find no authority that would sustain conversion under the facts in this case. When the tools were loaned there was a mere request to plaintiffs to return them when they were through using them with no suggestion as to when or where return was to be made. When we take this fact in connection with the apparent assent of defendant to the taking of the tools to plaintiffs' premises it seems clear that the proof fails to bring the case within the rule of the authorities cited by plaintiffs. The evidence is that the tools were worth \$75 to \$100. The answer alleged their value to be \$70.75 and the court limited recovery on this counterclaim to that amount.

[4] 4. The evidence is sufficient to sustain liability for the value of the platform and lumber. Plaintiffs agreed in their contract to leave the icehouse "in the same condition that it is now in and to remove none of the fixtures connected therewith." The lumber in question was used for boarding doors and openings and both platform and lumber were essentially part of the icehouse. Defendant's evidence is that when plaintiffs left the icehouse the platform and lumber were gone. Some question is raised as to the pleading of this counterclaim. We think the pleading sufficient to permit the proof that was made of breach of contract.

A new trial will be granted unless within ten days of the going down of the remittitur, defendant consents to the reduction of the verdict by \$70.75.

Order modified.

SIVERTS v. DAHOOT. (No. 22339.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

(Syllabus by the Court.)

1. Judgment $\S$ 199(3)—Evidence held not to entitle plaintiff to judgment notwithstanding verdict.

Plaintiff was not entitled to judgment notwithstanding the verdict.

2. Work and labor $\S$ 24(1)—On counterclaim for labor, held error to submit reasonable value of services.

It was error to submit the reasonable value of services rendered, for there was no evidence as to such value, and the only proof in respect to the services was that they were rendered under an express contract at a stipulated price.

3. Trial $\S$ 333—Verdict on express contract for one-third of what should have been allowed if the contract existed, cannot stand.

A verdict, based upon an express contract, for about one-third of the amount which should have been awarded if the contract had existence, must be regarded as perverse, and should not be allowed to stand, following *Alden v. Sacramento S. Fruit Co.*, 187 Minn. 161, 163 N. W. 133.

Appeal from District Court, Morrison County; J. A. Roeser, Judge.

Action by S. A. Siverts against Eunice Dahoot. Verdict for defendant, plaintiff's motion for judgment or a new trial denied, and he appeals. Order reversed in so far as it denied a new trial, and new trial granted.

Wm. H. Cherry, of Morris, and E. A. Kling, of Little Falls, for appellant.

D. M. Cameron, of Little Falls, for respondent.

HOLT, J. Plaintiff sued upon 11 promissory notes, executed by defendant, aggregating \$1,900 and interest. Defendant answered that the notes were executed without consideration and for the sole accommodation of plaintiff, and set up as a counterclaim that he had worked for plaintiff during the years 1912 to and including 1918 at the agreed price and reasonable value of \$1,200 for each year, and for the sum of \$100 during 1919, and there was due and unpaid \$3,650 and interest. A verdict for \$1,300 was rendered in favor of defendant. Plaintiff's motion for judgment or a new trial was denied, and he appeals.

[1] Defendant, a native of Kurdistan, Turkey, came to this country in his youth, and finally settled down in Morris, Minn., about 1900. Soon thereafter he became the owner of a team, and engaged in draying until 1908 or 1909, when he entered the ice business, conducting it under the name of City Ice Company. He bought a lot for an

icehouse, put up and retailed ice. He was wholly illiterate, and procured plaintiff, a banker at Morris, to keep whatever books were necessary in the business. Plaintiff's bank also loaned him the money he needed. This admittedly kept on until 1912, and, so far as any one else knew, until the fall of 1919, when a controversy arose between the parties. In the answer and upon the trial defendant asserted that in January, 1912, he sold the ice business to plaintiff, and was then hired by plaintiff to run it for him, and to do this in defendant's name, precisely as theretofore, his wages to be \$100 per month; that under this arrangement defendant worked for plaintiff until the fall of 1917, when he bought an ice business in Little Falls, and that from that time on he was to receive \$100 a year for letting plaintiff carry on the ice business ostensibly as that of defendant. We shall not discuss the remarkable story of defendant as to the ownership of the ice business at Morris from January, 1912, to the fall of 1919, for we are of opinion that, under the testimony, it became a jury question, and hence there was no error in denying the motion for judgment notwithstanding the verdict.

[2] We, however, deem the verdict perverse and not justified by the evidence. That it is such is due, in part perhaps, to an error in the charge. The counterclaim averred the wages to be of the agreed price and reasonable value of \$100 per month. There was no evidence whatever of the value of the services. Indeed, there was no room for an implied contract either as to employment or compensation. The testimony of defendant alone supported his counterclaim, and that was that there was an express contract of hiring at stipulated monthly wages. "An express contract necessarily excludes a contemporaneous implied one in relation to the same matter." *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52. Under this state of the evidence it was error for the court to charge the jury that a verdict might be given defendant for the reasonable value of his services, if they found no agreement for a specified salary. That the pleading alleged a reasonable value of the services did not justify a recovery on that basis unless there was evidence of such value.

[3] In addition to the error in the charge affecting the verdict, it is perverse and irreconcilable with the evidence. There could be no offsetting of claims in this case. If plaintiff's notes were the valid obligations of defendant, the whole counterclaim must be rejected. And, if defendant was justly entitled to compensation for services, it must follow that plaintiff and not defendant was operating the ice business, and no recovery could be had on any of the notes sued on which were issued for carrying on that business. Defendant's wages for six years

at \$100 per month would amount to \$7,200, and for two years more at \$100 a year would make a total of \$7,400. The answer avers payment to the amount of \$3,750, leaving a balance due of \$3,650 and interest. It is not certain just what date in the fall of 1917 defendant left Morris and started the ice business at Little Falls, but the jury would not be justified in reducing the principal sum asked for more than \$200 or \$300. The interest, which the court instructed the jury to give if the verdict was for defendant, would amount to over \$1,000, so that about \$4,650 was the lowest amount for which a verdict could have been rendered for defendant. The verdict returned was for \$1,300.

The argument is made that plaintiff should not be heard to complain since he is not prejudiced. The argument is not sound. The verdict does not respond to the evidence of either party. As well said by Justice Dibell in the case of *Alden v. Sacramento Fruit Lands Co.*, 137 Minn. 161, 163 N. W. 133:

"The jury compromised, not on the question whether there was a contract between the parties, nor upon what it was, nor upon what the recovery on the contract basis should be, but between the right of recovery and its amount. This compromise was a sacrifice of the very principle upon which a proper recovery rested. Neither the plaintiff nor the defendant had the fair judgment of the whole jury upon all the issues."

In that case the jury awarded about one-half of what the evidence indicated as proper; if any award at all should have been made in the instant case it is about one-third of the correct amount.

In so far as the order denied a new trial, it is reversed, and a new trial granted.

CITY OF ST. PAUL v. HARRIS. (No. 22250.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

(Syllabus by the Court.)

Criminal Law §376—Disorderly House §16—Defendant's character cannot be attacked unless defendant puts it in issue.

The character of the defendant in a criminal prosecution cannot be attacked until he puts it in issue by offering evidence of good character, and this rule applies although the offense charged is the keeping of a disorderly house.

Appeal from Municipal Court of St. Paul; John W. Finehout, Judge.

Maude Harris was convicted of keeping a disorderly house, and she appeals. Reversed, and new trial granted.

Gustavus Loevinger, of St. Paul, for appellant.

Arthur E. Nelson and Eugene M. O'Neill, both of St. Paul, for respondent.

TAYLOR, C. Defendant appeals from a judgment of the municipal court of the city of St. Paul convicting her of the offense of keeping a disorderly house.

At the trial the prosecution was permitted to present evidence tending to prove the bad reputation of the defendant as a part of its case in chief. This is urged as reversible error. No rule of criminal law is more thoroughly established than the rule that the character of the defendant cannot be attacked until he himself puts it in issue by offering evidence of his good character. This rule was considered and applied in the recent case of *State v. Nelson*, 181 N. W. 850, where the authorities were considered and the reason for the rule indicated. The state concedes that such is the general rule, but insists that prosecutions for keeping a disorderly house or house of ill fame are excepted from this rule. There is authority to that effect, but the weight of authority is to the contrary. 18 *Corpus Juris*, 1268, and cases there cited; 4 *Ency. of Ev.* 728. As there must be a new trial for the error in admitting this evidence, the other questions require no extended consideration. We will merely remark that evidence as to the reputation of the place and of the persons who frequented it was competent (*State v. Smith*, 29 Minn. 193, 12 N. W. 524; *State v. Terrett*, 131 Minn. 349, 154 N. W. 1073; *State v. Rogers*, 145 Minn. 303, 177 N. W. 358) and that there was sufficient evidence to sustain the verdict.

The judgment is reversed and a new trial granted.

HUNT v. KEYE. (No. 22349.)

(Supreme Court of Minnesota. Oct. 21, 1921.)

(Syllabus by the Court.)

1. **Boundaries** §3(3)—Courses and distances shown on plat must yield to monuments.

Courses and distances shown on a plat must yield to the monuments and fixed points shown thereon if inconsistent therewith.

2. **Boundaries** §3(3)—Width of railroad in plat locating adjoining street must yield to width as marked on ground.

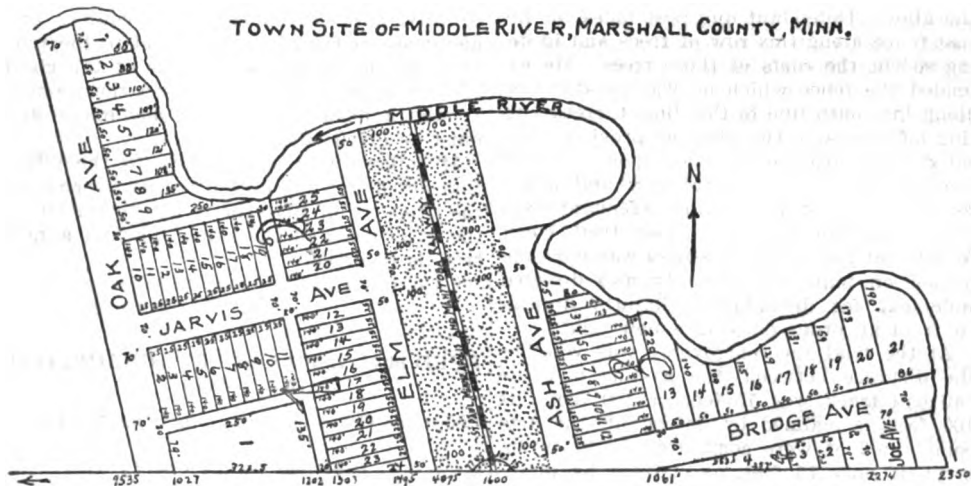
Where the plat of a town site locates a street along and adjoining a pre-existing railroad right of way which, in fact, is only 75 feet in width on each side of the track, but is marked on the plat of the town site as 100 feet in width on each side thereof, the width marked on the plat must yield to the true width, and the right of way as it actually existed on the ground forms the boundary of the street.

Appeal from District Court, Marshall County; Andrew Grindeland, Judge.

Action by Amelia Hunt against Henry Keye. Judgment for defendant, and from an order denying a new trial, plaintiff appeals. Order reversed.

A. N. Eckstrom, of Warren, for appellant.
E. A. Brekke, of Argyle, and Julius J. Olson and Rasmus Hage, both of Warren, for respondent.

TAYLOR, C. The controversy in this case is over the location of a boundary line in the town-site of Middle River located in the south half of the southwest quarter of section 10 in township 156 north of range 48 west in Marshall county. The town-site was platted two years or more after the St. Paul, Minneapolis & Manitoba Railway had been constructed across this section, and lies on both sides of the railroad right of way. The following is a copy of the plat:



Ash avenue, 50 feet in width, extends along the eastern side of the railroad right of way parallel with the railroad track. Bridge avenue, 70 feet in width, extends from Ash avenue to the river at a right angle to the railroad track. Block 3 is bounded on the south by Bridge avenue, on the west by Ash avenue, and on the north and east by the river. It is divided into two parts by an alley, 20 feet in width, extending from Bridge avenue to the river, parallel with Ash avenue and distant 140 feet therefrom. The portion of the block between Ash avenue and the alley is subdivided into 12 lots fronting on Ash avenue, numbered consecutively 1 to 12, beginning at the north, and each 25 feet in width except lot 1. The portion of the block east of the alley is subdivided into 9 lots fronting on Bridge avenue and extending from that avenue to the river, numbered consecutively 13 to 21, beginning at the alley, and each 50 feet in width except lot

21 which is bounded on the east and north by the river.

Defendant is the owner of the 12 lots fronting on Ash avenue and testified that he had lived there 24 years. Plaintiff is the owner of lots 13, 14, and 15 fronting on Bridge avenue and has occupied them as a home since 1892. Her dwelling house is on lot 13 which adjoins the alley. Joseph Le Blance is the owner of lots 16, 17 and 18 and has occupied them since 1894. Dan Erickson is the owner of lots 19, 20 and 21, having purchased them shortly before this suit. How long they had been occupied does not appear. While perhaps not important in this case, it may be proper to mention that a public highway has been established along the section line which forms the south boundary of the town site; that Bridge avenue, or that part thereof not included in this highway, has been vacated; and that the owners of lots in block 3 have acquired that portion of Bridge avenue and of block 4 lying between their respective

lots and this highway, thus making this highway the south boundary of their several properties.

Until shortly before the acts which led to this lawsuit, all the owners of lots in block 3 unquestionably understood that the railroad right of way was 75 feet in width on each side of the center line of the railroad track, for they located the east and west boundary lines of their respective properties by computing the distance of such lines from the railroad track allowing 75 feet for the right of way, and have occupied, improved and used such properties to the boundaries so located ever since acquiring them, a period of more than 20 years on the part of both plaintiff and defendant. The village officers also seem to have understood that Ash avenue was only 75 feet from the railroad track, for they graded it as so located.

Defendant learned that the right of way was marked on the plat of the town site as

100 feet in width on each side of the railroad track, and in October, 1919, claimed that his eastern boundary line was 290 feet from the track, being 100 feet for the right of way, 50 feet for Ash avenue and 140 feet for the depth of his lots, and measured off this distance from the center line of the track and began constructing a fence along the line so located and from this line along his south line. According to his contention the boundary lines of the lots in block 3 are 25 feet east of the lines which have always been recognized and accepted as such boundary lines. Moving these lines 25 feet east will bring Ash avenue within less than 1 foot of defendant's own house, will bring the alley within a few inches of plaintiff's house, will place plaintiff's barn partly on defendant's land and partly in the alley, will place the walk from plaintiff's house to the highway partly in the alley, and will place a row of trees set out by plaintiff several years ago along her side of the alley, as previously located and traveled, on defendant's side of the alley. Defendant dug post holes for his east fence along this row of trees and in doing so cut the roots of those trees. He extended the fence which he was constructing along his south line to this line, thereby cutting off access to the alley as previously located and traveled. Thereupon plaintiff brought this action in trespass and asked for an injunction restraining defendant from continuing the trespass. The trial court found that the alleged trespass was not committed on plaintiff's property and directed judgment for defendant. Plaintiff appealed from an order denying a new trial.

At the trial the controversy was whether the distance between Ash avenue and the railroad track was 75 feet or 100 feet. If 100 feet as claimed by defendant, the acts complained of were committed on his property; if only 75 feet, as claimed by plaintiff, a part of these acts were committed on plaintiff's property. Both parties took the railroad track as the point from which to measure in locating the disputed lines, and neither of them caused any survey to be made for the purpose of locating such lines from the other monuments or fixed points shown on the plat.

[1] From the record we take it as established and as practically conceded that the right of way is in fact only 75 feet wide on each side of the track. But defendant contends that the width marked on the plat is conclusive on the lot owners, and that they must locate their lots on the ground on the hypothesis that the right of way on the east side of the track is 100 feet in width as marked on the plat, although it is actually only 75 feet in width. We are unable to sustain this contention. It is thoroughly settled that in locating lines and boundaries according to prior surveys, courses and distances must

yield to monuments, fixed points, and the boundaries of adjoining lands established before the survey in question as shown on the plat or record thereof. *Obert v. Board of County Commissioners*, 122 Minn. 20, 141 N. W. 810; *Sandretto v. Wahlsten*, 124 Minn. 331, 144 N. W. 1089; *Lawler v. Rice County*, 180 N. W. 37; 4 Ruling Case Law, 100.

[2] It is admitted that the railroad still remains as it existed at the time of laying out the town site. In his certificate indorsed on the plat, the surveyor states that the railroad is "the line upon which the town site is laid out." This certificate gives the width of the streets and alleys and the dimensions of the full lots, and states that the other lots are as exhibited on the plat, but says nothing concerning the width of the right of way. The plat shows that Ash avenue adjoins the right of way—the eastern boundary of the right of way forming the western boundary of the street. The plat taken in connection with the surveyor's certificate shows that the town site was laid out with reference to the right of way, and, consequently, the courses and distances on the plat must yield to the true location and actual boundaries of the right of way as it in fact existed on the ground. It was a fixed and definite monument and must be given effect as such.

It follows that the finding to the effect that defendant had committed no trespass on the property of plaintiff is not sustained by the evidence, and the order denying a new trial is reversed.

REED et al. v. VILLAGE OF HIBBING et al. (No. 22336.)

(Supreme Court of Minnesota. Oct. 21, 1921.)

(Syllabus by the Court.)

1. Municipal corporations $\S$ 996—Taxpayers' interests held not invaded so long as street between them and mining operations remains safe for public travel.

Plaintiffs, taxpayers and residents of the village of Hibbing, in behalf of themselves and other residents, bring this action to enjoin defendants from doing the acts necessary to be done in order that the defendant owning the iron ore deposit under the town site of Hibbing may mine the same; the claim being that defendants have entered an unlawful conspiracy to vacate the streets, change the route of an electric railway, unlawfully dispose of public property, and have engaged in unfair competition to remove the business and residence portion of the village from the old to a new location therein. It is held:

The private interests of plaintiffs will not be invaded by the proposed vacation of the streets in the town site nor by the mining so long as the street between them and the mining operation is left safe for public travel. When the mining is so conducted as to constitute a

nuisance as to them it is time to apply for relief and not now.

2. Municipal corporations $\S$ 1000(5)—In taxpayers' suit finding that no unlawful conspiracy existed held sustained.

The finding is sustained that no unlawful conspiracy exists between defendants. No defendant has been shown to intend an unlawful act nor to employ unlawful means in attaining a lawful end, either singly or in unity with some other.

3. Municipal corporations $\S$ 996—In suit to enjoin removing buildings and mining ore from town site, objection that taxes will increase must be considered with revenue to be derived from mining.

In so far as plaintiffs are and represent taxpayers, the complaint that the taxes will be increased and property in other parts of the village depreciated by building up the new business center where the mining company intends, must be considered in connection with the situation and the employment and revenue, public and private, to be derived from mining the town site.

4. Municipal corporations $\S$ 1000(6)—Defendant in suit to restrain acts necessary to permit mining in town site cannot be forced to seek vacation of streets.

None of defendants intend to take any unlawful step in seeking to vacate the streets. In the vacation both private and public rights can be protected and compensation for injuries given. Defendants cannot be forced in this action to seek vacation of streets.

5. Street railroads $\S$ 20—Change of route held not open to attack.

The franchise under which the defendant railway company occupied a street in the town site provided for a change of route by agreement. The village council with the consent of the company could and did change the route. The change has been approved by the Railroad and Warehouse Commission. It cannot be questioned by plaintiff. It is unnecessary to decide whether the company is a street railway or an interurban railroad.

6. Municipal corporations $\S$ 996—As village may dispose of property unless grant forbids, transfer will not be enjoined.

The threatened sale of the village property has not reached a point where a court should interfere. A village may dispose of its property when occasion arises unless it was acquired through a grant which forbids a sale.

7. Municipal corporations $\S$ 1000(5)—Charge of unfair competition held not proven.

The alleged unfair competition of the mining company was not proven.

8. Appeal and error $\S$ 863—In action to enjoin removal of buildings for mining operations, validity of ore reservations in deeds held not for decision.

The validity of the ore reservations in the deeds to the lots in the town site are not properly for consideration on this appeal.

9. Municipal corporations $\S$ 1000(6)—Plaintiffs not being entitled to injunction, court will not retain jurisdiction to award anticipated damages.

Plaintiffs, not being entitled to an injunction, cannot claim the right to have the court retain the action to award anticipated damages.

10. Municipal corporations $\S$ 1000(5)—In suit to restrain city and mining company, excluding latter's articles of incorporation held not error; evidence of mining company's blasting on right of way of railroad held immaterial; testimony of company's officers' intentions held proper to meet charge of unlawful acts; refusing to allow complaint amended to litigate interests of adjoining town held proper.

There was no error in rulings during the trial, and no abuse of discretion in refusing to grant an amendment to the complaint.

11. Constitutional law $\S$ 315—Denying injunction against village and others, restraining removal of buildings and mining ore from town site, held not in violation of due process clause.

It is not perceived that any violation of the Fourteenth Amendment of the federal Constitution occurs in denying plaintiffs relief herein.

Appeal from District Court, St. Louis County; Edward Freeman, Judge.

Action by Henry P. Reed and others against the Village of Hibbing and others for injunction. Injunction denied, and from an order denying a new trial, plaintiffs appeal. Affirmed.

H. V. Mercer, of Minneapolis, and O. G. Anderson, of Hibbing, for appellants.

Washburn, Bailey & Mitchell, of Duluth, for respondent Mesaba Ry. Co.

Fryberger, Fulton, Hoshour & Ziesmer, of Duluth, for respondent Village of Hibbing and officers.

Davis, Severance & Morgan, of St. Paul (Frank D. Adams and Elmer F. Blu, both of Duluth, and D. T. Collins, of Hibbing, of counsel), for other respondents.

HOLT, J. The action is to enjoin defendants from carrying out an alleged unlawful conspiracy to destroy, by mining, a part of the village of Hibbing under which is a valuable iron ore deposit. The injunction was denied and from the order denying a new trial plaintiffs appeal.

The 73 plaintiffs are residents and taxpayers in the village. The village and its officers, the Oliver Iron Mining Company, the owner of the ore, and the Mesaba Railway Company, which owns and operates an electric railway into the village, are the defendants. The village was organized in 1893 with 326 inhabitants, but has now a population of over 15,000, and has greatly extended its limits particularly to the south

where the village of Alice has been taken in. Under part, at least, of the original village area was valuable iron ore. A 40-acre tract of the town site of Hibbing, being the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 8, and herein-after referred to as the town site, is the territory that has occasioned this lawsuit. On this 40 has grown up the business center of the village. An expensive village hall has been built thereon. To the north, east, and west thereof open-pit mining has been carried on and progressed to the very edge of the town site. The pits are excavated to a depth of more than 200 feet. The electric railway enters the village from the north upon a steel bridge spanning an open pit, and passes south on Third avenue through the center of the 40 and south through the center of Pillsbury and Southern additions. It connects several mining towns on the iron range, Gilbert being its eastern and Hibbing its western terminus. The owners of this 40 dedicated the streets to the public, but in selling lots reserved the minerals and the right to enter upon the surface to explore for and to mine and remove the ore. The defendant mining company has succeeded to the reservations. It has acquired the fee to 90 per cent. of the surface, and aims to acquire the balance. Its purpose for a long time has been to so arrange matters that it may be able to mine the ore in that 40. To that end the buildings it owns will be torn down or removed to two platted additions, known as Central and Park, located about $1\frac{1}{2}$ miles south of its ore land, where it is hoped the future business center of the village will be established. It is freely admitted by the mining company that it intends to mine the ore referred to as soon as it can be done lawfully; that it cannot be so mined until the streets upon this 40 are vacated, and hence it will seek their vacation when the time is ripe; that it has opened negotiations for the purchase of the village hall; that it has sought to facilitate the change of route of the electric railway so that it will not traverse any part of the forty; and that it acquired Central and Park additions with a view of moving the buildings from the town site thereon, and erecting hotels, residences, and business blocks for sale or rent to those who might desire to locate there in preference to further north.

We have been favored with exhaustive briefs of over 700 pages, citing an abundance of authorities, and discussing the numerous questions of law and fact which the well-known diligence and ingenuity of the learned counsel have injected into the case. But those matters only will be considered which in our judgment are determinative of the question whether an injunction should issue upon the facts found, or upon those facts,

if any, that ought to have been found from the evidence.

Plaintiff's right to relief must rest either upon a threatened invasion of their private property interests or their interests as taxpayers and residents of the village. We assume, for the purposes of this decision, that as taxpayers and residents they may maintain an action in protection of public rights; that is, the rights of the village and its inhabitants.

[1] As to any threatened invasion of their private interests it is enough to state that none of plaintiffs reside upon or do business within the town site. They are all located on the Pillsbury or Southern additions to the south. The street running east and west between the town site, the 40 in question, and the two additions last mentioned to the south thereof where plaintiffs either reside, do business, or own property, is not shown to be threatened with vacation; therefore they cannot be left with cul-de-sac streets. The inconvenience in reaching territory north of Hibbing is an inconvenience common to the public of which plaintiffs cannot complain. *Thorpe v. City of Ada*, 137 Minn. 86, 162 N. W. 886. Of course, any mining operation to the north of the dividing street mentioned must be so carried on that the street will be safe for travel. So long as that condition remains plaintiffs' interests south of the street are not endangered. At any rate, mining in the north part of the 40 can undoubtedly be carried on to a great extent without any direct interference with persons and property in the additions mentioned. In this aspect of the case we agree with the court below that the action is premature. No court will stop a great mining enterprise unless it is made to appear that an invasion of private or public right is imminent. Nor do we think there is much substance to the claim that mining could be carried on nowhere in the town site without constituting a nuisance to plaintiffs. Flying fragments, noise and vibrations from blasting, and smoke and rattle from steam shovels and ore trains may be so controlled as not to interfere materially with the peace and comfort of residents to the south of the 40. It is reasonable to require those, who take up a business or residence in a municipality dependent for its very existence upon the industry there carried on, to somewhat endure the disturbances and discomforts that unavoidably attend the proper and careful operation of the industry. It cannot now be said upon this record that no mining operations can be carried on in the town site within the rules enunciated in *Brede v. Minnesota Crushed Stone Co.*, 143 Minn. 374, 173 N. W. 805, 6 A. L. R. 1092, and 146 Minn. 406, 178 N. W. 820, 179 N. W. 638.

It is contended that in order to remove all

its ore in the town site the cross-street mentioned and a large part of the adjacent additions to the south must eventually be destroyed or appropriated for a slope. Therefore, since plaintiffs have come into a court of equity, the court should retain jurisdiction and ascertain and award the damages which plaintiffs will ultimately suffer for the injury to their property. The short answer to the contention is that, as matters now stand, it is not to be assumed that defendants will so mine that the lateral support of either the street mentioned or of plaintiffs' real estate to the south thereof will be impaired or destroyed. When that is attempted the time is ripe for injunctive relief. There is no way in which this action may be converted into a condemnation proceeding. The mining company has not the right of eminent domain, nor can it be forced to take the property under that right. We conclude that plaintiffs have not shown themselves entitled to an injunction or other relief for the protection of any private right of person or property.

[2, 3] The complaint charges a conspiracy between defendants to move the village so as to locate its business center in Central and Park additions upon ground where there is no underlying ore. The finding is that none of the defendants "has combined, arranged, or conspired with any of the other defendants herein to injure the plaintiffs or their businesses or properties or to accomplish any unlawful end, or any lawful end by unlawful means." We think the evidence amply sustains this finding. The removal and marketing of many millions of tons of ore by the rightful owner must be conceded a lawful and even laudable enterprise. It gives employment, and is productive of revenue for the owner, the nation, the state, and the municipality. Has the mining company separately or with the aid of any other defendant resorted to any unlawful means, or does it threaten so to do in order to remove this ore? It certainly has done no wrong in buying the surface rights on this 40 or in removing the buildings therefrom, or in erecting or encouraging the erection of buildings in a part of the village where no ore beds exist. Nor can a property owner be accused of using unlawful means if he applies to the proper authorities to change the routing of an electric railway operated on streets along or across his land, or takes such steps as the law provides for the vacation of public streets thereon. The mining company disclaimed any intention or threat to disturb any street or bridge over any public road until the same had been legally vacated. The court found this true, and could not well have found otherwise.

Much is made of the fact that an officer of the village, who had begun the erection of

an extensive building on lots owned by him in Pillsbury addition, sold his lots to the mining company, and removed the building material therefrom, and erected his building in the new location. There is no evidence to show that this was anything but a legitimate business transaction. The officer, when his attention was called to the new location, appreciated that it was more desirable than the one he had for a business block. It does not appear that the price paid for the new site nor that received for the old was other than the going market price. Nor is there any evidence from which an inference can be drawn that the village was to yield any rights or that the officer should use his influence to procure any advantage to the mining company because of the deal.

In finding that there was no conspiracy, and, in finding that where there was unity of purpose or action between any of the defendants the end was lawful and the means employed to attain such end were not unlawful so far as concerned public interests or the interests of the village, the court could properly consider the fact that the present growth and prosperity of the village is the result of the mining of the ore immediately adjacent thereto; that a continuance of such growth and prosperity depends upon a continuance of this industry; that an immense body of ore underlies the town site and will furnish employment for years and produce revenue both to the owners of the ore and the public; and that if public improvements in the town site have to be discarded and new ones made in the new location, involving great expenditure of public and private funds, the burden will fall almost wholly on the mining companies. The findings are that such companies now pay 98 per cent. of the municipal taxes of which the Oliver Mining Company contributes 85 per cent., and that 3,000 of the 15,000 inhabitants are employed in the mining operations in and adjacent to the village. It is also worthy of consideration that the permanent location of the village should be where the use and development of the natural resources will not be prevented. All of the defendants, and especially the village officers, may properly take these matters into consideration, and from the point of view of the best interests of the public and the municipality it is not difficult to see benefits greatly exceeding the expense found in the removal and destruction of the town-site buildings, streets, and improvements, and the erection of the business buildings, schools, public buildings, and homes in a new location.

[4] It will be necessary to note some of the particular facts upon which the claim for equitable relief is grounded, viz., the bridge and streets, the electric railway, the village hall, the mining nuisance, the unfair

competition, and the mining reservations; for even though no conspiracy was shown, still if the conduct of any one of the defendants warrants relief it should be granted.

Several years ago the mining company, at a cost of over \$80,000, erected the bridge across the open pit mine on the north of the town site. This bridge furnishes the only means of direct ingress and egress to the village from the north. The electric railway also runs thereon. The court found this bridge to be part of the public highway. It is therefore contended it cannot be destroyed or removed. If the streets it connects are vacated, the bridge would no longer serve a public purpose, and no valid objection could be raised to its removal. Whose the salvage will be is not involved on this appeal. And whether the authority to vacate streets in Hibbing is lodged in the village council or the district court is not necessary to consider. It cannot seriously be doubted that streets in a village may be lawfully vacated. And were it not so, the Legislature could surely grant the authority. We need go no further, for the finding and the undisputed evidence is that no mining will be attempted or can be done until the streets are lawfully vacated. If they cannot be there will be no occasion for demanding an injunction or any of the relief asked for in this action. It may also be suggested that the mining company's present intention to some time in the future make application for the vacation of the streets on the town site does not give plaintiffs the right to force the company to proceed now so to do. This is too plain for argument.

[5] The electric railway obtained a franchise to run cars into the village on certain streets, which franchise has 25 years yet to run. The village council has passed an ordinance permitting the company to change its route into the town site, so that now, before it reaches the northerly limits of the village, it turns east and skirts the easterly boundaries, avoiding passing over known ore deposits, and then turns westerly and northerly, passing through Central, Park, Southern, and Pillsbury additions terminating at the south town-site line. The railway company, conceiving that it was an interurban railway, also asked for and was granted permission by the Railroad and Warehouse Commission to make the change. The order granting permission was not appealed from, and is now final. If the company is a railroad within the control of the Commission, the abandonment of the old and the adoption of the new route cannot be questioned at this time. But plaintiffs earnestly contend that it is a street railway, and hence the Railroad and Warehouse Commission had no jurisdiction to make the order. We need not pass on the status of the railway com-

pany, for we have no doubt that the village council has full power to change the routing of the car lines on its streets. In fact, the original franchise contains a provision that by agreement the parties may change the route. The ordinance of 1919, accepted by the company, granted this change. Courts will not interfere with the judgment of the village authorities as to the streets upon which electric cars shall run. The length and convenience of the new route as compared with the old is for the village authorities. It is doubtful whether plaintiffs have any standing to question the change of route of any railway. See *Henry v. Ann Arbor R. Co.*, 116 Mich. 314, 75 N. W. 886.

[6] The negotiations for the sale of the village hall have not reached the point where a court should interpose its arm. The mining company signified to the village council that it was willing to buy, and the council has appointed a committee to ascertain the cost or value of the property. That is as far as matters have progressed. Chapter 149, L. 1891, amending the law under which the village of Hibbing is incorporated, gives the council the power "to receive, purchase and hold for the use of said village any estate, real and personal, and to sell, convey, lease or otherwise dispose of the same." There can be no doubt, under this statute, of the power of the village to dispose of a village owned building when by virtue of its location or inadequacy it has ceased efficiently to serve the public purpose for which it was built; there being no restrictions against any use or disposition in the grant through which the village derived title. *Thompson v. Nemeyer*, 59 Ohio, 486, 52 N. E. 1024; *Shaver v. Town of Salisbury*, 68 N. C. 291.

We have already covered the alleged mining nuisance. It can hardly be claimed that plaintiffs as representing the village or the public may prevent mining operations as a nuisance when they have not made out a case for relief as individuals occupying property as near to the place intended to be mined as any other inhabitant.

[7] We are not impressed with the proposition that the court should have found that the mining company had entered upon a course of unfair competition in attempting to establish the new village center, thereby causing irreparable injury to plaintiffs as individuals and as members of the community. No false representations were proven against the company. For many years it has been known that it intended to mine the town site at some time, and in preparation thereof was acquiring the surface rights or fee. Its acquisition of Central and Park additions was no secret, and openly the work of improvements thereon have proceeded, but, apparently, without holding out any in-

ducements for people to there locate other than the advantage that the place itself and its improvements offered over places further north in proximity to ore beds and mining operations. An individual or corporation having a peculiar interest in developing a certain part of a city or village may work toward that end without being charged with unfair competition, even though such development indirectly depreciates values and retards growth in other parts of the municipality, at least, so long as no misrepresentation as to other localities or unfair means towards them are employed. We have discovered no evidence of any unfairness or deception used by any of defendants in the development of the new business center of the village. The mining company had the right to buy the surface rights in the town site. It had also the right, so far as plaintiffs are concerned, to buy Central and Park additions. In dismantling the town site and upbuilding the additions it invades no rights of plaintiffs. Its efforts may not be charged with malice as in the case of *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807, for the sole purpose is to make it possible to mine its valuable ore deposit, a perfectly legitimate object.

[8] Another claim is that the reservations held by the mining company to the ore under the town site are void. If that were true it would affect only the price of the village property. As to the other property in the town site the company either has the surface, or fee, or intends to acquire it before starting mining. We decline to pass on the validity of the mineral reservations in the deeds through which the mining company claims. It is not necessary for a decision here.

[9] But plaintiffs maintain that, if not entitled to an injunction, the court should nevertheless retain the case to award damages. As already shown, there is no way in which this action may be converted into a condemnation proceeding. The mining company cannot be forced to mine or to buy plaintiffs out, or pay for anticipated damages in the distant future. In the proceedings to vacate the streets appropriate damages may be awarded to those entitled thereto. If after mining operations are started any public or private rights suffer injury, it is time to call upon the courts for protection or compensation. No nuisance, trespass, or wrong, either to private or public property or to persons, has been shown to be impending.

[10] Complaint is made of rulings on the reception of evidence. Whether the mining company is within its corporate powers in buying and improving real estate cannot have any bearing upon plaintiffs' right to re-

lieve, and hence the exclusion of the company's articles of incorporation was not error. Nor was it material to plaintiffs' case to show that the mining company blasted a hole in the right of way of the Great Northern Railway Company after it had obtained permission from the Railroad and Warehouse Commission to move its tracks to the south. Testimony from the mining company's officers regarding their intentions as to steps to be taken before beginning to mine was proper to meet the charge that unlawful acts were contemplated or threatened.

There was no error in refusing plaintiffs to amend the complaint so as to litigate the interests of the town of Stuntz, which adjoins but is not part of Hibbing.

[11] We see nothing in the contention that, unless the injunction is granted or the anticipated damages that may flow from mining the town site are adjusted in this action, plaintiffs will be deprived of their property without due process of law in violation of the Fourteenth Amendment to the federal Constitution. When any one of the plaintiffs shows an injury to his person or property from the acts of defendants, he is entitled to protection and damages, or shows that but for the interposition of the court an irreparable injury will occur to his person or property rights. But no such showing was made. The anticipated injuries to the village and its inhabitants and taxpayers are either too remote or problematic to resort to the remedy of an injunction now, or else it is plain that in the legal or statutory proceedings, which the mining company must take before it can begin to mine, the law furnishes ample redress. Whilst the court below in the memorandum stated that it will require the expenditure of enormous sums of money by the municipality to furnish the inhabitants of South Hibbing, that is, the new location, with the same municipal facilities that the residents of Southern and Pillsbury additions now have, such statement is not made a part of the findings. It is not clear what the court refers to. True, the change of the business center or residence center within any village or city involves large expenditures for streets, sidewalks, water mains, and the like; but the bulk of these expenditures is borne by the abutting real estate if Hibbing assesses the amount against benefited property as is authorized by the law under which the village organized. There are certain other expenses that must come from the taxpayers generally, such as fire and police protection and the cost of public buildings. If this is what the court means, such cost is incident to the growth and development of any city, where for various reasons the center of population moves and the public buildings and improvements in the old location fail properly to

serve the new demands. Who can say whether it is not vastly to the pecuniary advantage of not only Hibbing and its inhabitants and taxpayers, but to the state and nation as well, that every merchantable ore deposit within the village limits be mined and to that end all buildings be moved to some part within its extensive limits where there is no ore? The taxes and public revenues derived from mining operations have been enormous in the past and will be hereafter so long as there is ore to mine. And, as before pointed out, the mining companies have so far paid all but a fraction of the municipal expenses of Hibbing. In passing upon the right or wrong of increased taxation to plaintiffs, it is well to remember that a practice, so general that notice may well be taken thereof, has prevailed in the mining regions of this state for villages to extend their limits so as to take in every suspected ore body within reach, and without regard to the fitness or need of such territory for business or residence purposes; and this against the most vigorous opposition from the mine and ore owners. Hibbing's dimensions now are, roughly speaking, five miles long and three miles wide, while originally it consisted of but four sections. It is true the ore body here involved underlies the original village plat, but the policy of Hibbing, like the other villages, has been to expand so as to embrace adjacent ore lands, and there should rest a reciprocal duty upon the village and its taxpayers to permit these ore lands to be mined when it can be done lawfully, even if some additional public expense incidentally results therefrom. We think the decision of the learned trial court is right under any view of the law and facts of the case.

Order affirmed.

STATE v. DOLLIVER. (No. 22363.)

(Supreme Court of Minnesota. Oct. 21, 1921.)

(Syllabus by the Court.)

1. Criminal law §1186(1) — Where several errors show unfair trial, a new trial will be awarded.

Though any one of several errors assigned would not in itself be sufficient ground for the reversal of a conviction in a criminal case, yet if all of them taken together justify the conclusion that defendant was not accorded a fair trial he is entitled to a new trial.

2. Criminal law §377—Defendant's character evidence should antedate accusation.

The general rule is that character evidence should be confined in point of time to a period antedating the accusation of the defendant.

3. Criminal law §656(8)—Facts should be determined uninfluenced by bench's opinions.

In criminal prosecution the defendant has the constitutional right to have the facts determined by the jury, uninfluenced by opinions from the bench.

4. Criminal law §377, 561(3) — Defendant's character evidence admissible and may engender reasonable doubt.

In such cases defendant has a right to introduce character evidence of moral qualities having a definite relation to the crime with which he is charged and to have it considered by the jury as a fact in the case which, if established, tends to support the original presumption of innocence with which he is clothed. It may be sufficient of itself to engender a reasonable doubt of guilt.

5. Criminal law §776(5) — Instruction that defendant's good reputation is not of itself sufficient to raise reasonable doubt held erroneous.

An instruction that the "good reputation of the defendant is not of itself a sufficient fact from which a reasonable doubt of guilt may arise" is erroneous, and the error is not cured by the further statement that such doubt must arise from all the testimony in the case.

Appeal from District Court, Faribault County; E. C. Dean, Judge.

Kenneth Dolliver was convicted of statutory rape, and from an order denying his motion for new trial he appeals. Order reversed.

Allen, Selfert & Allen, of Fairmont, for appellant.

Clifford L. Hilton, Atty. Gen., and Henry J. Frundt, Co. Atty., of Blue Earth, for the State.

LEES, C. Defendant was indicted and convicted of the crime of having carnal knowledge of a girl 16 years of age, and has appealed from an order denying his motion for a new trial.

[1] The complaining witness testified to facts which, if true, established defendant's guilt. He flatly denied the charge. Two witnesses called by the state testified that they had been riding in an automobile with the defendant and the complaining witness during the evening when the offense is alleged to have been committed, and that after they had alighted from the car on their return from the drive the defendant drove away accompanied only by the complaining witness. The act took place shortly thereafter according to her testimony. There was no other evidence bearing directly on the issue as to defendant's guilt or innocence. As part of his defense he offered in evidence an honorable discharge from the United States army some six months prior to the date of the offense charged. Among other things, it set forth that he was in the service from May 26, 1918, to February 3, 1919; that he was in

the American Expeditionary Forces in France and participated in the engagements in the Argonne forest in September, 1918, where he received a wound in his right hand. It was certified that his character was excellent and that his services were honest and faithful. With some hesitation the court received the discharge in evidence, saying:

"This seems to show that he has a good reputation for fighting, being a good fighter, but this is something entirely different from fighting. It may be admitted though."

It is doubtful whether the discharge was admissible. *People v. Eckman*, 72 Cal. 582, 14 Pac. 859; *Taylor v. State*, 120 Ga. 857, 48 S. E. 861. But after it had been received the court took occasion to say in charging the jury that, although the discharge was an honorable thing to have, "that of itself doesn't give a license to any young man to return and debauch a child or enter a home for the purpose of destroying it." So far as the record shows there was no occasion for such a statement. It was likely not only to overcome pretty effectually any weight the jury might have attached to the discharge as evidence of good character, but also to prejudice the defendant in their eyes as a man capable in the estimation of the court of the base conduct mentioned. If the defendant had no other ground for complaint we should not be inclined to reverse, but there are additional grounds. And the rule is that where any one of several errors assigned would not in itself be sufficient to warrant a reversal, yet if all of them taken together justify the conclusion that defendant was not accorded a fair trial, it becomes the duty of this court to reverse. *State v. Briggs*, 84 Minn. 357, 87 N. W. 935; *State v. Almos*, 122 Minn. 479, 142 N. W. 801.

[2, 3] Defendant produced several witnesses who testified that his reputation as a moral and law-abiding man was good. His counsel, in examining these witnesses, so framed the questions as to include the period which followed as well as that which preceded his indictment and arrest. Objection being made to such questions, the trial judge inquired whether counsel meant by them to cover defendant's reputation "now after he has been arrested and the case brought to trial?" Being answered in the affirmative, the judge said, "The witness may answer the question, although I don't think it competent." Each of the character witnesses was asked the same question. The county attorney repeatedly objected and the trial judge repeatedly addressed the same question to defendant's counsel and received the same answer, except on one occasion when, according to the record, the answer was, "No." Exception being taken to the repetitions of his questions, the trial judge said "that as framed by defendant's counsel the questions were not in proper form," and added "that some of the

witnesses had testified that even after defendant's arrest his reputation was good." Counsel then inquired whether the court meant to express an opinion to the contrary and was answered thus:

"None whatever, although there is more or less talk about it. I simply called the witnesses' attention to that fact so that they could be advised of what they were answering. The general rule of character testimony should be up to the commission of the offense, or the arrest, and immediately previous to that."

Defendant took exception and now urges that the effect of the evidence as to defendant's good reputation was destroyed by these and other like questions and remarks of the trial judge. The general rule was correctly stated by the trial judge. 16 Corp. Jur. 581; 10 A. L. R. note 2, p. 9. But since the witnesses were permitted to answer questions framed so broadly as to cover defendant's reputation up to the time of the trial, we cannot approve of the statements from the bench, and particularly that there had been more or less talk about defendant's reputation. They tended to counteract the effect the character evidence might have had with the jury, and in criminal prosecutions the defendant has the constitutional right to have the facts determined by the jury uninfluenced by opinions from the bench. *State v. Yates*, 99 Minn. 461, 109 N. W. 1070. But defendant has a more serious cause for complaint in this connection.

[4, 5] In charging the jury on the subject of the character evidence in the case the court said:

"The question of good reputation of the defendant is not of itself a sufficient fact from which a reasonable doubt of guilt may arise. Reasonable doubt or guilt must arise from all the testimony in the case."

There was no other reference to the subject in the charge and no additional instructions were requested. The instruction given is open to the criticism that it would lead the jury to believe that evidence of good character may not of itself raise a reasonable doubt of guilt. The rule is that in all criminal actions the defendant may introduce evidence showing that he bore in the community where he lived a good reputation for moral qualities having a definite relation to the crime with which he is charged. Such evidence is received on the theory that a person possessing the moral qualities in question would not be likely to commit the offense charged. It should be considered by the jury with all the other evidence in the case in determining whether the witnesses who have testified to facts tending to criminate defendant have been mistaken or have testified falsely. 3 Greenleaf, Evid. 25; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Cancemi v. People*, 16 N. Y. 501; *People v.*

Elliot, 163 N. Y. 11, 57 N. E. 103; Com. v. Webster, 5 Oush. (Mass.) 295, 52 Am. Dec. 711; United States v. Gunnell, 5 Mackey (D. C.) 198; Edgington v. United States, 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467. It is admissible to support the original presumption of innocence. It is a fact in the case that may tend in a greater or less degree to establish innocence. It may be sufficient to establish a reasonable doubt of guilt. State v. Sauer, 38 Minn. 438, 38 N. W. 355; State v. Holmes, 65 Minn. 230, 68 N. W. 11. It goes to the probabilities of defendant's guilt and bears on the general question of guilty or not guilty. State v. Hutchison, 121 Minn. 405, 141 N. W. 483. A man accused of the crime for which defendant was indicted is as good as convicted in the minds of many men even before he is tried. If he is of good character and if his reputation has hitherto been unblemished, these facts become his chief dependence in meeting and refuting the charge. Evidence thereof is substantive proof strengthening the presumption of innocence with which the law clothes him. True, it is to be considered in connection with all the other evidence in the case, but it may be sufficient of itself to raise a reasonable doubt of guilt. Edgington v. United States, supra; People v. Garbutt, supra; Remsen v. People, 43 N. Y. 9; Com. v. Aston, 227 Pa. 106, 75 Atl. 1017. See, also, 10 A. L. R. 1017, note 7, p. 105; 103 Am. St. Rep. note, p. 905.

We are of the opinion that the instruction given unduly restricted the effect of the character evidence and to his substantial prejudice deprived defendant of the benefit it would have been to him if the jury had been instructed as to its weight in accordance with the principles above stated.

The order denying a new trial is therefore reversed.

STATE ex rel. HILTON, Atty. Gen., v. VILLAGE OF BUHL et al. (No. 22236.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

(Syllabus by the Court.)

1. Municipal corporations §29(4)—Annexed property must be such as to be properly subjected to village government.

In a proceeding under Gen. St. 1913, § 1800 et seq., to annex territory to a village, the property annexed must be so conditioned as properly to be subjected to village government.

2. Municipal corporations §33(8)—Voter's determination that annexed territory may be properly subjected to village government not sustained, if arbitrary.

Whether it is so conditioned is primarily for the voters; but if their action is clearly arbitrary, for the purpose of increasing sources of revenue rather than of subjecting to the local

village government property having a natural connection with it and people residing thereon having a community of interest, the courts will not sustain it.

3. Municipal corporations §29(4)—Annexation of practically uninhabited territory held arbitrary and invalid.

The territory annexed to the village of Buhl was not so conditioned as properly to be subjected to the village government, within the meaning of the Legislature, and the annexation was arbitrary and invalid.

Proceeding in quo warranto by the State, on the relation of Clifford L. Hilton, Attorney General, against the Village of Buhl and others, to determine validity of annexation of territory. Writ of ouster ordered.

Clifford L. Hilton, Atty. Gen. (Washburn, Bailey & Mitchell, of Duluth, of counsel), for relator.

Warner E. Whipple, of Duluth, and A. R. Folsom, of Buhl, for respondents.

DIBELL, J. Quo warranto on the relation of the Attorney General to determine the validity of the annexation of territory to the village of Buhl in St. Louis county.

[1] 1. The proceeding for annexation was under G. S. 1913, § 1800 et seq. It was regular. The respondents contend that since the statutory proceeding was regular there is nothing for review by the courts. We have held that section 1800 must be construed in connection with section 1204 et seq., and that the requirement of section 1204, not contained in section 1800, that the property annexed must be "so conditioned as properly to be subjected to village government," attaches to the proceeding under section 1800. State v. Village of Gilbert, 127 Minn. 452, 149 N. W. 951; State v. Village of Kinney, 146 Minn. 311, 178 N. W. 815. The holding was made after argument, it was correctly made, and it is to be taken as settled law.

[2] 2. The question whether territory proposed to be annexed is so conditioned as properly to be subject to village government is primarily and in the first instance one of fact for the voters; and their decision will not be disregarded unless it clearly appears that it was arbitrary. That was distinctly held in State v. Village of Dover, 113 Minn. 452, 130 N. W. 74, 539.

In referring to the meaning of the requirement that the lands annexed be so conditioned as to be properly subject to village government, the court in that case said:

"It does not mean that there must be a present necessity for such lands for building or other village purposes. It is not necessary that all such lands shall be platted, graded, or used for village purposes at any particular time in the future. Adjoining lands may be brought within the limits of the corporation and be subjected to village government, if it may fairly

be said that there exists, or may exist within a reasonable time in the future, a unity of interest in the enforcement of the law, such as police patrol and the public health."

In *State v. Village of Alice*, 112 Minn. 330, 127 N. W. 1118, the court, referring to the same matter, said:

"Whether the adjacent territory may be properly subjected to village government is not to be determined by the pecuniary interests of the owners thereof; but their land cannot arbitrarily be brought into the village simply for the purpose of increasing its revenues by taxing it. The adjacent lands must be so near to the center of the platted lands as to be somewhat suburban in their character. The final test is whether the platted territory and the adjacent territory are so limited in area and have such a natural connection, and the people residing thereon have such a community of interest, that the whole may be properly subjected to village government."

The general principles announced in these cases were followed in the *Gilbert Case* and in the *Kinney Case* just cited; and the court appreciated the nature of the range mining country, the character of the villages scattered along it, the presence of mining locations and clusters of people without village government, but tributary to organized villages, with intervening unsettled areas, and the desirability or necessity of policing and providing sanitation and other comforts and conveniences.

[3] 3. Prior to the annexation under review Buhl contained substantially forty-one forties or 1,640 acres. The platted portion was on three forties. The territory annexed contains slightly less than 2,800 acres. West of a line projected along the westerly border of the village there are substantially 1,400 acres. There are three residents. They live on a forty more than a mile west of the westerly line of the village and about two miles from the platted portion. Directly north of the village eight forties, three of them state land, are annexed. There are no residents. South and southeast there are annexed twenty-seven forties. On nine of these there are residents. On the others there are none. Six or seven are state land.

Buhl had a population of 2,008 by the 1920 census. By the annexation its population was increased by 104, of whom 19 were voters. It had an assessed valuation of nine and one-half millions. By the annexation it got four and one-half millions more.

The lands around the village are of the usual character of cut-over lands with brush growing and stumps standing. The territory to the west is crossed by a steam railroad and by the range electric line and there are public highways. At the south and east, where all the 104 except 3 live, there are a

few who do farming. It amounts to little. They gain their livelihood by working in the mines or in the village or otherwise. The evidence does not show that mining development affecting the village is to be expected in the near future. The inference from the evidence is to the contrary. One forty at the extreme west of the added territory is now being stripped. It will be mined as an open pit mine in connection with three forties running east and west immediately west of it. The entrance is from the west. It will add no population to the annexed territory. The mining locations for this development are to the west in the village of Chisholm. The village, like other villages, is occasionally in danger from brush fires within its limits or outside of them. There is nothing exceptional in the situation of Buhl. Perhaps some of the territory to the south and to the east, where the 101 people live, is properly conditioned for village government. That is not a matter for present consideration.

There were 19 voters in the added territory. They voted unanimously for annexation. By their vote they added a population of 104 to the village's population of 2,008. 2,800 acres to the village's 1,640 acres, and an assessed valuation of four and one-half millions to the village's nine and one-half millions. Nearly all of the added valuation of four and one-half millions comes from the area of 1,400 acres containing a population of 3. The territory to the south and east, with a population of 101, adds less than \$10,000 to the valuation.

The levy of taxes for village purposes in 1920 was \$350,000; in 1919, \$268,000; in 1918, \$273,000; and in 1917, \$179,000. The village has an indebtedness in excess of \$600,000. These taxes do not include taxes for the support of schools and the indebtedness does not include the indebtedness of the school district. An increase of taxes in the annexed territory because of annexation is an expected result. It does not prevent annexation. But, as said in *State v. Village of Alice*, supra, land cannot be brought into a village arbitrarily just to increase its revenues or to add taxable property. The annexed territory ought of right to have some advantages for the increased taxes it pays.

We defer, as we ought, to the views of the 19 voters. We would blind ourselves to the facts if we declined to see that the purpose of the annexation of all this territory is to annex sources of revenue rather than territory properly subject to village government. We do not hesitate to hold that the annexed territory is not so conditioned, within the meaning of the Legislature, as to be subjected to the village government of Buhl and that the annexation is arbitrary and invalid.

Let a writ of *ouster* issue.

BATCHELDER v. STEPHENSON et al.
(No. 22532.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

(Syllabus by the Court.)

Fraud — False representations by third person having purchaser's confidence actionable.

False representations deceitfully made by a third person to a prospective purchaser of land relative to its value, and the price for which it was offered and held, may constitute actionable fraud; and the facts alleged in the complaint, showing such representations made by third parties to a prospective purchaser, who reposed confidence in them, stated a cause of action.

Appeal from District Court, Hennepin County; J. W. Molyneaux, Judge.

Action by A. E. Batchelder against John W. Stephenson and another, and from an order sustaining demurrer to his complaint the plaintiff appeals. Order reversed.

Bert O. Loe, of Granite Falls, for appellant.

C. F. Keyes, A. H. David, and Le Roy Bowen, all of Minneapolis, for respondents.

DIBELL, J. This is an appeal by the plaintiff from an order sustaining the demurrer to his complaint upon the ground of insufficiency of facts.

The plaintiff is the assignee of a cause of action for deceit claimed by one Gough against the defendants. The complaint alleges facts substantially as follows: Gough was a farmer living in Yellow Medicine county where he was breeding thoroughbred Duroc Jersey hogs. The defendants published a paper devoted to the interests of breeders. Gough and they became acquainted and had numerous business transactions. They had his confidence. They advised him that it would be to his advantage to buy a farm near Minneapolis and carry on his breeding there; and they volunteered to find a farm suitable for him.

Later they reported that they had found a suitable farm and recommended its purchase. It contained 53 acres and was owned by one Dutton. It was worth \$22,000. Dutton owned a tract of 18 acres adjoining it worth \$6,000.

They told Gough that the 53 acres was offered for \$25,650, that it was worth that amount, that it could not be purchased for less, and that it could be sold at any time for that much. Gough looked at the land and purchased for \$25,650. Dutton had listed the land for sale at \$22,000 and was willing to sell at that price. He was willing to sell both tracts for \$28,000. He was offering the 18-acre tract for \$6,000. The defendants

were negotiating for its purchase at the time. By getting Gough to pay \$25,650 the defendants secured the 18 acres at \$2,350, making a total of \$28,000 to Dutton, for which he was all the time willing to sell both tracts. The purpose of the defendants in making their false representations was to get Gough to purchase the 53 acres at \$25,650 so that they might get the 18 acres for \$2,350 instead of \$6,000, its worth. The complaint sufficiently alleges that the representations were falsely and fraudulently made to deceive the plaintiff, that he was ignorant of the facts, and that he relied upon the defendants. There was no privity of contract between him and the defendants.

The gist of the cause of action for deceit is fraud resulting in injury to the plaintiff; and whether a third party making the false representations makes or loses is not important, though an actual or anticipated profit may characterize his purpose and actions.

The well-settled general rule is that an action of deceit cannot be predicated, under usual circumstances, upon a vendor's fraudulent misrepresentation of the value of the property sold. Men naturally exaggerate the value of what they own. They purposely exaggerate to induce a sale. The buyer knows this. He does not rely upon the vendor's statements of value under ordinary circumstances. The two deal at arm's length. The law, practical here as in other cases, does not build a cause of action against the exaggerating vendor in favor of the vendee foolishly relying upon interested misstatements of his vendor. The fraudulent false representation of a third person is upon a different footing. The purchaser is not so on his guard; and the circumstances may be such that he relies upon the representation fraudulently made without fault so serious that the law will deny him relief for the injury coming from it. The rule is recognized in *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. 360. And see *Hubbell v. Meigs*, 50 N. Y. 490; *McBeth v. Craddock*, 28 Mo. App. 380; *Adams v. Collins*, 196 Mass. 422, 82 N. E. 498. A case often cited is *Medbury v. Watson*, 47 Mass. (6 Metc.) 246, 39 Am. Dec. 726. Referring to the distinction between misrepresentations by the owner and by a third person, the court said:

"In the one, the buyer is aware of his position; he is dealing with the owner of the property, whose aim is to secure a good price, and whose interest it is to put a high estimate upon his estate, and whose great object is to induce the purchaser to make the purchase; while in the other, the man who makes the false assertions has apparently no object to gain; he stands in the situation of a disinterested person, in the light of a friend, who has no motive nor intention to depart from the truth, and who thus throws the vendee off

his guard, and exposes him to be misled by the deceitful representations.

"In the present case, we think the averments in the declaration would not have supported an action, if the false representations had been made by the vendor to the vendees. But the representations were made by a third person, apparently disinterested, and who proposed to aid the plaintiffs in making the purchase, and to procure the estate for them for a price which he stated he knew that it cost, and which he affirmed it was worth. Such false affirmations and representations, having been made by a third person, with the intent to defraud, we hold are actionable."

The principle stated finds application here. The defendants had the confidence of Gough. He did not know that they were acting for their own advantage. They knew that he did not know. He was off his guard and took their statements. The fact that he went to the land before he purchased is not of controlling importance on the issue tendered by the demurrer. It will have its proper weight on the trial.

The facts alleged are such as to call for an answer, and the demurrer should not have been sustained.

Order reversed.

BONDERSON v. HOVDE et al.
(No. 22299.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

(Syllabus by the Court.)

1. Physicians and surgeons ⇨18(8)—Evidence held to sustain finding that patient was injured through physician's negligence.

The evidence sustains the jury's finding that a patient sustained injury through negligent treatment on the part of defendants.

2. Physicians and surgeons ⇨18(11)—Damages for malpractice held not excessive.

The damages are not excessive.

3. Physicians and surgeons ⇨18(10) — Instruction held not to permit recovery for other than defendant's negligence.

The charge is not open to the objection that it permits recovery for injury other than that caused by the negligence of defendants.

4. Appeal and error ⇨971(3)—Refusing expert opinion on cross-examination based on facts not in evidence is not error.

Wide latitude should be allowed on cross-examination of medical experts. The extent of the examination is largely in the discretion of the court. It is not reversible error to refuse to permit counsel on cross-examination to elicit an opinion based on an assumption of facts as claimed by him but not in evidence.

5. Appeal and error ⇨1069(1)—Trial ⇨308 —Not error on request of jury to permit reporter to read from notes of evidence.

It is not error to permit the court reporter at the request of the jury to read from his

notes of evidence when the permission is exercised with fairness. There was no reversible error in this case in permitting the reporter to read evidence not pertinent to the point as to which the jury had made inquiry.

Appeal from District Court, Sibley County; C. M. Tift, Judge.

Action by A. W. Bonderson against Rolf Hovde and another. Verdict for plaintiff. From an order denying a new trial, defendants appeal. Order affirmed.

Dille, Hoke, Krause & Faegre, of Minneapolis, for appellants.

Geo. A. & C. H. MacKenzie, of Gaylord, and P. W. Morrison, of Norwood, for respondent.

HALLAM, J. In September, 1919, plaintiff's 14 year old daughter, Hazel, fell from an apple tree and sustained a fracture of the left arm near the wrist. She was taken to defendants, who are physicians and surgeons, for treatment. They examined her, reduced the fracture and put the arm in splints. She went to them for treatment from time to time during a period of about three weeks, consulting mostly with defendant Hovde. Then it developed that there were sores under the bandages and that a septic condition had set in. There was dead tissue and part of the bone was dead. Hazel thereupon received treatment from other physicians and surgeons, namely Dr. Olson, of Gaylord, and Dr. Fritsche, of New Ulm. As a result of the diseased condition that developed, the hand and part of the arm are deformed and Hazel has suffered permanent loss of much of the use of them. This action is brought to recover damages on the theory of malpractice. Plaintiff had a verdict for \$5,000, and defendants appeal.

[1] 1. The first contention is that the evidence does not sustain the verdict. The evidence is in conflict. The claim of plaintiff is that the bandages placed on the arm by defendants were wrapped too tightly, that she complained of this from time to time, but that defendants told her it was all right. There is expert medical testimony to the effect that the tight wrapping of the bandages was a cause of the diseased condition of the arm. There are some inconsistencies in the testimony of the witnesses for the plaintiff and the evidence is far from conclusive but we regard it as sufficient to sustain the jury's findings.

[2] 2. Claim is made that the damages are excessive, and in this connection it is contended that there is no proof that the loss of the portion of the bone was due to the tight bandages. We need not stop to consider whether or not the evidence contains sufficient proof on this point, for, aside from the loss of the

bone, the condition of the arm is such that, if liability exists at all, a verdict for \$5,000 is not excessive.

[3] 3. Exception is taken to the instruction of the court that "if he is entitled to recover at all he is entitled to recover to the extent of the injuries sustained by the child." The contention is that this permits recovery against defendants for the broken arm as well as for the alleged malpractice. The charge commences with an instruction that the action is to recover damages for the injury "alleged to be due to and caused by the negligence of the defendant," and then advises the jury that "it is the claim of plaintiff that defendant did not properly or correctly treat the fracture," and in substance that the claim was that the effect of the treatment was "to cause the necrosis or decaying and that the defendants were negligent." Then the court gave the instruction complained of and further charged the jury that they could "give no damages for any pain or suffering of the child before such time as she was attended by defendants." We think the jury would understand from the whole charge that the only damages they could take into consideration were those resulting from the alleged negligence of defendants.

[4] 4. Plaintiff called medical experts to give opinion evidence as to the cause of the diseased condition of the arm based upon assumption of facts as shown by the testimony on behalf of plaintiff. On cross-examination defendant's counsel sought to elicit an opinion from these witnesses based on an assumption of facts as claimed by the defendants. The facts assumed were not then in evidence. The court rejected this testimony. This is assigned as error. We think there was no reversible error. We fully agree with counsel for defendant that wide latitude should be allowed on cross-examination of medical experts and it is altogether probable that if the court had permitted the cross-examination there would have been no reversible error. Counsel may even be permitted on cross-examination, for the purpose of testing the skill and accuracy of the expert witnesses, to ask hypothetical questions pertinent to the inquiry, assuming facts having no foundation in the evidence. *Williams v. Great Northern Ry. Co.*, 68 Minn. 55, 70 N. W. 860, 37 L. R. A. 199. But the range of such cross-examination must rest largely in the discretion of the trial court and we think there was no abuse of discretion in this case.

[5] 5. After the jury retired and after they had considered the case for some time, they returned to the courtroom and asked what Dr. Olson had testified as to the kind of bandage the child had on when she first visited his office. The court told the court reporter to read Dr. Olson's testimony on that

point to the jury and this was done. However there was some conflict between the testimony of Dr. Olson and Hazel on that point and the court said, "I think it is only fair to read the testimony of the girl in reference to the bandage at that time." The reporter evidently did not find the testimony of Hazel on this point. He read somewhat from her testimony but read nothing on this point. The court then asked that the testimony of Dr. Hovde on this point be read and this was done. Counsel for defendants strenuously contend that the court committed error.

It is contended that it is error to permit the reading by the reporter of any testimony to the jury without the consent of the parties. We do not agree with this contention. This practice is so common and sometimes so necessary to enlighten the jury that we should encourage rather than discourage it, when permitted with such an exercise of fairness as was exhibited by the court in this case. We find nothing in G. S. 1913, § 7803, inconsistent with this rule. That section relates to the papers which the jury may take into the jury room.

It is further contended that it was error to read the testimony of Hazel bearing on other features of the case. There was no occasion for reading the testimony but we think the reading of it was not prejudicial. There was really little dispute as to the facts stated in the testimony read.

Order affirmed.

STATE V. MINNEAPOLIS COLD STORAGE CO. (No. 22420.)

(Supreme Court of Minnesota. Oct. 23, 1921.)

(Syllabus by the Court.)

1. Evidence $\S$ 368(2)—Party to tax enforcement case may be required to produce books, if containing material evidence, but not to enable opposite party to get information against third persons.

It is within the power of a court to require a party to a tax enforcement case to produce his books and papers if they contain evidence material to the issues to be tried, but not to enable the opposite party to examine them and use information gained from them as a basis for taxing the property of third persons.

2. Evidence $\S$ 368(1)—Trial court held justified in refusing to order defendant's production of books.

The trial court was justified in its conclusion that the production of defendant's books was demanded in order to enable the representatives of the state to fish for evidence, and in declining for that reason to require their production.

3. Appeal and error ¶971(3)—Witnesses ¶268(15)—Latitude in cross-examination is within court's discretion, and does not require reversal except for abuse.

The latitude to be allowed in cross-examination is largely within the discretion of the trial court, and its action will not be reversed on appeal, except for a clear abuse of such discretion. There was no such abuse in the rulings complained of.

4. Taxation ¶593(3)—Evidence held to support findings as to value of personal property when assessed.

The evidence is sufficient to support the findings as to the value of defendant's personal property when it was assessed for taxation.

Appeal from District Court, Hennepin County; W. W. Bardwell, Judge.

Proceedings by the State of Minnesota against the Minneapolis Cold Storage Company to enforce payment of delinquent taxes on personal property. Judgment for defendant and from an order denying its motion for new trial, the state appeals. Order affirmed.

Clifford L. Hilton, Atty. Gen., Floyd B. Olson, Co. Atty., and Frank J. Williams, Asst. Co. Atty., both of Minneapolis, for the State.

Edwin S. Slater, of Minneapolis, for respondent.

LEES, C. This is a proceeding to enforce the payment of delinquent taxes assessed against defendant's personal property. Defendant had returned a list to the assessor showing that on May 1, 1919, its taxable property was of the value of \$1,425. The assessor raised the amount to \$100,475. The Board of Equalization denied its application for a reduction. Defendant declined to pay the tax, and resisted its collection on the ground that there had been a gross overvaluation of its property. The court found in its favor, and the state has appealed from an order denying its motion for a new trial.

Defendant is a public warehouse company engaged in the cold storage business in the city of Minneapolis. On May 1, 1919, it had in its possession stored in its warehouse, merchandise of a value greatly in excess of the amount of the assessment. Its vice president and general manager testified that it did not own any of the goods stored with it, and that all such goods were owned by other corporations or firms. Three of its employees testified that its books and records contained no entries showing that it had stored any goods in its warehouse, and that if it had done so there would have been such entries. The county attorney requested the court to direct the defendant to produce its books and records for inspection,

and to enable him to cross-examine the witnesses who had testified to the absence of such entries. Defendant's vice president testified that he knew the names of some of the concerns that had stored goods in its warehouse, and on cross-examination was asked to give the names. The court refused to order defendant to produce its books, and sustained objections to cross-examination of the vice president to ascertain the names of those who had stored goods with defendant. These rulings are complained of, and furnish the principal grounds upon which a reversal is sought. Defendant justifies the court's refusal to compel the production of its books on four grounds: Because no effort was made to secure an inspection before the trial, under section 8447, G. S. 1913; because no subpoena duces tecum was issued; because there was no specific description of the books required or specification of the period of time to be covered by entries which might appear in them; and finally because the demand for their production was made solely to enable the representatives of the state to embark on a fishing expedition to ascertain who were the owners of the goods with a view to taxing them.

[1, 2] It is within the power of a trial court to require the production of the books and papers of a party to an action which contain evidence material to the issues to be tried (*Carson v. Hawley*, 82 Minn. 204, 84 N. W. 746; *McGuire v. Village of Caledonia*, 140 Minn. 151, 167 N. W. 425, L. R. A. 1918D, 943), and we do not attach much weight to the first three reasons advanced in support of the court's ruling. But we think it may be sustained on the ground which defendant suggests last. When the demand was made the court, after inquiry respecting the use proposed to be made of the books, informed the county attorney that he was not prepared to rule that they should come in for the purposes of a fishing expedition. Defendant's counsel inquired whether the county attorney was willing to have the books examined without making a record of the names of the owners of the goods, unless the books showed that defendant was an owner. He replied that if the books disclosed that other persons owned the goods, and that they had not been taxed, he would not stipulate that he would not disclose the facts or do his duty in collecting the taxes. Thereupon the court ruled that defendant should not be compelled to produce the books. Later on the same question came up again, when defendant's counsel offered to permit an examination of its record cards on condition that the names of the owners of the goods entered thereon should not be used by the state. The county attorney declined the offer on the ground that it was incom-

patible with the discharge of his official duties to make such an agreement. The court adhered to its previous ruling, giving as the reason that on the statement of the county attorney if he felt it incumbent to use any knowledge he might acquire from an inspection of the books and records in enforcing the payment of taxes by persons other than the defendant it need not produce them. Finally, when another request for their production was made, the court suggested the appointment of an accountant to make a thorough examination to ascertain whether the books showed anything not in accordance with the testimony of defendant's witnesses, but not for the purpose of disclosing the names of defendant's patrons. The county attorney declined to accede to the suggestion, saying:

"No, I don't want to enter into any agreement where if a leak occurs I will be criticized, and I don't want to acquire any information that I can't use freely."

The court then refused to modify its prior rulings saying they had been made for the reason that the county attorney intimated that he felt obliged to use any information he might gain from the books in proceeding against the owners of goods whose names were thus ascertained. We think it sufficiently appears that the real purpose of the demand for the production of the books was to gather information from them to be used as a basis of tax proceedings against third persons, rather than an expectation that the entries would contradict the testimony of defendant's witnesses. Such an inquisition was not relevant to the issues on trial.

[3] With respect to the rulings when defendant's vice president was cross-examined, the same situation was presented in a somewhat different form. He testified that defendant did not own any of the goods in its warehouse on May 1, 1919, and had no interest in them. When asked who owned them, defendant objected, and the objection was sustained. He was asked whether the Kildal Fish Company or Armour & Co. owned any of them, and this was objected to and the objection sustained. Undoubtedly a witness who has testified that the party calling him had property in its possession, but did not own it, may be asked who the owner was in order to test his credibility and lay a foundation for possible impeachment. If such was the purpose of the cross-examination the court should not have sustained the objections. But it is quite evident that the questions were put to elicit information to serve the same purpose as the repeated demands for the production of the books. The relation of a public warehouseman to his patrons is such that he

is not bound to become an informer when called upon to disclose their names in order that they may be taxed. At least such was the case until the Legislature made it the duty of warehousemen to furnish such information. This has been done by the enactment of chapter 527, Laws of 1921. The fact that such legislation was deemed necessary indicates that prior to its enactment no such duty existed. In its absence public officials ought not to be permitted to accomplish by indirection that which could not be done directly. The latitude to be allowed in cross-examination is largely within the discretion of the trial court, and its action will not be reversed on appeal except for a clear abuse of such discretion. *Lukens v. Hazlett*, 37 Minn. 441, 35 N. W. 285; *State v. Seeling*, 126 Minn. 386, 148 N. W. 458. There was no abuse of discretion in the rulings complained of.

[4] It is urged that, since the assessment was presumptively correct and the burden of proving the contrary rested upon the defendant, the evidence it produced was not sufficient to sustain the finding that the full and true value of its personal property was \$1,425 and no more. We cannot so hold. True the testimony of defendant's bookkeeper and clerks was merely negative, for they had no knowledge of the amount or value of their employer's property. But the testimony of the vice president was direct and positive, and, if true, was sufficient to sustain the finding in question. The other assignments of error are unimportant, and need not be discussed. The order denying a new trial is affirmed.

**HOLLISTER v. HINES, Director General of
the Federal Ry. Administration.**
(No. 22387.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

(Syllabus by the Court.)

1. Appeal and error §1066 — Submitting ground of recovery not justified by evidence is error.

Submitting to the jury a ground for recovery not justified by the evidence is reversible error.

2. Railroads §307(4)—Gates or flagman at ordinary crossing not required.

Unless required by some statutory enactment, a railway company is not negligent in failing to provide gates or a flagman or other warning device at an ordinary crossing.

3. Railroads §350(5)—Negligence in not guarding crossing question for jury.

Whether the dangers at a peculiarly and unusually hazardous crossing are such that ordinary care requires it to be guarded in some such manner is a question for the jury.

4. Railroads —351(7)—Instruction on failure to guard crossing held unwarranted.

The crossing in question was not unusually hazardous, and instructing the jury that they could find defendant negligent for failing to guard it by gates or a flagman or some other warning device was error.

5. Railroads —348(4)—Evidence held not to show crossing signals were not given.

The evidence will not sustain a finding that the usual warning signals for the crossing were not given, and submitting this issue to the jury was error.

6. Railroads —350(11)—Negligent speed held question for jury.

There is evidence tending to show that the train was run over this crossing at an unlawful and unusual rate of speed, and whether defendant was negligent in this respect was a question for the jury.

7. Negligence —136(30) Railroads —350 (21)—Contributory negligence of automobile passenger held question for jury.

The evidence does not show conclusively that the deceased was guilty of contributory negligence or engaged in a joint enterprise with the driver of the automobile, and these questions were for the jury.

8. Railroads —320—Trainmen may assume automobile will stop in time.

The train had the right of way and the men operating it had the right to assume that the automobile would stop in time to avoid a collision, and the court should have given the charge to that effect requested by defendant.

Appeal from District Court, Wadena County; J. A. Roeser, Judge.

Action by C. A. Hollister, administrator of Alice Hollister, deceased, against Walker D. Hines, Director General of the Federal Railway Administration, etc. Verdict for plaintiff, and the defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial, and from an order denying it, the defendant appeals. New trial granted.

M. L. Countryman and A. L. Janes, both of St. Paul, for appellant.

Byron R. Wilson, of Wadena, and M. J. Daly, of Perham, for respondent.

TAYLOR, C. The public highway known as the Jefferson Highway crosses the Great Northern Railway track within the corporate limits of the village of Wadena, but south of the built-up portion of the village. Plaintiff with his family, consisting of his daughter Alice, 19 years of age, and three younger children, resided on a farm a few miles south of the village. A married daughter, Mrs. McCormick, with her babe, 8 months of age, was also at the farm on a visit. On August 23, 1919, Mrs. McCormick and Alice, taking the babe with them, drove to the vil-

lage in plaintiff's automobile, a Dodge touring car. Shortly after 4 o'clock in the afternoon they started to return along the Jefferson Highway, Alice in the rear seat holding the babe and Mrs. McCormick in the front seat driving. At the crossing they were struck by a passenger train coming from the south and Alice and the babe were killed. Alleging that the accident resulted from the negligence of defendant, plaintiff, as administrator of the estate of Alice, brought this action for damages and recovered a verdict. Defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial and appealed from an order denying it.

[1] Plaintiff claimed that defendant had been negligent in three particulars: First, in running the train over the crossing at an unlawful and unreasonable rate of speed; second, in failing to give the usual warning of the approach of the train by blowing the whistle and ringing the bell; and, third, in failing to maintain either gates, a flagman, or a gong at this crossing. The court submitted these three claims to the jury and instructed them to the effect that plaintiff was entitled to recover if they found that defendant had been negligent in any one of the three particulars specified, and did not find that Alice had been guilty of contributory negligence. Submitting to the jury a ground for recovery which is not justified by the evidence is reversible error; for the jury may have based their verdict on that ground. Dunnell Minn. Dig. and Supp. § 7174, and cases there cited.

[3] In *Lawler v. M., St. P. & S. S. M. Ry. Co.*, 129 Minn. 506, 152 N. W. 882, it was held that the failure to provide gates or a flagman or a signal bell at the crossing of the principal street of a village of 700 people was an element to be taken into consideration in determining whether it was negligence to run a train over that crossing at a speed of 50 miles an hour.

In *Zenner v. Great Northern Ry. Co.*, 135 Minn. 37, 159 N. W. 1087, it was held that the jury might find that ordinary care required "either crossing gates, or a flagman, or automatic bells, or some other warning device" at the busiest crossing in a city of 10,000 inhabitants, but it was expressly stated that the question whether such precautions were required at country road crossings was not before the court.

In *Gowan v. McAdoo*, 143 Minn. 227, 173 N. W. 440, the accident occurred at a crossing in the village of Barnum over which all travel to or from the territory west of the village passed. Defective planking rendered the crossing dangerous, the view of a driver approaching it was obstructed, and a finding that the train was running at a rate of 60 miles an hour would have been

justified. This court sustained the action of the trial court in submitting to the jury the question whether ordinary care required the maintenance of gates, a flagman, or a bell at this crossing, saying that whether the railway company "exercised the required degree of care in view of the location of the crossing, the conditions surrounding its maintenance, and the rate of speed at which trains were run over it was a question for the jury to pass upon."

The court recognized that the crossing in each of these cases was peculiarly and unusually hazardous, and on that ground held that whether ordinary care required the maintenance of gates, a flagman, or some other warning device at the particular crossing was a question for the jury. It was not held, nor intended to be held, that this rule applied to crossings not extra hazardous.

[2] The authorities uniformly hold that in the absence of a statutory requirement the failure of a railway company to provide gates, a flagman, or other warning device at ordinary crossings is not negligence, and that the failure to provide such protection at a crossing can be held to be negligence only where the location and surrounding conditions and the manner in which trains are run over it are such as to render it unusually dangerous. *Cowen v. Dietrick*, 101 Md. 46, 60 Atl. 282, 4 Ann. Cas. 292, and numerous cases cited in note found in 4 Ann. Cas. at page 294, *Folkvire v. M. U. Ry. Co.*, 157 Mich. 159, 121 N. W. 811, 17 Ann. Cas. 979, and cases cited in note in 17 Ann. Cas. at page 982.

[4] While the crossing in question was on a much-traveled highway and within the corporate limits of the village, there were no houses in its immediate vicinity and the view of a traveler approaching it was not obstructed by buildings or other obstacles. The railway was a branch line over which the only traffic was a passenger train which passed each way daily and a freight train which passed in one direction one day and in the opposite direction the next. We are unable to see wherein this crossing differs in any substantial respect from the ordinary crossings on any much-traveled highway, and are satisfied that the evidence does not disclose any of those peculiar or unusual hazards which would justify a finding of negligence in failing to maintain gates, a flagman, or other warning device at this place.

[5] Plaintiff asserted that the customary warning signals for the crossing were not given. The train always stopped at the station in the village. The engineer and fireman testified that the whistle was blown for the station and also for the crossing, and that the bell was rung. Several residents of the village testified that they heard both the station whistle and the crossing whistle, and one or two testified that they

also heard the bell. Against this positive testimony we have the negative testimony of Mrs. McCormick that she heard no warning signals whatever. Her child was crying in the back seat and this may have distracted her attention. However this may be, she evidently gave no attention to the railroad, although perfectly familiar with the crossing, for the train was in plain sight at all times after she reached a point 300 feet from the track and she remained wholly unaware of its approach until she heard the exhaust from the engine when she was so near the track that she was unable to stop in time to avoid the collision, although she says she was going at a speed of only 10 miles an hour. The evidence is clearly insufficient to warrant a finding that the signals were not given. *Cotton v. W. & S. F. Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935; *Uggen v. Bazille*, 123 Minn. 97, 143 N. W. 112; *Moore v. M. & St. L. Ry. Co.*, 123 Minn. 191, 142 N. W. 152, 143 N. W. 326; *Plachetko v. C., B. & Q. Ry. Co.*, 139 Minn. 278, 166 N. W. 338.

[6] It is conceded that an ordinance of the village prohibited running trains over this crossing at a greater rate of speed than 12 miles an hour, and that defendant's train crews were instructed to comply with this requirement. The engineer testified that he had slowed down to 12 miles an hour at the crossing. The estimate of Mrs. McCormick as to the rate of speed is not of much probative value, for she had only a momentary view of the moving train, and her estimate could be little better than a guess, but a passenger on the train estimated the speed at 20 or 25 miles an hour. This testimony, together with the fact that the train struck the automobile with sufficient momentum to throw it 25 or 30 feet and to throw parts of it some 200 feet, we deem sufficient to make the question whether the train was run over this crossing at an unusual and unlawful rate of speed a question for the jury.

[7] It appears that Mrs. McCormick was the one whom their father, the owner of the car, told to drive it on this occasion. But from the fact that both Mrs. McCormick and Alice had frequently driven the car, that they went to the village to make social calls, and to arrange a boarding place for a younger sister who expected to attend school in the village, and that Alice drove while going to the village and Mrs. McCormick while returning, defendant contends that they were engaged in a joint enterprise and that the negligence of Mrs. McCormick is imputable to Alice for that reason. The fact that both were going to the village for the same purpose and that each drove the car at times did not necessarily constitute driving the car a joint enterprise. The management of the car was intrusted

to Mrs. McCormick by its owner, and Alice had no authority to control or direct the manner in which Mrs. McCormick operated it. Conceding that the evidence was sufficient to make a question for the jury, it was not sufficient to establish as a matter of law that they were engaged in a joint enterprise. *Kokesh v. Price*, 136 Minn. 304, 161 N. W. 715; 22 Ruling Case Law, 1048.

Defendant contends that the evidence conclusively shows that Alice herself was guilty of contributory negligence in failing to observe the train and warn her sister of its approach. If it had appeared that she saw the train and knew, or from the circumstances ought to have known, that her sister was not aware of its approach, or was inattentive, or a careless and reckless driver, there might, perhaps, be ground for charging her with contributory negligence as a matter of law, although the question whether one not the driver nor in control of the car is guilty of contributory negligence is almost always a question for the jury. But here the crying child required, and doubtless absorbed, her attention. She was the younger and would naturally place confidence in her older sister, to whom her father had intrusted the car. In the absence of knowledge to the contrary, she had the right to assume that her sister would exercise ordinary care and take proper precautions to guard against obvious dangers. She was only required to exercise the degree of care for her own safety which persons similarly situated would ordinarily exercise under like circumstances. She is dead, and the presumption is that she was not negligent. On the facts as disclosed by the record the question as to her contributory negligence was for the jury. *Carnegie v. Great Northern Ry. Co.*, 128 Minn. 14, 150 N. W. 164; *Kalland v. City of Brainerd*, 141 Minn. 119, 169 N. W. 475; *Praught v. Great Northern Ry. Co.*, 144 Minn. 309, 175 N. W. 998.

[8] As there must be a new trial for the errors in submitting to the jury the issues as to negligence in failing to give the usual warning signals, and in failing to maintain gates or a flagman or other warning device at the crossing, it is proper to add that the train had the right of way, and that the court should have given the instruction requested by defendant to the effect that the men operating the engine who saw the automobile approaching the crossing had the right to assume, until the contrary became apparent, that it would stop in time to avoid an accident, and were not required to slacken speed for the purpose of avoiding a collision until they realized that a collision was imminent if they failed to do so.

For the errors mentioned a new trial must be, and is, granted.

GILES et al. v. LUCE et al. (No. 446.)

(Supreme Court of Michigan. Nov. 3, 1921.)

Schools and school districts §44—Method for disbanding rural agricultural school districts provided by statute.

Pub. Acts 1921, No. 97, provides the method for disbanding rural agricultural school districts.

Petition of Frank A. Giles and others for a writ of mandamus against Emmett E. Luce and others. Judgment for defendants, and plaintiffs bring certiorari. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

John F. Henigan, of Jackson, for petitioners.

W. S. Cobb, of Jackson, for respondents.

CLARK, J. Certiorari to mandamus. A petition to disband a rural agricultural school district organized about July, 1919, under the provisions of Act No. 226, Public Acts of 1917, was presented to its board of education early in 1920. On June 7, 1920, the board declined to submit the proposition. To compel submission at the annual school meeting of July 12, 1920, plaintiffs, voters and taxpayers of the district, petitioned for the writ of mandamus against the board and the trustees. An order denying the writ was entered July 22, 1920. In the application for the writ of certiorari made July 30, 1920, plaintiffs say:

" * * * It being apparent that the decision of the circuit judge could not be obtained by July 12, 1920, the date of the annual meeting of said school district, said school district meeting was adjourned and has been held open since that time, awaiting the decision on this question. * * *"

The act in question provided no method for disbanding the district, unless it may be said that by the reference found in section 6 a method was prescribed. It seems a declaratory judgment is here sought, for it does not appear that the annual school meeting of 1920 was adjourned beyond July 30, 1920, and, because of the annual meeting of 1921, the meeting of 1920 and its necessary adjournments (section 5667, Comp. Laws of 1915) are historic, merely. But we need not dispose of the case on that ground. The act in question was amended by Act No. 97, Public Acts of 1921, in section 3 of which appears the following:

"That whenever any rural agricultural school district has been organized as provided in this act and said rural agricultural school district has complied with the provisions of this act for a period of five years, or longer, the qualified

school electors of said school district shall have the right, by presenting the trustees with a petition signed by a majority of the legal school electors, to disband such school district in the same manner as that provided in section six of chapter ten of act number one hundred sixty-four of the Public Acts of eighteen hundred eighty-one, being section five thousand seven hundred thirty-nine of the Compiled Laws of nineteen hundred fifteen."

It is not claimed that this act is not valid and binding upon the parties. It follows that the judgment is affirmed. The question being one of public interest, no costs will be awarded.

PEOPLE v. McDONALD. (No. 178.)

(Supreme Court of Michigan. Nov. 3, 1921.)

Bribery ¶(2)—Police officer prosecuted under wrong statute.

A prosecution against a police officer for accepting a bribe given to prevent the institution of a criminal prosecution could not be maintained under Comp. Laws 1915, § 14992, relating to bribery of executive, legislative, or judicial officers, as it should have been brought under section 14979, punishing bribery of sheriff, coroner, constable, or other officer authorized to serve process.

Error to Recorder's Court of Detroit; William M. Heston, Judge.

Charles McDonald was convicted of accepting a bribe, and brings error. Reversed, and defendant discharged.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Kent & Hayes, of Highland Park, for appellant.

Paul Voorhies, Pros. Atty., and Seward Nichols, Asst. Pros. Atty., both of Detroit, for the People.

FELLOWS, J. Defendant was a police officer of the metropolitan police department of the city of Detroit. He was convicted of a violation of section 14979, C. L. 1915. The testimony tended to show that he accepted a bribe given to prevent the institution by him of a criminal prosecution. In the recent case of *People v. Romaniski*, 213 Mich. 636, 182 N. W. 121, where the facts were substantially the same as those disclosed by this record, we held that the prosecution should have been under section 14992, C. L. 1915, and that it could not be maintained under section 14979, and we there reversed the conviction and discharged the defendant. Upon the hearing of this case in this court the prosecuting attorney conceded that the instant case was controlled by that case and

confessed error. In this the prosecuting attorney was right. The *Romaniski* Case is decisive of this case.

The conviction will be set aside, and the defendant discharged.

BARNEY et al. v. BARNEY. (No. 38.)

(Supreme Court of Michigan. Nov. 3, 1921.)

1. Courts ¶472(4)—**Judgment** ¶489—Decree determining that decedent died intestate held nullity and open to collateral attack.

A portion of a decree of chancery court determining that decedent had died intestate was a nullity and open to collateral attack, where the bill of complaint showed that the probate court of the county had issued letters of administration of the estate and had jurisdiction of the same; such determination invading the jurisdiction of the probate court.

2. Wills ¶719—Mere delay in presenting will for probate not estoppel against claiming under will.

Mere lapse of time and delay in offering a will for probate will not estop one from claiming land thereunder, although during such delay letters of administration were issued; no considerable improvements being made upon the land by the heir.

3. Adverse possession ¶62(1)—Heir held not to have title by adverse possession as against devisee.

Where father claimed land as heir and son claimed it under a will, which son delayed offering for probate, held, that father did not have title by adverse possession.

4. Quietting title ¶39—Defendant held entitled to have title quieted.

Where plaintiff enjoined defendant from instituting a proceeding at law, whereby he sought to dispossess the plaintiff from the premises, he cannot be heard to say that defendant might not by his cross-bill have his title quieted; plaintiff having compelled defendant to come into court of equity.

Appeal from Circuit Court, Calhoun County, in Chancery; Walter H. North, Judge.

Suit by Fred W. Barney and others against Oliver W. Barney. Decree for defendant, and plaintiff named appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

Powers & Winkler and J. M. Powers, all of Battle Creek, for appellant.

Leland H. Sabin and Henry F. Jacobs, both of Battle Creek, for appellee.

CLARK, J. Earlier efforts to get for the defendant lands left him by the will of his grandfather are *In re Barney's Will*, 187

Mich. 145, 153 N. W. 730, and *Howes v. Barney*, 199 Mich. 569, 185 N. W. 658.

On August 11, 1898, Oliver Barney and Phoebe J. Barney, his wife, executed a deed of the lands in question here to their grandson, Oliver W. Barney, the defendant. The deed reserved to the grantors the use and control of the lands during their lives, and it was left with the attorney who drew it. Oliver Barney died February 12, 1900. The deed was recorded February 23, 1900. Fred W. Barney, son of Oliver and father of the defendant, claiming to have had no knowledge of the deed and alleging that his father died intestate seized of the said lands, applied to the probate court of Calhoun county for the appointment of an administrator of the estate. The appointment was made July 20, 1900. The only claim presented was that of Fred W. Barney, which was allowed September 24, 1901, in the sum of \$450.45. Fred W. Barney filed a bill against his mother to set aside the life estate in said lands as reserved in the said deed, to set aside that deed, and to set aside a deed of other land, made on August 11, 1898, by his father to her. This suit was settled March 27, 1901, and plaintiff secured from his mother a lease of the lands in question for the term of her life. She died in 1915. In December, 1901, plaintiff Fred W. Barney brought suit in the Calhoun circuit against defendant, his son, then 18 years of age, to set aside the said deed, alleging that when the deed was made his father was mentally incompetent and unduly influenced by his mother, that there had been no delivery, and that the deed was a fraud upon his rights as a creditor and as the sole heir at law. The return of the subpoena states that Fred W. Barney served it personally upon the defendant, his son, whom he later took to the office of his attorney, where the son signed a petition for the appointment of the clerk of the court as guardian ad litem. Defendant testified that he had no knowledge of the service of the subpoena, and as to his understanding of the signing of the said petition said:

"My father asked me to go up there and sign a paper that would fix matters in regard to grandfather's property so that my grandmother could not leave it to her family, the Hendershot family, at her death."

And he also testified that he knew nothing of the making and recording of said deed until 1913. On June 5, 1902, decree was entered, finding the allegations of the bill to be true, setting aside the deed, and determining that the said lands were the property of Fred W. Barney as the sole heir at law. The decree was recorded in the office of the register of deeds for the county on December 20, 1902. Upon receiving the lease from his mother, Fred W. Barney went into possession of the lands and has since con-

tinued in possession. Oliver W. resided with his father until March, 1913, working for him, attending school, and from 1910 to 1913 was interested with him in business. About the time defendant became 21 years of age, October, 1904, he found in his room at home a will of his grandfather. He retained the will in his possession until July 28, 1913, when it was offered for probate. He said nothing of its existence during that period unless he talked with his mother about it, as he now claims. The will was allowed. It is set forth at length in *Re Barney's Will*, 187 Mich. at page 147, 153 N. W. at page 730, opinion filed July 23, 1915. It gave the lands in question to defendant, subject to a life estate in the widow and the payment of certain small legacies and charges. In September, 1915, an administrator with the will annexed was appointed. He began proceedings for possession before a circuit court commissioner. A question of title was raised, and the proceedings were dismissed. He then brought ejectment in the circuit court and again failed. See *Howes v. Barney*, supra. Then Oliver W. Barney, defendant here, January 10, 1919, began a suit in ejectment against Fred W. Barney for the lands, claiming title under the will. Then plaintiff Fred W. Barney, with other plaintiffs, who claimed to be his tenants, filed this bill with a prayer that the ejectment proceedings be enjoined, that the record of the will be set aside as a cloud upon the title, and that title be quieted in the plaintiff Fred W. Barney. The ejectment proceedings were enjoined. Defendant answered and by cross-bill prayed that he be decreed to be the absolute owner of the lands under and by virtue of the will and according to its terms, that an accounting as to rents and profits of the lands be had, that the decree of June 5, 1902, setting aside the deed to defendant, be held to be of no force and effect in so far as it decrees said lands to be the property of Fred W. Barney as the heir at law of Oliver Barney. There was a prayer also for general relief. The decree in this cause provides: That plaintiff's claim against the estate be set off against defendant's claim for use and occupancy of the lands, for timber cut and removed, and for unpaid taxes; that the decree of June 5, 1902, made by said court, be set aside and vacated as a cloud upon the title; that defendant is the owner of the land in fee, subject to payment of the legacies; and that defendant have a writ of possession for the lands. Fred W. Barney, the real party of interest as plaintiff, has appealed.

As we are able to gather from the briefs, the questions raised by appellant are:

[1] 1. That the cross-bill is a collateral attack upon the decree of June 5, 1902. The cross-bill does not attack that portion of the decree in which the deed was set aside, that

portion which the chancery court had jurisdiction to make, but it attacks that portion of the decree wherein the chancery court sought to determine that Oliver Barney had died intestate and that Fred W. Barney was the sole heir at law and as such the absolute owner of the lands in question. The bill of complaint in that cause shows that the probate court of the county had issued letters of administration of the estate and had jurisdiction of the same. The determination sought to invade the jurisdiction of the probate court and was a nullity and open to the attack here made by the defendant. See *Tipson v. Jeannot*, 204 Mich. 403, 169 N. W. 874; *Brooks v. Hargrave*, 179 Mich. 136, 146 N. W. 325; *People v. Wayne Circuit Court*, 11 Mich. 393, 83 Am. Dec. 754; *Green-vault v. Farmers, etc., Bank*, 2 Doug. 498; *Winegar v. Newland*, 44 Mich. 367, 6 N. W. 841; *Kellogg v. Aldrich*, 39 Mich. 576; *In re Andrews' Estate*, 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296; *Tromble v. Hoffman*, 130 Mich. 676, 90 N. W. 694; *Adams v. Hubbard*, 30 Mich. 104; 23 Cyc. 1073.

[2] 2. That defendant should be held to be estopped from taking anything under the will because of laches. Defendant first learned of the will about 1904. He neither offered it for probate nor claimed anything because of it until 1913, a period of nine years. No laches can be charged against him before he learned of the will, and the history of the litigation fairly discloses that none may be claimed since the will was offered for probate. The mere lapse alone of nine years will not suffice to defeat defendant's claim. It is said in *Walker v. Schultz*, 175 Mich. at page 293, 141 N. W. at page 548:

"But mere lapse of time does not necessarily constitute laches. As a rule it involves other considerations. It means that negligence or omission to assert a right which, considering the lapse of time in connection with other facts and circumstances prejudicial to the interests of the adverse party, render it unjust and inequitable to recognize such right when finally asserted. * * * Where the situation of neither party has changed materially, and the delay of one has not put the other in a worse condition, the defense of laches cannot as a rule be recognized. *Parker v. Hotel Co.*, 96 Tenn. 252, 34 S. W. 200, 31 L. R. A. 706."

Plaintiff claims prejudice by the delay in the loss of witnesses against the will. An examination of the record does not disclose merit in this contention, and there is creditable testimony of witnesses that plaintiff knew of this will soon after the death of the testator and that—

"He said the will was made to Oliver, but he was not going to let him know anything about it until he got older; that boys were apt, if they thought they had property, not to take any interest in anything else, if they had plenty to do with without work, and he thought Oliver would do better if he did not let him know anything about the will."

Knowledge of the existence of the will does not square with the claim of prejudice. The trial judge found that no considerable improvements upon the lands had been made by plaintiff; that he had removed timber and had enjoyed the use of the lands. The taxes for 1915 and subsequent years, amounting to \$823.41, were not paid. An explanation by defendant of the delay was that upon reading the will it appeared that he would have nothing while his grandmother lived. And the fact that the parties were father and son, living at home together, is to be considered. It is said in *Wright v. Wright*, 37 Mich. 55 (Chief Justice Cooley):

"The relationship of the parties is entitled to great weight when the question is one of laches in taking hostile steps, and the same prompt and energetic proceedings which would be expected in other cases ought not to be demanded of near relatives, not only because they may naturally and commendably be reluctant to engage in litigation, but also because they ought to be able to rely more on substantial justice being voluntarily done them by a member of the family than by a stranger."

Defendant's right to the relief prayed is not barred by laches.

[3] 3. It follows from the foregoing that plaintiff's claim of title by adverse possession is without merit. Nor are we inclined to disturb the provision of the decree wherein plaintiff's claim against the estate was set off against the claim for use and occupation.

[4] 4. It is said that defendant may not upon his cross-bill have his title under the will quieted; he not being in possession, citing section 12302, 3 Comp. Laws 1915. Of this the trial court correctly said:

"I am of the opinion that this position is not well taken because, since the plaintiff enjoined the defendant from instituting a proceeding at law whereby he sought to dispossess the plaintiff from the premises, he cannot now be heard to say that the proceeding cannot be heard in this court in equity. The plaintiff has compelled the defendant to come into this court, and therefore all matters pertaining to the subject-matter of the suit should be adjusted in this one proceeding."

The decree is equitable, and it is affirmed, with costs to defendant.

PEOPLE v. DONOVAN. (No. 174.)

(Supreme Court of Michigan. Nov. 3, 1921.)

Burglary §45—Evidence as to intent to use burglar's tools sufficient to go to jury.

In a prosecution for having burglar's tools in possession with intent to use them in violation of Comp. Laws 1915, § 15334, evidence held to warrant submission of the question of unlawful intent to the jury.

Error to Recorder's Court of Detroit; William M. Heston, Judge.

Daniel Donovan was convicted of having burglar's tools in his possession, and brings error. Affirmed.

Argued before STERRE, C. J., and WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Thomas L. Dalton, of Detroit (Frederick P. Hempel, of Detroit, of counsel), for appellant.

Merlin Wiley, Atty. Gen., Paul W. Voorhies, Pros. Atty., and John V. Brennan, Asst. Pros. Atty., both of Detroit, for the People.

BIRD, J. Defendant was convicted in the recorder's court for the city of Detroit of having in his possession burglars' tools, knowing them to be such, with an intent to use them in violation of section 15,334 of Compiled Laws of 1915.

Defendant was seen on the forenoon of March 25, 1920, running north on Second street in the city of Detroit. His conduct appeared to a policeman, who happened to see him, as being somewhat suspicious. He followed and apprehended defendant just as he was turning into an alley off from Jones street. He was taken to the station house, and there was found secreted in his clothes 11 keys, 8 of which were skeleton keys, and 3 were master keys for opening spring locks. Beside this there were found a lock-blade knife, screwdriver, a pair of pliers, and a jimmy. Upon the trial testimony was offered showing that these tools were adapted to the business of a burglar, and also proof of the circumstances under which defendant was arrested. Upon this testimony the defendant was found guilty.

The point is made by counsel that defendant should have had a directed verdict because the offense with which he was charged was not established. This is based upon his contention that there was no proof of defendant's intent to use the tools in committing a burglary. We do not find any direct proof in the record of defendant's intent. The people relied principally upon the inference to be drawn from his possession of the tools to establish the question of intent. Counsel's contention raises the question

whether the testimony was sufficient to justify the jury in inferring felonious intent from the fact that defendant had burglars' tools secreted in his clothing.

The cases under this statute which have reached this court have been supported by other proof than the fact of possession of burglars' tools. It was shown in *People v. Jefferson*, 161 Mich. 621, 126 N. W. 829, that defendant had been a burglar and sneak thief by occupation for several years, and a similar showing was made in *People v. Howard*, 73 Mich. 10, 40 N. W. 789. It was held in these cases that possession of the burglars' tools, together with this additional fact, were sufficient to submit to the jury upon the question of intent. The question here presented has, however, been passed upon by the Wisconsin court. In the case of *Scott v. State*, 91 Wis. 552, 65 N. W. 61, the defendant was informed against under a similar statute. He was arrested at the railway station in Milwaukee, after he had been taken from the front end of an express train, upon which he had been stealing a ride. Upon searching him they found burglars' tools secreted in his clothing. Testimony was given that these tools were adapted for the business of burglary. Upon this proof the jury found the defendant guilty, and he appealed, making the same point as is made here. The court there said in part:

"There was no evidence that the defendant had ever been convicted, or had ever been guilty, of larceny. He was on trial for having tools, implements, etc., in his possession, in order to steal from buildings, rooms, safes, etc., such money or property as he might find therein, and with intent to unlawfully use and employ such tools for such purposes. Whether he had possession of them for that purpose and with that intent was a vital question, entirely for the jury upon the evidence. The fact that he had them secreted in the legs of his pants and in his shoes was evidence from which the jury might or might not infer the criminal purpose alleged."

See, also, *People v. Reilly*, 49 App. Div. 218, 63 N. Y. Supp. 18; *People v. Morgan*, 13 N. Y. Supp. 448; *People v. Thompson*, 83 App. Div. 177, 53 N. Y. Supp. 497.

The jury in the present case had before them the suspicious circumstances attending his arrest, and the fact that he had secreted in his clothing tools adapted to the business of burglary. We are of the opinion that these proofs were sufficient to submit to the jury on the question of felonious intent. When a man goes about with burglars' tools secreted in his clothing, it is fair to infer that he intends to use them for the purpose for which they are adapted. The inference may be strong or weak, depending upon the

¹ Reported in full in the New York Supplement: reported as a memorandum decision without opinion in 59 Hun, 619.

explanation which the respondent gives for having them on his person.

We think this is the only meritorious question presented by defendant's assignments of error. The judgment of conviction is affirmed.

NOTT v. GUNDICK. (No. 54.)

(Supreme Court of Michigan. Nov. 3, 1921.)

1. Equity ⇨429—Amendment of decree held proper.

Where decree in partition provided "that on making such sale the said circuit court commissioner make and execute to the purchaser at such sale a deed of conveyance to the land and premises so sold," the court did not err in amending it by inserting after the word "commissioner" the words "shall immediately after confirmation thereof," under Circuit Court rule 66, and Comp. Laws 1915, § 13309.

2. Appeal and error ⇨882(16)—Defendant in partition estopped to assert impropriety in order.

Defendant in partition proceeding was estopped to assert impropriety in an order of reference, having petitioned that it be enlarged to cover her claims, and having submitted her claims and testimony under such enlarged order.

3. Judgment ⇨527—Opinion of court concerning effect on other cases immaterial.

It is the judgment entered which concludes the parties and not opinions or statements of the court seeking to define the extent to which such judgment shall prejudice the rights of the parties in other actions.

4. Partition ⇨81—Defendant held not entitled to allowance for repairs.

In partition proceeding, defendant was not entitled to an allowance for repairs made upon the property, not only without the knowledge or consent of the plaintiff or her attorney, but also in defiance of her rights and for the sole convenience of the defendant.

Appeal from Circuit Court, Wayne County, in Chancery; Theodore J. Richter, Judge.

Action by LITTLE NOTT against Martha Gundick. Decree for plaintiff, and defendant appeals. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WREST, STONE, CLARK, BIRD, and SHARPE, JJ.

Samuel W. Shier, of Detroit, for appellant. Chas. C. Stewart and Wm. O. Gottman, both of Detroit, for appellee.

CLARK, J. Following decree for partition in this cause affirmed here, 212 Mich. 229, 180 N. W. 376, there was reference to a circuit court commissioner and report by him that the property was not susceptible of

division, and there was further reference to take testimony as to the rental value of the property, amount of attorneys' fees to be allowed plaintiff, and expense of abstract. Upon petition of defendant the order of reference was broadened to include taxes paid and repairs made by her. The commissioner took the testimony offered by the parties and made his report. Both parties filed exceptions to the report, which was confirmed and decree entered, the provisions of which, material here, follow. From the fund arising upon sale, after deducting costs, charges, and expenses of sale, the decree states that—

The commissioner "shall pay to the attorneys for the plaintiff \$50 per month to be computed from May 22, 1919, to the date of sale for rent, \$23.50 expended for the abstract and the sum of \$350 allowed them for attorney fees over and above the ordinary taxed costs. The balance of the fund remaining in his hands shall be divided into two parts and credited equally to the plaintiff and defendant, respectively, but subject to the following specific charges, namely: From the half of such fund so credited to the plaintiff said commissioner shall deduct the sum of \$47.05 costs allowed in case No. 79,271 at law in this court and the further sum of \$38.92, being one-half of the 1920 taxes, which two sums shall be paid by said commissioner to Samuel W. Shier, as attorney for the defendant on his procuring the discharge of record of a mortgage given May 28, 1920, by Martha Gundick to Joseph Gryger, but which mortgage has been fully satisfied by the judgment rendered on the appeal in which it was given; from the other half of such fund which said commissioner has credited to the said defendant he shall deduct the following items, \$22 adjudged the plaintiff in said case No. 79,271, \$68.80 costs awarded plaintiff against defendant in the Supreme Court on appeal, and also the costs in this case to be taxed, which several sums the said commissioner shall pay the attorneys for the plaintiff.

"It is further ordered, adjudged and decreed that the said commissioner shall pay the balance of the two said several sums so credited to the plaintiff and defendant respectively, to each their accredited remainder or to their respective attorneys."

The decree was entered March 31, 1921. On April 14, 1921, plaintiff by petition sought amendment thereof, that the clause respecting a sale of the premises which read "and that on making such sale the said circuit court commissioner make and execute to the purchaser at such sale a deed of conveyance of the land and premises so sold," be changed to read, "and that on making such sale the said circuit court commissioner shall immediately after confirmation thereof make and execute to the purchaser at such sale a deed of conveyance to the land and premises so sold."

[1, 2] The decree was amended, and final decree entered April 18, 1921. Defendant

has appealed. Her complaints will be discussed in the following order:

Amendment of decree. Defendant was not prejudiced by the amendment. It was properly allowed. Circuit court rule 56; Section 18309, Comp. Laws 1915. Order of reference. Defendant is estopped to assert impropriety in the order, having petitioned that it be enlarged to cover her claims, and having submitted her claims and testimony under such enlarged order.

Rents. The original decree provided an accounting for rents by defendant to plaintiff from May 22, 1919, to date of sale. The report of the commissioner fixed the monthly rental at \$50. This value, accepted by the trial court, within the limits fixed by the testimony, we are not inclined to disturb. But of the question of rent defendant claims a former adjudication.

On January 10, 1920, defendant began a suit against plaintiff to restrain her from obtaining possession of the property in question, and filed in such cause a bond in the penal sum of \$600 with George Nunn as surety, conditioned on the failure of such suit to pay plaintiff costs that might be awarded and rent. The suit was dismissed, and plaintiff here, Lettie Nott, was awarded costs against defendant here, Martha Gundick, in the sum of \$22. On March 1, 1920, plaintiff here commenced suit upon the bond in justice's court before Theodore J. Richter against Martha Gundick and George Nunn for such costs and for rent, and had judgment for \$322 and costs, which cause defendants appealed to circuit court on May 6, 1920. The original decree by Judge Hosmer in the case at bar entered April 15, 1920, as to such rent, said:

"Taking into due consideration any rental that may be due from the said Martha Gundick to the said Lettie Nott from May 22, 1919, to the date of partition, but deducting therefrom any time for which the said Lettie Nott may recover in her action before Theodore J. Richter."

In the circuit court, in said cause appealed from justice's court, plaintiff upon directed verdict on January 15, 1921, had judgment for the \$22, and defendant was awarded costs in the sum of \$47.05, and in which cause appears the following order:

"In the above cause, it duly appearing that the verdict ordered might be considered or treated as a bar to the recovery of rents awarded by the decree of Judge Hosmer, which has since been affirmed by the Supreme Court, therefore, it is ordered that it be so amended as to provide that such verdict shall in no sense be considered as bearing on the rights as to rents settled and established by such Supreme Court decision."

[3] Defendant seems to contend that she may set off against the claim for rent the amount of the judgment rendered by Justice

Richter, and that the language of the decree above quoted so directs. But the words "action before Theodore J. Richter" mean the cause itself, which defendant appealed to circuit court. We recognize the rule that it is the judgment entered upon such appeal which concludes the parties, and that the parties are not bound by opinions or statements of the court seeking to define the extent to which such judgment shall prejudice the rights of the parties in other actions. 23 Cyc. 1218. But we need not consider the order above quoted entered in said cause. The record in that cause is not before us, but it appears that plaintiff had judgment for the \$22, which had been awarded her as costs in the said chancery suit, and that she had judgment for no part of the rent. If such judgment is to be given any force as to the rent, it must be treated as an adjudication that plaintiff was entitled to no rent. But that may not be, for the original decree in this cause, as we read the record, amounts to a determination to the contrary, and such decree was entered months before said judgment in the cause on appeal. Plaintiff's right to rent here is not barred by the judgment in said cause.

It is urged that plaintiff is given the whole rental value for the time, \$50 per month, when defendant owns half the property. The answer to this is that the decree orders such rent to be paid to plaintiff from funds one-half of which belongs to her. Taxes. The court refused to allow defendant the amount of taxes of 1919, \$49.14, paid July 21, 1919, and treated such claim as concluded by the original decree herein. We think it was not so concluded. The taxes were paid while the parties were tenants in common. Decree may be modified to award defendant one-half of the sum so paid.

[4] Attorneys' fees. The court allowed \$350. This is said to be excessive as charged against defendant. But the decree orders payment from a fund one-half of which belongs to plaintiff. Plaintiff has not appealed. The sum to be paid by defendant is surely not excessive. Repairs claimed by defendant. Of these the trial court correctly found:

"As to the claim by the defendant for repairs put upon the dwelling house since the date of such decree, it appears from the evidence that all such repairs were placed upon the property, not only without the knowledge or consent of the plaintiff or her attorney, but also in defiance of her rights and for the sole convenience of the defendant, and they are disallowed."

Because of the character and purpose of the repairs claimed, the cases of *Fenton v. Miller*, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 204, and *Liebetreu v. Liebetreu*, 197 Mich. 668, 164 N. W. 430, cited by defendant are not applicable. See *Ward v. Ward's Heirs*, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911; 33 Cyc. 56. The

questions raised have been considered. The decree is equitable, and, except as above modified, it is in all things affirmed. Plaintiff will recover costs.

BROADWELL v. WALKER. (No. 86.)

(Supreme Court of Michigan. Nov. 3, 1921.)

1. Logs and logging $\S$ 3(14)—Title to remaining timber after termination of timber deed in landowner.

Where a timber deed gave a limit of three years to cut and remove timber, with additional time if conditions required, but no such conditions were shown nor an extension made, the timber remaining on the land at the end of the three years was the property of the owner of the land.

2. Taxation $\S$ 737—Plaintiff seeking to recover timber cut held not divested of title to land by tax sale.

In replevin by a landowner for timber cut and taken after the expiration of the time limited in a timber deed, plaintiff held not barred from maintaining the action as having lost title to the land by a tax sale under Comp. Laws 1915, $\S$ 4067; it appearing that the timber was taken before the period of redemption provided by Pub. Acts 1917, No. 320, had expired.

3. Taxation $\S$ 737—Tax lien held no bar to recovery of timber cut from plaintiff's land.

In replevin for timber cut after the time limited in a timber deed had expired, that the state could have asserted a lien on the timber under Comp. Laws 1915, $\S\S$ 4112, 4154, 4155, held no bar to plaintiff's rights.

Error to Circuit Court, Chippewa County; Louis H. Fead, Judge.

Replevin by Louis O. Broadwell against William Walker. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and MOORE, FELLOWS, WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Wiley & Green and McDonald & Kaltz, all of Sault Ste. Marie, for appellant.

M. M. Larmonth, of Sault Ste. Marie, for appellee.

CLARK, J. On July 6, 1914, Cadrean and wife conveyed to Rowan and Stegeman all timber upon the east $\frac{1}{2}$ of west $\frac{1}{4}$ of section 27 of Sugar Island, "together with the right to enter upon said premises and cut and remove said timber at any time within three years from date, but not thereafter. All timber thereafter remaining or being thereon to revert and become the property of the first parties. And will extend time to cut and remove two years if conditions require it. To have and to hold, unto the said parties of the

second part, their executors, administrators and assigns, to warrant and defend the sale of said timber hereby made to the parties of the second part, and their executors, administrators, and assigns, against all and every person or persons whatsoever, provided that the said parties of the second part will pay all taxes legally assessed to the said described lands during the time in which the said parties of the second part has to remove the said timber off from said described lands."

In August, 1914, interests of Rowan and Stegeman in the timber were conveyed to Mrs. Robert (Ann) Rowan, "with the privilege of entrance upon said lands to cut and remove the timber at any time within three years from date."

Plaintiff acquired title to the land in September, 1914, with knowledge of the timber deed. Robert Rowan cut timber upon the land in 1915, 1916, 1917, and 1918. In the summer of 1918, defendant purchased some of the timber cut by Rowan, and in August formed a partnership with him, under which they cut for a time, and in November defendant received from Rowan a bill of sale of the timber upon the land, under which he continued the cutting until April, 1919.

In January, 1920, Robert Rowan and Annie Rowan, by an instrument recorded as a deed, did "sell, assign, transfer, and set over to the said William Walker and to his heirs and assigns forever, all the right, title, and interest, belonging to both or either of us, in and to the timber, cut or uncut, and to the right to cut or remove the same," and which provided that—

"This bill of sale is given in confirmation and for the completion of a bill of sale given and delivered to the said William Walker and dated November 5, 1918."

Having from the plaintiff an option, which, however, was not exercised and which expired, one Miller caused the land to be platted and the plat to be approved by the board of supervisors of the county and by the auditor general, and to be recorded January 22, 1915. For 1915 and subsequent years the land was assessed as platted. The taxes were not paid. Plaintiff did not pay them because of the obligation of the timber deed. Defendant did not pay them because the platting greatly increased the amount. In 1918 the lands were sold and bid to the state for the taxes of 1915. Respecting plaintiff's knowledge of the cutting in 1918 and 1919 and of delinquent taxes, we quote from the finding of the circuit judge:

"Plaintiff was on the premises in August, 1918, but states that he saw no one cutting timber and no fresh cuts. He was informed by John Joseph that Rowan had cut the timber taken off. He states he did not know defendant was cutting or had cut until just before

commencement of suit, when he was informed of it by Judge Colwell. He had instructed James J. McDonald to get Rowan to pay the first three years' taxes. McDonald, in the winter of 1919, finding that defendant was cutting, asked him to pay the taxes, told him that he could not remove timber unless the taxes were paid, but defendant refused to pay them. McDonald had no other authority from the plaintiff than a request that he try to get the taxes paid."

In September, 1919, plaintiff brought replevin for the forest products then in possession of the defendant and which he had cut from the land, the value upon inventory being \$3,970.80. The cause was tried without a jury. There was judgment for plaintiff. The court made findings of fact and conclusions of law, to which exceptions were taken.

Defendant by his assignments of error contends:

1. That under the timber deed of July 3, 1914, the grantees and their assigns had five years thereafter in which to cut and remove the timber. Of this the trial court said:

"The claim is, in my judgment, untenable. The deed expressly provides for the reversion of the unremoved timber at the expiration of three years. The effect of this clause is to divest the purchaser of title at the end of that period. *Gamble v. Gates*, 92 Mich. 510. The provision for the extension of time follows the reversion clause. It is not absolute but provides for extension 'if conditions require it.' The conditions the parties had in mind as being sufficient to require extension are not stated, although they might properly have been the subject of evidence to remove ambiguity. No extension of time was granted, and no conditions requiring extension have been shown, other than the bare fact that the timber was not removed within three years."

[1] But defendant insists that *Gamble v. Gates*, supra, 92 Mich. 510, 52 N. W. 941, supports his contention. In that case it was agreed that the second party to the contract be given three years in which to cut and remove the timber, that if more time be required second party be allowed two years more by paying all taxes levied or assessed on the lands during the additional time required, and that all timber remaining on the land after the limit of the five years shall revert to and become the property of first party. And it was held that all timber remaining upon the land at the expiration of the five years, whether cut or uncut, reverted to the vendor. There the time limited in the reversionary clause was five years, here, three years. There the two years additional were to be had upon payment of taxes, which were paid at the time of trial. Here the grantor agreed to give additional time "if conditions require it." The extension was not requested or claimed. It was not given. No conditions requiring an extension are shown. The effect of the language was not to give absolutely a

limit of five years. It gave a limit of three years, and there being no extension of time, the timber remaining upon the land at the end of such period became the property of plaintiff.

It was held in *Perkins v. Stockwell*, 131 Mass. 529 (quoting from syllabus):

"A deed of land from P. to S. contained the following clause: 'Except reserving all the pine trees or pine timber thereon standing and to stand and grow thereon for the term of ten years from' a certain day, 'and longer by paying said S. ten dollars per year after the expiration of the ten years.' Held, that the right of P. to the pine trees and timber was lost by his failure to elect to have them stand and grow, longer, by any offer of payment to S. for more than a year after the expiration of the ten years named."

—and in *Dye v. East Shore Woodenware Co.*, 169 Mich. 78 (134 N. W. 986), quoting from syllabus:

"Under a conveyance to defendant of all timber on certain land, to be removed before a date specified, after which all timber, whether cut or uncut, remaining thereon, should revert to complainant, logs cut and skidded, remaining on the land at the date named, became complainant's property."

See, also, *McRae v. Stillwell*, 111 Ga. 65, 38 S. E. 604, 55 L. R. A. 513; *United States Coal & Oil Co. v. Harrison*, 71 W. Va. 217, 78 S. E. 846, 47 L. R. A. (N. S.) 870.

[2] 2. That plaintiff cannot maintain the action, having lost title to the land by the tax sale of May, 1918. The timber in question was cut and taken during the year following such tax sale. At such sale the land was bid to the state. Defendant claims that plaintiff's title to the land was divested by and upon such sale. Plaintiff contends that because of his right of redemption from such sale his title was not so divested.

Section 4067, Comp. Laws 1915, in part provides:

"If any parcel of land cannot be sold for taxes, interest and charges, such parcel shall be passed over for the time being, and shall, on the succeeding day, or before the close of the sale, be reoffered; and if, on such second offer, or during such sale, the same cannot be sold for the amount aforesaid, the county treasurer shall bid off the same in the name of the state, for the state, county and township, in proportion to the taxes, interest and charges due each. And in such case the taxes assessed on the lands so bid off to the state, and the interest and charges thereon, shall remain a lien upon said lands, * * * and thereupon the auditor general shall, after the period of redemption provided in section seventy-four has expired, execute deeds to the purchasers in such form as shall be determined by him. All lands bid off in the name of the state shall continue liable to be taxed in the same manner as if they were not the property of the state, except as hereinafter provided."

Under section 4112, Comp. Laws 1915, making it unlawful to cut or remove timber from land so bid in by the state, the auditor general may issue his warrant and seize such timber if so cut or remove or sufficient thereof, as may be necessary to pay such tax. Act No. 320, Public Acts of 1917, amending the general tax law, provides in part:

"Any person owning any of the lands sold as aforesaid, or any interest therein, may, at any time before the first Tuesday in May in the year following such sale, redeem any parcel of such lands, or any part or interest in such lands, by showing to the satisfaction of the county treasurer or auditor general that he owns only that part or interest in the same which he proposes to redeem, by paying to the county treasurer or auditor general the amount of the sale of the parcel of land, or the portion thereof wished to be redeemed, and interest thereon from the date of such sale."

The difference between state tax lands and state bids should be recognized. Section 4082, Comp. Laws 1915; *Muirhead v. Sands*, 111 Mich. 487, 69 N. W. 826; *Hickey v. Rutledge*, 136 Mich. 128, 98 N. W. 974; *Griffin v. Kennedy*, 148 Mich. 583, 112 N. W. 756; *Allen v. Cowley*, 128 Mich. 531, 87 N. W. 620; *Board of Supervisors of Alcona County v. Auditor General*, 136 Mich. 130, 98 N. W. 975; *Monaighan v. Auditor General*, 136 Mich. 247, 98 N. W. 1021.

From the foregoing it appears that the plaintiff had until May, 1919, in which to redeem, that his title was not divested until the time for such redemption had expired, and that the sale for taxes of 1915 presents no obstacle to plaintiff's recovery in this cause.

Defendant relies upon *Gustin v. Fitzpatrick*, 182 Mich. 641, 148 N. W. 742. That was an action of replevin for forest products cut after the period of redemption from a sale and bid to the state had expired, and after sale by the state. It was held that the owner of the record title of the land so sold could not maintain replevin, and that after a valid sale for taxes, and after the period of redemption had expired, the state possessed the absolute title. This case, and others of like holding, also cited, are not in point.

[3] The defendant is not aided by section 4112, above cited, nor by sections 4154, 4155, Comp. Laws 1915, making it unlawful to cut timber growing upon lands upon which taxes remain unpaid from and after the 10th day of January succeeding that at which the tax was assessed, and making it the duty of the county treasurer to cause such timber, if cut or removed, or such thereof as may be necessary, to be seized for such taxes. Plaintiff's right of possession of the timber is not to be denied because the state may assert a lien thereon for taxes.

3. That plaintiff is estopped to assert title

to the timber because of his laches in permitting defendant to cut timber and his requesting payment of taxes. This contention is disposed of by the circuit judge, whose finding above set forth is sustained by the record, and under which this defense may not be maintained. We find no error.

Judgment affirmed.

CAMPBELL v. MURRAY. (No. 99.)

(Supreme Court of Michigan. Nov. 3, 1921.)

Elections **←260—Recount nullity where ballot box was not locked and sealed, and the box seal and key kept as required by statute.**

Where ballot box was not locked and sealed following the canvass by the board of canvassers, and the box seal and key were not kept in the manner required by Comp. Laws 1915, § 3708, and Pub. Acts 1917, No. 203, c. 14, § 5, as amended by Pub. Acts 1919, No. 266, c. 14, § 5, a recount was a nullity.

Error to Circuit Court, Mecosta County; Joseph Barton, Judge.

Quo warranto by Alfred E. Campbell against Douglas E. Murray. Judgment for plaintiff, and defendant brings error. Affirmed.

Argued before STEERE, C. J., and WIEST, STONE, CLARK, BIRD, and SHARPE, JJ.

Alpheus A. Worcester and Fred R. Everett, both of Big Rapids, for appellant.

Arthur J. Butler, of Big Rapids (George E. Nichols, of Ionia, of counsel), for appellee.

CLARK, J. The parties were rival candidates for the office of supervisor at the election of April 4, 1921. The ballot had a single ticket on which was plaintiff's name. Defendant ran on slips. When the canvass was completed the election of plaintiff was announced, and he qualified. He claims that at the election for the office 243 votes were cast, and that the canvassers announced the election by a vote of 121 to 105, and that certain ballots were not counted. Defendant claims, and the minutes of the election show, that 239 votes were cast, plaintiff receiving 116, defendant 105, and that 18 ballots were not counted.

After the canvass the ballots and tally sheet were placed in a box which was left in the township hall the night of the election. The box was not locked. There was a lock on it, but the clasp connecting the lid with the box proper was broken. The box was placed in a sack, and the sack sealed. The key was taken and kept by an inspector, not the chairman of the board. The seal was kept by the clerk.

Defendant petitioned for a recount, which

was had on April 7th. Plaintiff filed with the board written objections to the recount on the ground of the failure to observe the requirements of the statute respecting the locking and keeping of the ballot box and the keeping of the seal following the canvass. The board recounted the ballots found in the box, and found that plaintiff received 117 votes and the defendant 117. The board then determined by lot the election of defendant, who qualified and took the office. Plaintiff brought quo warranto. At the conclusion of the proof, both sides requested a directed verdict. A verdict was directed for plaintiff, and judgment entered.

Defendant here insists that a verdict in his favor should have been directed. Section 5, c. 14, of Act No. 286, Public Acts 1919 (amending section 5, c. 14, Act No. 203, Public Acts 1917; section 3708, Comp. Laws of 1915) provides:

"After the ballots of each kind are counted they shall, together with one tally sheet, be placed in the ballot box which shall be securely sealed, as provided in section twenty of chapter ten, in such manner that it cannot be opened without breaking such seal. The ballot box shall then be delivered to the township or city clerk, but the keys of said ballot box shall be held by the chairman of the board and the election seal by one of the other inspectors of election."

The sealing provided by said section 20 of chapter 10:

"The ballot box shall then be opened and the poll list placed therein, the box locked, and, at least five minutes before the removal of the same, a piece of leather or canvas so placed as to extend from the opening in the lid of said ballot box to the keyhole and to completely cover both such holes, shall be placed thereon, and the same securely fastened thereon with sealing wax stamped with the official election seal of such township, ward or precinct, such piece of leather or canvas and the sealing wax to be so arranged as to render it impossible to open either of said holes without breaking said seal; or a covering for the opening of the said ballot box may be used of any other material so placed over said opening that it cannot be removed without opening the ballot box or breaking the seal fastening such covering, and provided also that a sealing device of either metal or wax be used and so arranged that the official seal of the township, ward or precinct can be stamped thereon and so arranged that the key cannot be inserted in the lock without breaking such seal."

Because of the failure to lock and seal the ballot box following the canvass by the board of canvassers, and the failure to have the box, seal, and key kept as required by statute, the recount was a nullity. The statute is mandatory as applied to a recount board. It was said in *Keith v. Wendt*, 144 Mich. 49, 107 N. W. 443, that a recount of the votes

can be had under the statute only in cases where the recount board can find from an inspection of the ballot box that the statutory requirements for the preservation of the ballots as cast have been observed. See *Ritze v. Board of Canvassers of Iron County*, 172 Mich. 423, 137 N. W. 964; *May v. Board of Canvassers of Wayne County*, 94 Mich. 505, 54 N. W. 377; *Andrews v. Judge of Probate of Otsego County*, 74 Mich. 278, 41 N. W. 923; and *Hartley v. Board of Canvassers of Bay County*, 205 Mich. 523, 171 N. W. 496, and cases there cited.

But defendant, conceding the above to be the rule, and that it was correctly applied in the mandamus cases above cited respecting a recount by canvassers, boards, or committees, contends here that in quo warranto the statute is directory, that it is a question of fact whether the ballots not cared for as the law directs are in fact the ones cast at the election, that the court may go behind the canvass to find the number of votes cast for a candidate, that upon quo warranto an opportunity is afforded for a judicial determination of the facts, that the statute in question provided no machinery for a trial of disputed questions of fact, and that to hold otherwise would put it in the power of ignorant, corrupt, or careless officers of election to frustrate any investigation into an election, citing *People v. Van Cleve*, 1 Mich. 363, 53 Am. Dec. 69; *People v. Tisdale*, 1 Doug. 59; *People v. Higgins*, 3 Mich. 233, 61 Am. Dec. 491; *Keith v. Wendt*, 144 Mich. 49, 107 N. W. 443; *People v. Sackett*, 14 Mich. 320; *Baldwin v. Alger County Supervisors*, 189 Mich. 372, 155 N. W. 367. Defendant's contention seems to be further sustained by a case and a note in which the authorities are fully reviewed found in *Newhouse v. Alexander*, 27 Okl. 46, 110 Pac. 1121, 30 L. R. A. (N. S.) 602, Ann. Cas. 1912B, 674. But the case at bar seems to have been tried upon the theory that the recount was valid. The ballots and box were not in evidence.

But it is now claimed that, wholly apart from the recount, the evidence as to the election itself shows that defendant received the greater number of votes. Without considering the question of whether the court on quo warranto may canvass the votes and determine an election in the unexplained absence of the ballots, upon the memory of witnesses of what the ballots were, we think the testimony of the witnesses as to the ballots does not establish the claim. The record seems to indicate that 13 ballots were thrown out by the canvassers at election, which, under the holding in *Sawyer v. Hart*, 194 Mich. 399, 160 N. W. 572, should have been counted for the defendant, but the exact state and legal effect of the other ballots were not before the court.

Judgment affirmed.

GROESBECK, Governor, v. FULLER, Auditor General.

ORMAN, State Treasurer, v. SAME.

(No. 421.)

(Supreme Court of Michigan. Nov. 3, 1921.)

Officers 94—Extra compensation for state officers, performing duties outside the range and scope of their offices, not prohibited by Constitution.

The duties imposed on the State Administrative Board, composed of certain state officers, by Public Acts 1921, Act No. 2, creating duties outside the constitutional duties imposed on the officers named, and not falling within the range and scope of the office being official, and the incumbent compelled to perform, may be compensated for without violating Const. art. 6, § 21.

Petitions for mandamus by Alex J. Groesbeck, Governor, and by Frank E. Gorman, State Treasurer, respectively, against Oramel B. Fuller, Auditor General. Findings for petitioners, but writ not to issue.

Argued before STEERE, C. J., and MOORE, WIEST, FELLOWS, STONE, CLARK, BIRD, and SHARPE, JJ.

Merlin Wiley, Atty. Gen., and Clare Betan, Asst. Atty. Gen., for plaintiffs.

George L. Hauser, of Lansing, for defendant.

SHARPE, J. A State Administrative Board is created by Act No. 2, Public Acts 1921, of which the Governor, plaintiff herein, is made chairman. The other members of the board are Charles J. De Land, Secretary of State, Frank E. Gorman, State Treasurer, Oramel B. Fuller, Auditor General, Merlin Wiley, Attorney General, Frank S. Rogers, State Highway Commissioner, and Thomas E. Johnson, Superintendent of Public Instruction. The allegations in the petition are all admitted in the answer. Those material to the issue here presented are set forth:

"IV. That among the duties imposed upon said board are the exercise of general supervisory control over the functions and activities of all administrative departments, boards, commissions and officers of the state and all the state institutions. In addition thereto said board performs all the duties heretofore vested by law in the State Budget Commission, the State Purchasing Agent, and the Advisory Board in the Matter of State Purchasing. Said board also exercises control over the system of state accounting and the manner of handling such work. The aforesaid confers upon said board direct and complete supervision over the State Budget, all state purchasing, state accounting, the state accident fund, Department of Agriculture, expenditure of state appropriations, state building activities, all matters of state finance, including bond issues and ex-

penditure of the emergency fund, and the regulation of the sale of steamship tickets and foreign exchange. It also confers upon said board supervision and primary control over the Department of Public Safety, Department of Conservation, State Highway Department, Department of Labor and Industry, and the State Welfare Department.

"V. That said board was duly organized upon the taking effect of said Act No. 2 of the Public Acts of 1921, and since its organization said board has held two regular weekly meetings and a special meeting almost every day since its organization, and has performed all the duties imposed upon it by the provisions of said act; that in addition to attending the regular meetings of said board its members have from time to time served upon various committees appointed by your petitioner, the appointment of which has been made necessary owing to the duties which have been imposed upon said board.

"VI. By the provisions of Act 389 of the Public Acts of 1921, the State Treasurer, the Secretary of State, and the Auditor General for all duties prescribed for and imposed upon them as members of the State Administrative Board were given compensation at the rate of \$2,500 per year in addition to their salaries as heads of their respective departments. Said act providing for the payment of this compensation became effective on the 18th day of August, A. D. 1921."

At a session of the board held on July 15, 1921, the names of the officers designated in paragraph VI were ordered placed on the pay roll of the board at the rate of compensation fixed in said Act No. 389, and such roll duly certified to the defendant Auditor General, who refused to draw his warrant on the State Treasurer in order that payment thereof might be secured. Mandamus is now sought by the Governor as chairman of the State Administrative Board and by the State Treasurer to compel him to do so.

The defendant justifies his refusal on the ground that said Act No. 389 is in conflict with the following provisions of our state Constitution:

Article 6, § 1: "There shall be elected at each general biennial election a Governor, a Lieutenant Governor, a Secretary of State, a State Treasurer, a Commissioner of the State Land Office, an Auditor General and an Attorney General, for the term of two years. They shall keep their offices at the seat of government, superintend them in person and perform such duties as may be prescribed by law. * * *

Article 6, § 21: "The Governor and Attorney General shall each receive an annual salary of five thousand dollars. The Secretary of State, State Treasurer, Commissioner of the State Land Office and Auditor General shall each receive an annual salary of twenty-five hundred dollars. They shall receive no fees or perquisites whatever for the performance of any duties connected with the offices. It shall not be competent for the Legislature to increase the salaries herein provided."

The question presented is whether the Legislature may provide that compensation shall be paid these three constitutional officers for the performance of the duties imposed on them by the act creating the State Administrative Board. The applicable provisions of the Constitution have been quoted. Section 1 of article 6 provides for the election biennially of certain state officers, that they "shall keep their offices at the seat of government, superintend them in person and perform such duties as may be prescribed by law." Certain specific duties are imposed on the Secretary of State, State Treasurer, and Commissioner of the Land Office by section 20. They shall constitute a board of state auditors, a board of state canvassers, act as a state board of escheats and a board of fund commissioners. Section 21 fixes the salary of all such state officers and provides that "it shall not be competent for the Legislature to increase the salaries herein provided."

The duties of a public officer are seldom defined with precision in the provision of the Constitution or act of the Legislature creating such office. The Constitution imposed on two of these officers the duty to serve on the boards as provided in section 20, and on the three of them such duties as may be prescribed by law; that is, such as the Legislature may lawfully impose. While the title to the office and the place it occupies in our political system may be and usually are indicative of the duties to be performed, we have no doubt that other duties within its scope which, although collateral and incidental, naturally and properly serve to aid and further the accomplishment of the purpose for which the office was created, may be prescribed as a part of the service to be rendered by the official. These offices were created to secure to the state certain officials who, as the heads of departments, should superintend its affairs. This duty devolves on them as to all matters pertaining to their several offices or administrative departments. The fact that several were created and administrative departments thus provided for leads to the conclusion that the duties of such officials were regarded as separate and distinct from each other and that it was expected that the Legislature, by a wise exercise of discretion, would apportion the administrative affairs of the state among them, having in mind the office or administrative department on which the performance of a prescribed duty would, under the title of the office, naturally fall or that office to which the particular duty pertained or was incident. In the exercise of its discretion in this respect, the Legislature could not have imposed on the Secretary of State the duty of receiving or disbursing the moneys of the state, as this duty pertains to or is incident to the office of State Treasurer, nor could the duty of looking after the public lands have been assigned

to the Attorney General or Auditor General. This reasoning leads to the further conclusion that, as new duties of an administrative character arise and are provided for by law, the Legislature must determine to what office or administrative department they naturally or appropriately belong.

With its expressed judgment as indicated in the legislative act, the courts will not interfere except in cases where it clearly appears that duties are imposed on an official of a character and nature wholly foreign to his office. It could scarcely be claimed that the duties of the Secretary of State might be enlarged by making him warden of a prison or that the State Treasurer might be made a superintendent of a normal school. This leads us further to conclude that the framers of the Constitution, when they created these offices and fixed their salaries, had distinctly in mind, not the particular, but the general, duties which might be imposed on each of these officials. The authority of the Legislature to prescribe duties is and must be subject to limitation. The official cannot be required to perform all manner of public service at the will of the Legislature. Many boards and commissions have been provided for by law for the purpose of carrying on the general functions of the state government. To that end a Public Utilities Commission has been provided for and the duties of its members defined. When we consider these duties, could it be claimed that they might have been imposed on the Secretary of State, State Treasurer, and Auditor General, by designating them officially as such a commission?

With these considerations in mind, let us examine the duties imposed on these officials by the act in question. They are not to act individually. They are required to serve with the others named therein as members of a board designated "the State Administrative Board." This board has "general supervisory control over the functions and activities of all administrative departments, boards, commissioners, and officers of the state, and of all state institutions." It may "intervene in any matter touching such functions and activities and may by resolution or order, advise or direct the department, board, commission, office or institution concerned as to the manner in which the function or other activity shall be performed, and may order an interchange or transfer of employees between departments, boards, commissions and state institutions when necessary." It is made "the duty of each and every official and employee connected with any administrative department, office or institution of the state to follow the direction or order so given; and to perform such services in the carrying out of the purposes and intent of this act as may be required by the board." It is further provided that "failure so to do shall be deemed to constitute mal-

feasance in office and shall be sufficient cause for removal." Sec. 3.

The enumeration of these duties makes it apparent that they may not be imposed on these constitutional officers as such. They are clearly without the scope of their respective offices, wholly foreign to the purpose for which the office was created. By no stretch of the imagination can they be said to have been within the minds of the framers of the Constitution at the time of its adoption.

The purpose of this act is apparent. The legislative department, with a view to greater efficiency and economy in the conduct of the affairs of the state, created this board, and authorized it to exercise the supervisory control provided for. The necessity for frequent meetings was foreseen. Any of the citizens of the state might have been designated as its members. Their appointment by the Governor might have been provided for. But, influenced by considerations which appealed to the members, and with which we have no concern, the heads of several of the administrative departments were designated to constitute the board. No individual duty was assigned to the members, nor can each one under the act have any individual service to perform. Their official titles were used merely for the purpose of designating the individuals who should compose the board. See *City of Detroit v. Redfield*, 19 Mich. 376.

As has been said, the duty imposed must belong to the office; it must fall within the ordinary range or scope of the work of such office. The duties provided for in the act clearly do not do so. If the State Treasurer as such may be required to act as a member of a board exercising supervision over the state highway department, may he not be required by law to perform all of the duties of State Highway Commissioner, or the Auditor General be required to act as a Commissioner of Agriculture? The duty prescribed must be an official one, else the incumbent cannot be compelled to perform it, and if rendered by him it may be compensated for without a violation of the provisions of section 21 of article 6 of the Constitution.

The conclusion reached is, we believe, sustained by the great weight of authority. Our own case of *Warner v. Auditor General*, 129 Mich. 648, 89 N. W. 591, is relied on by defendant. The opinion in that case written by Mr. Justice Moore, is an able and exhaustive discussion of the question there presented. It is in no way controlling of the issue before us. The proceeding was mandamus to compel payment to the Secretary of State, State Treasurer, and Commissioner of the Land Office of the compensation provided for by Act No. 171 of the Public Acts of 1901 for services rendered by such officials while acting as members of the Board of State Auditors. As the Constitution created this board and designated these officials to act as

such, it was held that additional compensation could not be provided for them for such service. The distinction is pointed out between duties imposed by the Constitution and those prescribed by the statute. The limitation upon the power of the Legislature in prescribing the duties of officials was recognized. In discussing *Roulo v. Board of Auditors*, 74 Mich. 129, 41 N. W. 879, it was said that the duties there sought to be imposed were "outside of and different from his duties as an officer, which he might refuse to do, if he so desired."

The following Michigan cases will be found instructive:

In *City of Detroit v. Redfield*, supra, the plaintiff, as comptroller of the city, was authorized and directed by a resolution of the common council to perform certain duties relative to the issue and sale of so-called "soldiers' bounty bonds." It appeared that he received an annual salary as such comptroller, and it was insisted that he was not entitled to extra compensation for the duties imposed on him under the resolution. The first question considered was whether the services performed came within his official duties as comptroller; in other words, whether, by officially designating him as a person to perform the duty, such duty thereby attached to his office and became a part thereof. The court said:

"The resolution appointing him expressly designated him as 'the agent of the city' for this purpose, and the use of the word 'comptroller' in such a connection would naturally be taken as a mere designation of the person intended—a mere substitute for the name of the individual. But the duties required by the act to be performed by this 'agent of the city' were wholly foreign to his duties as comptroller, as defined by the charter."

It was pointed out that while the charter, after enumerating the duties of the comptroller, requires him to "also perform such other duties as are prescribed by this act, or may be prescribed by the common council, subject to the provisions of this act," the common council "could not prescribe any duties to the comptroller which do not come within the scope and are in no way subject to the provisions of the charter, and which are of an entirely different nature from those required by the charter." It is further said:

"It is unreasonable to suppose the Legislature intended that such services and to such an amount should be performed without compensation."

In *McBride v. Grand Rapids*, 47 Mich. 236, 10 N. W. 353, it was held that a police justice, appointed by the council to assist in drafting ordinances for the city, was entitled to recover compensation therefor, such service being acts outside of his official duty. See, al-

so, the cases cited and quoted from in *Warner v. Auditor General*, supra.

The authorities are reviewed and discussed at considerable length in a note to *Moore v. Nation*, 80 Kan. 672, 103 Pac. 107, 23 L. R. A. (N. S.) 1115, published in 18 Ann. Cas. 397. We refer to but a few of them.

In *Love, Attorney General, v. Baehr, Treasurer*, 47 Cal. 384, a quite similar question was presented. A statute of that state required the Attorney General to serve as a member of the State Board of Examiners, with duties somewhat similar to our Board of State Auditors, and provided for compensation for such service. The Constitution of that state provided that certain executive officers, of which the Attorney General was one, "shall each at stated times during their continuance in office receive for their services a compensation, which shall not be increased or diminished during the term for which they shall be elected; but neither of these officers shall receive for his own use any fees for the performance of his official duties." The statute provided that certain officers, among them the Attorney General, shall not "receive any other compensation whatever, for any duties that are now, or may hereafter be, required of them by law, than such as is fixed by this act. No new office, which is now, or may hereafter be, created, the duties of which, in whole or in part, shall be required to be performed by any such officer, shall entitle them to receive any extra compensation therefor." In discussing the power of the Legislature to impose this additional duty on the Attorney General, the court said:

"It is admitted that the Constitution contains no express limitation on the power of the Legislature in this particular. But we think a limitation is necessarily implied from the definition of the office. From the earliest period of our history as a nation, almost every state in the Union had a Secretary of State, Controller, Treasurer, and Attorney General, and the general nature of the duties pertaining to each were perfectly well known to the framers of our Constitution. It is clear beyond controversy that in establishing similar offices here the framers of that instrument had reference to the same general class of duties which it was well known pertained to such offices elsewhere. The Constitution provides for the election of a Superintendent of Public Instruction, whose duties are not defined, and might have provided for the election of a State Geologist. Can it be claimed, with any show of reason, that the Legislature could compel either of them to become ex officio Warden of the State Prison or Superintendent of the State Lunatic Asylum? It is not usual in state Constitutions to define the particular duties of subordinate officers; that being the peculiar province of the Legislature, which, it is to be presumed, will prescribe only such duties as in their nature have heretofore appertained to similar offices elsewhere. In the performance of this duty, the Legislature may rightfully exercise a wide discretion. It may assign to each of these of-

ficers any duties which, by the most liberal interpretation, can be held to come within the general scope of that class of duties which have usually appertained to such offices, as they were understood by the framers of the Constitution. In cases of doubt, it would be the duty of the Courts, in deference to the legislative authority, to solve the doubt in favor of the power as exercised; and they ought to interfere only in a clear case, when the Legislature has manifestly transcended its authority by imposing upon one of these officers duties which, in their nature, are wholly foreign to his office."

Additional quotations from this decision will be found in *Warner v. Auditor General*, supra. The conclusion was reached that the Legislature had no power to impose the duties of a member of the board on the Attorney General as an incident to his office.

In *Thomas v. O'Brien* (June 17, 1910), 138 Ky. 770, 129 S. W. 103, the question was presented as to whether certain magistrates, who by virtue of their office became members of the fiscal court of the county could be required to serve as a building committee, a turnpike committee, etc., without extra compensation for so serving. The statute of the state providing for compensation of officials of the court prohibited the changing thereof during the official term. The question presented was whether the magistrates were acting officially as members of the court while serving on such committees. The court said:

"The magistrates in acting upon the committees do not act as magistrates, nor could they claim the privilege of so acting by virtue of their office. Nor could they be required to so act because of their membership in the court. * * * If any one else had been appointed a committee to do the identical work done by appellant, it is not questioned that it would have been within the legal power of the fiscal court to have paid him for it out of the public revenues."

In *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428, a statute imposed on county treasurers the duty of assessing and collecting city taxes and provided compensation therefor. In refusing to enjoin the payment thereof, the court said:

"Appellant further contends that said act is in violation of section 8, art. 11 of the Constitution, which provides that 'the salary of any county, city, town or municipal officer shall not be increased or diminished after his election or during his term of office,' etc., and also section 25, art. 2, which provides, 'Nor shall the compensation of any public officer be increased or diminished during his term of office;' and also the first part of section 12, art. 11, which denies to the Legislature the right 'to impose taxes upon counties, cities,' etc. Section 10 of this act of the Legislature (Laws 1893, p. 170) provides that each city shall pay to the county treasurer for duties performed by him in the collection of city taxes \$500 per year, which shall be in addition to the salary otherwise provided by law. We do not think there is any

conflict here, as the additional salary is not paid to the county treasurer as county treasurer, but new duties have been imposed upon him in the way of collection of city taxes, and the additional compensation is provided therefor, a matter which is entirely outside of his former duties as county treasurer for which his previous salary was fixed."

The plaintiffs are entitled to the relief sought. As the defendant will undoubtedly comply with the order of the board on his attention being called to this opinion, it will not be necessary to issue the writ. No costs will be allowed.

STATE ex rel. WEHE, Com'r of Workmen's Compensation Bureau, v. FRAZIER, Governor.

(Supreme Court of North Dakota. Oct. 12, 1921.)

(Syllabus by the Court.)

Appeal and error  **1207(1)—Trial court must enter judgment as directed by Supreme Court.**

It is the duty of the lower court, on the remand of a case, to comply with the mandate of the appellate court and obey the directions therein. Hence where the Supreme Court directs that a judgment be modified in certain particulars, and, as thus modified, affirmed, it is the duty of the court below to modify the original judgment as, and only as, directed; and it has no power to make other modifications or changes in such judgment. It is held that in the instant case the trial court correctly interpreted and carried out the mandate of the appellate court.

Grace, C. J., and Robinson, J., dissenting.

Appeal from District Court, Burleigh County; Nuessle, Judge.

Certiorari by the State, on the relation of Laurens J. Wehe, against Lynn J. Frazier, as Governor, to review the Governor's action in removing relator as commissioner of the Workmen's Compensation Bureau. From an order and judgment finding the removal invalid, the Governor appealed, and the case was affirmed (182 N. W. 545) and remittitur sent down, and the judgment entered as directed, and from orders denying motions by the Governor's counsel for amendment and modification of last judgment, the Governor appeals. Orders affirmed.

Wm. Lemke, Atty. Gen., Geo. K. Foster, Asst. Atty. Gen., Philip Elliott and Chester A. Marr, both of Bismarck, for appellant.

Theodore Koffel and L. J. Wehe, both of Bismarck, for respondent.

PER CURIAM. This is a sequel to State ex rel. Wehe v. Frazier, 182 N. W. 545, where in this court modified and affirmed a judg-

ment of the district court of Burleigh county. After the remittitur was sent down, the district court made an order for judgment, pursuant to which judgment was entered in that court. Subsequently, the attorneys appearing for the Governor moved that the order for judgment and the judgment be amended and modified in certain particulars, which will hereinafter be noted. These motions were denied, and the Governor has appealed from the orders denying such motions.

This litigation arose out of proceedings before, and orders made by, the Governor purporting to suspend and remove the relator, Wehe, from the office of workmen's compensation commissioner in this state.

On April 19, 1920, the Governor wrote a letter to the relator, Wehe, stating that on account of certain reasons specified therein the Governor had suspended the said Wehe "from the office of workmen's compensation commissioner, such suspension to continue until the final determination of this matter." This was followed by a letter dated April 20, 1920, directing Wehe to show cause before the Governor on April 23, 1920, why his suspension should not be made permanent. In response to this latter letter the relator appeared before the Governor, and, after certain proceedings there had, the Governor made an order removing Wehe from the office of workmen's compensation commissioner; such order being entered on April 23, 1920. Subsequently Wehe instituted a mandamus proceeding to compel the Workmen's Compensation Bureau to issue to him his salary warrant for the month of April, 1920. In the answer in that proceeding it was asserted as a defense that said Wehe had been suspended by the Governor on April 19, and removed on April 23. It was further alleged, as a defense in that action, "that a voucher for plaintiff's salary for the period of April 1 to 23, 1920, had been allowed in the sum of \$159.85." See State ex rel. Wehe v. North Dakota Workmen's Compensation Bureau et al., 180 N. W. 49, 50.

In November, 1920, said Wehe applied to the district court of Burleigh county for a writ of certiorari for the purpose of reviewing the validity of the alleged removal proceedings had before the Governor. The trial court determined such proceedings, and the orders of suspension and removal entered therein by the Governor, to be irregular, illegal, and void, and entered judgment as follows:

"It is hereby ordered and determined that the proceedings of the defendant, Lynn J. Frazier, as Governor of the state of North Dakota, had and taken in connection with the removal of the plaintiff, Laurens J. Wehe, were irregular, illegal, and void, and that no evidence was given nor trial had before said defendant to

justify such removal, and the same is here in all things reversed, annulled, and set aside, and that the order and determination of the suspension and removal of said plaintiff by said defendant from the office of workmen's compensation commissioner of the state of North Dakota be, and the same is hereby, annulled, vacated, and set aside.

"And it is further ordered and adjudged and determined that the plaintiff, Laureas J. Wehe, be, and he hereby is, reinstated in his said position of workmen's compensation commissioner of the state of North Dakota, with all the rights, privileges, and emoluments, with interest thereto pertaining, as of the 23d day of April, 1920, the date of his illegal suspension and removal, as fully as if said order of removal had never been made."

The Governor appealed from that decision to this court. This court held that the relator had not been accorded a hearing as provided by law, and that the proceedings had in the removal proceeding before the Governor were irregular, and that the order of removal was null and void. In the opinion in that case this court said:

"In the legislative act under consideration, the Legislature has granted to the Governor the power of appointment and of removal, but it has expressly provided that the removal must be for cause. Section 4, c. 162, Laws 1919; chapter 73, Spec. Sess. Laws 1919. An express legislative limitation was placed upon this executive power of removal. This limitation prescribed the exercise of a legal discretion in addition to an executive discretion. This limitation, as has been stated, the Legislature had the right to prescribe. A removal for cause means for a legal cause. *State v. Common Council*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 596; *Townsend v. Tobey*, 71 Minn. 379, 74 N. W. 150; *State v. Donovan*, 89 Me. 451, 36 Atl. 985; *Andrews v. Board*, 94 Me. 76, 46 Atl. 804; *State v. Walbridge*, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; *Hayden v. Memphis*, 100 Tenn. 582, 47 S. W. 182. When the Legislature deemed it proper to prescribe a legal cause as the basic ground for the removal of the office involved, necessarily there then applied those fundamentals in Anglo-Saxon jurisprudence, essential and recognized in any free and democratic government, namely, the right of the accused to a hearing, to be confronted with his accusers, and to the right of defense. See *People v. Therrien*, 80 Mich. 187, 195, 45 N. W. 78. * * *

"This court, therefore, has already adopted, without dissent, the principle that a legal cause in such case must exist and must be established at a hearing. It is merely trite to state that a legal cause is a judicial cause. It follows, accordingly, that the Governor, in exercising his power in such removal proceeding, necessarily acts in a quasi judicial manner, that his orders, quasi judicial in character are subject to judicial jurisdictional review, and that such review does not serve to interfere with any purely executive prerogative. * * *

"It is evident from this record that the Governor did not appreciate the extent of this leg-

islative prescription. It is quite apparent that he doubted whether it was necessary that charges be preferred or a hearing be given; that he considered to a considerable extent that he might exercise this right of removal as a pure act of executive discretion based upon facts that might have been brought to his attention ex parte as the chief executive. By reason of such construction of his powers, it is further evident from this record that the Governor overlooked and ignored, in order to exercise his power of removal for cause, the necessity of granting a hearing to the relator where the relator might learn the nature of the charges against him, and might have an opportunity to answer the same, cross-examine witnesses, and adduce testimony to disprove such charges. Manifestly such hearing was not accorded the relator. It was jurisdictional for the exercise of the power of removal. No legal cause for removal was established at the hearing. The affidavits upon which the order for removal was based were neither produced nor presented. Accordingly, it follows that the order of removal must be determined illegal and void, unless the act of the relator in refusing to be sworn as a witness has conferred a jurisdiction to order a removal, as if upon default.

"(3) *Refusal of relator to be sworn*: It may be granted that the Governor had the right to examine the relator as a witness. *State v. Borstad*, 27 N. D. 533, 147 N. W. 390, Ann. Cas. 1916B, 1014. The exercise of this right, however, involves the concession that a hearing was necessary with the rights that flow to the relator at such hearing. Plainly, therefore, this right could not be exercised without according to the relator his rights. The record fairly shows that the relator was willing to be sworn, if to the relator a hearing would be accorded. The record fails to show any offer to accord such hearing as was required.

"The trial court, in the writ of certiorari, ordered that the relator be reinstated in his position of commissioner, with all the rights, privileges, and emoluments, with interest thereto pertaining, as of the 23d day of April, 1920, the date of his illegal suspension and removal, as fully as if said order of removal had never been made. This portion of the judgment perhaps may, by construction, receive an interpretation beyond the issues in this certiorari proceeding. It appears from the record herein that the Governor has appointed another person in place of the relator as commissioner, and that such person has qualified as commissioner. The only issues involved in this proceeding are the jurisdictional questions concerning the order of removal. The questions of law involved between the relator, as a de jure commissioner, and Mr. Spencer, as the de facto commissioner, are collateral to the present inquiry. 29 Cyc. 1393. The judgment of the trial court should not be construed to extend further than the restitution of the relator as commissioner de jure, the same as if no order of removal had ever been made. Thus construed and modified, the judgment of the trial court should be, and is, in all things affirmed."

Upon the filing of the remittitur in the district court, that court entered an order

for judgment, and judgment was entered thereon, as follows:

"Now, therefore, on motion of L. J. Wehe and Theodore Koffel, of Bismarck, N. D., attorneys for the plaintiff, Laureas J. Wehe, as commissioner of the North Dakota Workmen's Compensation Bureau, it is hereby adjudged and determined that all the proceedings of the defendant, Lynn J. Frazier, as Governor of the state of North Dakota, had and taken in connection with the removal of the plaintiff, Laureas J. Wehe, were and are irregular, illegal, and void, and that no evidence was given nor trial had before said defendant to justify such suspension and removal, and that the same be and hereby is in all things reversed, annulled, and set aside, and that the order of suspension and the order of removal and the determination of the suspension and removal of said plaintiff by said defendant from the office of commissioner of the Workmen's Compensation Bureau of the state of North Dakota, be, and the same is hereby, in all things annulled, vacated, and set aside, the same as if no proceedings for the suspension and removal of the plaintiff had ever been commenced.

"And it is further adjudged, determined, and decreed that the plaintiff, Laureas J. Wehe, be, and he hereby is, reinstated in his said position as commissioner of the North Dakota Workmen's Compensation Bureau, with all the rights, privileges, and emoluments, with interest thereto pertaining, as of the 23d day of April, 1920, the date his illegal suspension was made permanent and absolute, and the date the illegal order of removal was made therein, as fully as if no order of suspension and order of removal had ever been made therein, save and except as to any questions of law involved between the plaintiff, Laureas J. Wehe, as de jure commissioner, and one C. A. M. Spencer, as the de facto commissioner, which are collateral to the present inquiry; and that this judgment extends only to the restitution of the plaintiff herein, as commissioner de jure, that is, the legal and lawful commissioner, with the right and title in him to said office, the same as if no order of suspension and order of removal had ever been made; and the judgment heretofore entered, excepting said modifications, be, and the same hereby is, in all things adjudged, reinstated, affirmed, and determined."

The defendant moved to have this judgment amended by striking therefrom all references to the order of suspension; the contention being that the former decision of this court merely adjudged the order of removal to be invalid, and did not in any manner adjudicate with respect to the order of suspension. The trial court refused to amend the judgment, holding that the judgment which had been entered was in accord with, and carried out, the mandate of this court.

We have above set out the judgment originally entered by the trial court. It will be noted that therein the court specifically adjudged.

"That the order and determination of the suspension and removal of said plaintiff [Wehe] by said defendant [the Governor] from the office of workmen's compensation commission-

er of the state of North Dakota be, and the same is hereby, annulled, vacated, and set aside.

"And it is further ordered and adjudged and determined that the plaintiff, Laureas J. Wehe, be, and he hereby is, reinstated in his said position of workmen's compensation commissioner of the state of North Dakota, with all the rights, privileges, and emoluments, with interest thereto pertaining, as of the 23d day of April, 1920, the date of his illegal suspension and removal, as fully as if said order of removal had never been made."

It was the manifest object of this judgment to set aside all the proceedings had before the Governor in said removal proceedings including both the order of suspension and the order of removal, and to reinvest the relator with all of his rights as an incumbent of the office from which the Governor purported to have removed him.

This was the judgment brought before this court for review, and considered by us in the former opinion. It will be noted that the judgment contained two distinct provisions: The first specifically adjudged that the determination of the suspension and removal of said Wehe be annulled, vacated, and set aside; the second provision directed that he be reinstated in his position with all the rights, privileges, and emoluments as of the 23d day of April, 1920.

The decision of this court became the law of the case. It was binding upon the trial court. That court had no discretion, but was required to render such judgment as this court had directed to be entered. 4 C. J. 1233. And in our opinion the trial court correctly interpreted and carried out the mandate of this court.

While we deem the matter here under consideration determined and the law of the case settled by the former opinion, we do not see how any other conclusion could well have been reached, in view of the principles announced and the conclusion reached in the former opinion. As pointed out in that opinion, this court had already (on the first appeal in this controversy) adopted, without dissent, the principle that the relator could not be removed from his office except for legal cause, established at a hearing. And by application of that principle this court ruled that the determination of the Governor purporting to deprive the relator of his office was a nullity. Manifestly, if the Governor had no power to remove an officer except for legal cause and after hearing, he could not indefinitely suspend such officer except for similar cause and after hearing. It would be an absurdity to say that an officer may not be removed except for legal cause and after hearing, and in the same breath say that such officer may be indefinitely suspended from his office without any hearing whatever. See *United States v. Wickersham*, 201 U. S. 390, 26 Sup. Ct. 469, 50 L. Ed. 798. A

suspension is merely a temporary stop of a right. To suspend an officer is merely to forbid him from exercising the functions of his office for a more or less definite interval of time. See *Black's Law Dictionary*, p. 1129. In case of suspension it is contemplated that the suspended officer may be restored to his office and hold the same by virtue of his original title. *State v. Heinmiller*, 38 Ohio St. 101, 108. The order made by the Governor on April 19, 1920, recognized these facts. It will be noted that the order of suspension merely purported to be effective until the Governor made a further order disposing of the matter. On April 23, 1920, the Governor made such other order, and manifestly the order he then made was intended to wholly supersede the alleged order of suspension made on April 19, 1920. That, as has already been indicated, was also the construction placed upon this latter order by the officers of the state, as they caused a salary warrant to be drawn in favor of the relator, Wehe, for his salary as workmen's compensation commissioner up to April 23, the date that the alleged removal order was entered. In our opinion the judgment originally entered by the trial court upon the return of the remittitur from this court was correct and carried out the mandate of this court, and the trial court was correct in refusing to grant the motions for amendment or modification of that judgment.

We express no opinion upon the question pressed by the appellant on this appeal that the power to remove a workmen's compensation commissioner which the statute confers upon the Governor includes the power to suspend such officer temporarily from office. That question is not involved or properly determinable on this appeal.

Orders affirmed.

CHRISTIANSON, BRONSON, and BIRDZELL, JJ., concur.

GRACE, C. J. (dissenting). I most earnestly and vigorously dissent, and this for the same reasons set forth in my dissenting opinion in the previous case of *State v. Frazier*, 182 N. W. 551.

ROBINSON, J. (dissenting). This is a political case. Twice it has come before this court and twice dissenting opinions have been filed. 180 N. W. 49; 182 N. W. 545, 550, 551, 552. For certain causes, which this court held sufficient, the Governor made an order suspending Mr. Wehe from office and then an order inviting him to appear and show cause why he should not be permanently removed from office. Then, for cause shown to the satisfaction of the Governor, he made

what he considered an order of removal. The order of removal was held by three judges of this court, with two dissenting, to be void. Now if the removal order was void and of no effect, of course it left in full force the order of suspension. The first case which came before the court was on a demurrer to the complaint or charges made against Wehe, and it was held to state a cause for removal. One judge dissented. The second case was a certiorari proceeding to test the validity of the order of removal made by the Governor. The judges held thus:

"The only issues involved in this proceeding are the jurisdictional questions concerning the order of removal."

The decision said not a word concerning the order of suspension. It was based on the ground that the Governor had denied Wehe a hearing or trial on the charges against him, but, as the record shows, at the time and place set for a hearing the Governor and his counsel were present. Wehe and his counsel were present. The Governor demanded that Wehe be sworn as a witness. Of course the purpose was to examine him on oath concerning the charges against him. The answer of Wehe was: "I absolutely refuse to be sworn." Now the Governor had no power to compel Wehe to be sworn. But the Governor and his counsel supposed, and had a right to suppose, that calling Wehe as a witness was the commencement of the hearing on the charges against him. Wehe was given ample opportunity to testify and to present his case, but it seems he did not desire to be the first witness. Hence the Governor made an order of removal without calling any other witness, and that he had a right to do. The Governor is the head of the executive department. He had a right to adopt his own mode of procedure, and neither this court nor the district court had any right to dictate to him. Wehe was given ample opportunity for a trial, but he refused to accept it. He played to the galleries and the newspapers and set the Governor at defiance. There is no claim that Wehe had ever applied for a hearing or that he had been denied a fair hearing and a prompt hearing on the charges against him. This court has no right to control or usurp the functions of the Governor, or to hold that his order of suspension does not remain in full force pending a legal decision on the charges made against Wehe. Certain it is an unseemly thing for this court, by a majority of one judge, to hold void the official action of the Governor. And, as the result shows, it leads to an unseemly contest between the executive and the judicial departments, and to endless, vexatious, and expensive litigation.

EYNON v. THOMPSON et al. (BEISEKER, Intervener.)

(Supreme Court of North Dakota. Oct. 10, 1921. Petition for Rehearing Denied Oct. 29, 1921.)

(Syllabus by the Court.)

Mortgages — 163(2)—Prior recording of mortgage held not to establish precedence.

Where a mortgage is given by one in possession of realty under an agreement with a guardian of an estate to sell and to deliver title through a judicial sale, and where, thereafter, pursuant to the agreement, a guardian's sale is held, and a guardian's deed is issued to one who is entitled to retain title as trustee of the mortgagor for advances made prior to the execution of the mortgage, it is held that the prior recording of the mortgage did not establish precedence, under the recording statutes, to the title and lien of the trustee.

Appeal from District Court, Wells County; Coffey, Judge.

Action by A. W. Eynon against Bessie Thompson and others to foreclose a mortgage, in which T. L. Beiseker intervened. Judgment for plaintiff, and the intervener appeals. Judgment modified.

John A. Layne and Arthur L. Netcher, both of Fessenden, for intervener.

B. F. Whipple, of Fessenden, and John O. Hanchett, of Valley City, for respondent.

BRONSON, J. Statement.—This is an action to foreclose a mortgage. The intervener has appealed from a judgment in favor of the plaintiff, and demands a trial de novo. The facts disclosed by the evidence are as follows: One Norton, an incompetent under guardianship, was the owner of three vacant lots in the town of Chaseley. The guardian testified that he first had a talk with defendant Thompson, one Sheppard and one Knoble about purchasing these three lots. They wanted to build upon the lots. He made a price of \$250 for the lots. They told him the money would be deposited at the bank of the defendant Swanson. He told them that he would guarantee a deed, so they proceeded to build. Thompson built a hotel and garage upon the west 25 feet of the lots in 1916. The plaintiff, Eynon, testified that the bank, of which he was formerly president, loaned to the defendants, Mrs. Thompson and Mr. Thompson, her husband, \$300 on October 3, 1916, upon a note and mortgage covering the entire three lots executed by Bessie Thompson and J. H. Thompson, her husband, defendants. Then they were occupying the hotel building and in possession of the property. They represented that the lots were paid, and there was nothing against the property; that it was in the hands of an estate,

and they would not get a deed until that fall or later. He further testified: That, during the following week, he talked with the defendant Swanson about this property and the mortgage. That Swanson stated that he had a plain note against Thompson, and wanted Eynon to protect it. Later, when the guardian's sale of this property was being advertised, he saw Swanson. Swanson said he intended to bid in the property. That he agreed that if Eynon would not appear at the sale, he would take up the mortgage. Further, he testified that he knew before the loan was made that Sheppard was in possession of a portion of these lots and had buildings thereon. Also Knoble was in possession with a building thereon. That he never had any intention of bidding in Knoble's and Sheppard's portions of the lots. That he became owner of the note and mortgage, and Swanson subsequently refused to pay the same.

On February 25, 1916, the guardian made a written agreement with Swanson to deliver a warranty deed covering the lots for a consideration of \$250. He further testified: He had no talk with Thompson concerning how much of the lot he should have. That the talk between him and Swanson was that Swanson should bid in the lots himself for the parties to whom he had sold them. That the buildings on the lots were completed before the sale proceedings were finished. That before the deed was issued Swanson stated he would pay the Eynon mortgage. Swanson testified that he had been cashier of the Chaseley State Bank. That prior to the execution of the written agreement with the guardian he had a talk with Sheppard. He then determined to purchase these three lots. The talk was had with Thompson after the time of the written agreement. Previously, he had agreed to deed a portion of the lots to Sheppard, and another to Knoble, and to reserve the west 25 feet for himself. Then he talked with Thompson. He wanted him to build a hotel on the west 25 feet. Thompson did not have enough money. The agreement was made that Thompson should pay enough money to invest in the lot, and the bank would finance him, holding the lot and hotel as security. That these deals concerning the lots were made to help build up the town. That Thompson paid for his portion of the lot \$75.00. Sheppard and Knoble around \$80.00. That Thompson proceeded to build the hotel. The bank financed him, furnishing \$975 in various items, between March 18 and July 24, 1916, evidenced by notes maturing October 1, 1916. This portion of the lot after construction of the hotel buildings was worth about \$1,500 or \$1,600. On October 3, 1916, Thompson renewed these notes by a new note for \$975, and upon the next day left town. That he made these advances

es, being assured through the written agreement of the guardian. That he first learned, concerning plaintiff's mortgage, through the weekly commercial report of mortgages on record. That he made the arrangements with the guardian about the sale. That he had no talk with Eynon about his not bidding upon the lots. That he did not agree to pay the mortgage. That he did tell him that they would take no action on their claim without first taking it up with him so that he would have a chance to protect himself. The bank's claim for \$975 is now held by the intervener, who together with Swanson in an answer and counterclaim, asserts the validity of Swanson's legal title for purposes of the claim concerned over plaintiff's mortgage. Plaintiff's mortgage was recorded October 4, 1916. The guardian's deed is dated March 9, 1917, and was recorded May 8, 1917. It recites therein the making of an order authorizing private sale dated October 24, 1916, the holding of the sale on November 27, 1916, and the offering of the property in separate parcels and the order confirming the sale, dated January 8 (1916?). The deed covers, in addition to the lots concerned herein, an additional lot in another block. The Thompsons, defendants, were served by publication, and are in default. The trial court found that, when plaintiff's mortgage was made, Thompson was then the full equitable and beneficial owner of west 25 feet involved, subject only to the payment of \$75 for such lot then on deposit with the bank for that purpose; that plaintiff's mortgage was a conveyance of the premises involved in good faith and for value within the meaning of the recording statutes, and that the equitable liens and rights of Swanson and his bank were void in respect thereto. Judgment of foreclosure was ordered accordingly. In its findings of fact the trial court found in plaintiff's favor upon the disputed questions of fact.

Decision.—The respondent does not question the legality of the guardian's sale and deed. On the contrary, he relies upon its validity in order to sustain the lien of the mortgage. It is not necessary to give serious consideration, nor does the respondent, to the testimony concerning nonbidding or the assumption of the mortgage by Swanson. Eynon had no intention to bid on the three lots, and certainly not upon the extra lot mentioned in the guardian's deed. The property was sold as it was agreed that it should be sold. There is no contention made that the property, or any part of it, was sold at an improper low price, or that a greater price could have been secured therefor. 24 Cyc. 28. The evidence is insufficient to establish that Swanson agreed to take up the mortgage prior to the payment of Swanson's advances to Thompson, and the trial court does not so find. The respondent relies for

protection upon the recording act. Sections 5594-5598, C. L. 1913. That his mortgage, taken bona fide for a valuable consideration without notice of any claim or lien, is, under these statutes, prior, although taken from one in possession of the realty under an unrecorded contract of purchase, citing *Simonson v. Wenzel*, 27 N. D. 638, 147 N. W. 804, L. R. A. 1918C, 780. He contends that Thompson was the full equitable owner of the premises when the mortgage was made, and that, accordingly, the conclusions of the trial court should be sustained.

The purpose of the recording statutes is to give notice of, and to protect, rights as against subsequent purchasers or incumbrancers, not to create rights not possessed, either of record or in fact. This purpose is apparent even though the recording act protects concerning subsequently acquired title through the doctrine of inurement. See section 5529, C. L. 1913. The recording statutes apply as notice only to subsequent purchasers and incumbrancers. *Salles v. McGee*, 1 N. D. 365, 48 N. W. 231, 26 Am. St. Rep. 683. In this case, the title involved is dependent upon a judicial sale, a sale in guardianship proceedings. Both parties, in order to maintain any right at all, must rely upon the validity and regularity of this judicial sale. This sale is not questioned in this proceeding. May it be said that, prior to this judicial sale, either Thompson or Swanson had any title in the premises? May a guardian part with a right or an interest in the estate, and thus abrogate the statutory authority of the court both before and after the sale? It is plainly apparent that, prior to the judicial sale, Thompson possessed no equitable title such as existed in the vendee of a contract for a deed in *Simonson v. Wenzel*, supra, upon which reliance is placed by the respondent. The giving and the recording of the mortgage did not create any greater right than Thompson then had. It neither enlarged the estate nor the lien. Upon any conclusion that may be drawn from the evidence, it appears that Swanson received the title as it was agreed that he should receive it, Thompson has no title except as it is conferred through the title to Swanson. The mortgage has no force except such as it secures through the title to Swanson. If it be contended that, under favorable construction of the evidence for the plaintiff, Swanson was only the agent of Thompson, the fact remains that he was in any event an agent coupled with an interest, and pursuant to the agreement was to receive this title first, not from Thompson, but from the estate, and afterwards was to convey the same to Thompson. Swanson was not a subsequent purchaser or incumbrancer from Thompson. No title could be received by Thompson until first it had been vested in Swanson. Upon this record, the

priority of rights between the contending parties, already established in fact by the agreement of Swanson and Thompson, is not to be disturbed, or even determined, by a foot race to the recorder's office. In fact, the advances made by Swanson were prior in point of time to those made by the plaintiff. In law, the title to secure these advances was prior to the vesting of plaintiff's lien. If the plaintiff seeks equity to compel the performance of Swanson's trust, he must do equity by recognizing the priority in fact of Swanson's advances. It is unnecessary to consider the question whether the plaintiff is a bona fide purchaser. The conclusions and judgment of the trial court must be modified so as to provide for foreclosure of plaintiff's mortgage, inferior and subsequent to the priority of intervener's note. It is so ordered. The appellant will recover costs.

ROBINSON, BIRDZELL, and CHRISTIANSON, JJ., concur.

GRACE, C. J. (specially concurring). I concur in the opinion of Mr. Justice BRONSON on the ground that the alleged contract for sale of the lots in question between the guardian and Thompson, Sheppard, and Knoble was wholly invalid and was of no legal force or effect.

To be of any validity it would necessarily have to be made in pursuance of the laws governing the sale of this kind of property by guardians. It was not; hence plaintiff's mortgage never attached.

EDGELEY CO-OP. GRAIN CO. v. SPITZER.

(Supreme Court of North Dakota. Oct. 17, 1921.)

(Syllabus by the Court.)

1. Gaming $\S$ 49(3)—In action on note defended as having been given in gambling, evidence held to show loss was in "hedging" transaction.

In an action brought to recover on a promissory note in the sum of \$4,000, the defense of no consideration was pleaded and relied on. In that connection it was claimed the note was given for losses sustained in a gambling transaction, to wit, the buying and selling of grain options. The evidence shows that the loss was occasioned by what is termed a "hedging" transaction, conducted by The Pomona Valley Farmers' Elevator Company (of which the plaintiff is the successor, and now the owner of the note) for the defendant and at his request.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Hedging Contract.]

2. Gaming $\S$ 50(1)—Where evidence showed note was not for grain gambling, directing verdict for plaintiff held not error.

At the close of the testimony the court directed a verdict in plaintiff's favor, and it is held for reasons stated in the opinion that in this there was no error.

3. Appeal and error $\S$ 1151(2)—Where plaintiff consents to modification of judgment correcting error, it will be so modified.

Defendant claims there is conflicting testimony with reference to the proper application of a certain sum of money, in amount \$1,710, which he claims he ordered to be applied on the note. The judgment has been directed to be modified, plaintiff having consented, so that any benefit he would have received if the money had been applied on the note, instead of otherwise, viz. on an account, is secured to him, and a new trial is therefore unnecessary. For reasons stated in the opinion, nothing would be gained by a new trial.

Appeal from District Court, La Moure County; F. J. Graham, Judge.

Action by the Edgeley Co-operative Grain Company against H. Spitzer. Directed verdict and judgment for plaintiff, and defendant appeals. Modified and affirmed.

John W. Carr, of Jamestown, for appellant.

Hutchinson & Lynch, of La Moure, for respondent.

GRACE, C. J. This is an action to recover on a promissory note in the sum of \$4,000, with interest thereon from the 20th day of April, 1917, to date of maturity, at the rate of 7 per cent. per annum until due, and 10 per cent. per annum thereafter. The issues of fact were presented to a jury.

At the close of the testimony the court directed a verdict in plaintiff's favor for the amount of the note and interest. Judgment was entered on the verdict, and this appeal is from the judgment.

The complaint states a cause of action in the ordinary form on a promissory note. The answer admits the execution and delivery of the note to the payee. It denies that it was executed or delivered for value received or any legal consideration, and further denies any indebtedness to the plaintiff in any sum whatsoever. In the answer it is further alleged that the sole and only consideration for the execution and delivery of said note by defendant was in substance as follows: That during the months of March and April, 1917, and subsequently thereto, this defendant, acting through the said Pomona Valley Farmers' Elevator Company, as his agent, engaged in the purchase and sale of grain options and in gambling and speculating upon the prices of grain upon various boards of trade, selected by said Pomona Valley Farmers' Elevator Company, and dur-

ing said periods this defendant, acting through said Pomona Valley Farmers' Elevator Company, as his agent, bought and sold grain options, solely as gambling and speculative operations, it being at all times fully understood by the said Pomona Valley Farmers' Elevator Company, by this defendant, and by all others connected with said transactions, that said transactions were purely and solely gambling and speculative operations; and it was never understood by said Pomona Valley Farmers' Elevator Company, or by this defendant, or by any one else connected therewith, that any actual grain was to be bought or sold, received or delivered by defendant. And defendant alleges that neither this defendant nor Pomona Valley Farmers' Elevator Company, nor any other party connected with the transaction mentioned above, actually intended that there should be any actual transfer, delivery, or receipt of the commodities covered by said options.

The answer is of too great length to be set out in full. The principal defense set forth in the answer is that the entire transaction with reference to the sale and purchase of 10,000 bushels of rye, the facts in reference to which will hereafter be set forth, was one of speculation and gambling. The defendant pleads a counterclaim in the sum of \$1,800, the alleged value of the number of bushels of rye delivered by him to the Pomona Valley Farmers' Elevator Company in the fall of 1917, and further claims that it agreed to give credit on the note for that amount which it failed to do. A reply was interposed to the answer averring payment to defendant of the amount of the actual rye delivered in the fall of 1917.

The material facts in the case are substantially as follows: The price of rye in March, 1917, was about \$1.49 per bushel. At that time Ernest Steel was the agent of the Pomona Valley Farmers' Elevator Company at Edgeley, N. D. During the month of March, and until April 20, 1917, the Pomona Valley Farmers' Elevator Company sold in the manner hereinafter described for defendant 10,000 bushels of rye at the market price of about \$1.49 per bushel. Between the time when defendant had through the said Elevator Company sold the rye and the 20th day of April, 1917, rye on the market had advanced in price to such an extent that a loss of about \$4,000 had occurred on the transaction, and at that time for this amount the note in suit was taken. After the giving of the note, rye still continued to advance. The defendant in the month of July, 1917, through the Elevator Company, purchased 10,000 bushels of rye at \$2.05 per bushel. The loss on the entire transaction up to the time of the purchase last mentioned was approximately \$5,505.

The defendant owns and operates a farm of about 1,000 acres in the vicinity of Edge-

ley. He also owns about 1,000 acres of land in Canada. Formerly he was engaged in the real estate business and had also seven years experience as a grain buyer. He was a stockholder in the Pomona Valley Farmers' Elevator Company which was later reorganized into the Edgeley Co-operative Grain Company, now the owner and holder of the note in suit.

In the fall of 1916, he sowed 800 acres of winter rye on his La Moure county, North Dakota, farm. In the spring of 1917 he endeavored to contract with the Pomona Valley Farmers' Elevator Company his prospective rye crop, which he estimated at about 12,000 bushels. Steel, the agent of the said Elevator Company, stated that he could not at that time contract to buy the rye, but that it might be handled as a "hedge."

The defendant desired to sell September rye. There was then no dealings in September rye, and the commission firm informed said Elevator Company to this effect. Steel again took the matter up with the commission firm and they finally suggested that what is termed a trial sale for July might be undertaken, and, if that went through, the sale could be later transferred to September when defendant could make actual delivery of the rye. Steel informed the defendant of this and such a sale was made at \$1.49 per bushel. At this time he authorized the sale of 1,000 bushels, later of 4,000, and later still of 5,000 bushels, and sales thus authorized were made.

In the fall of 1917, the defendant delivered to the Pomona Valley Farmers' Elevator Company approximately 2,518 bushels of rye. On the 20th day of October, 1917, this was sold at \$1.67 per bushel, amounting to a total of \$4,196.85. Prior to the time the defendant delivered to the Elevator Company the above-mentioned number of bushels of actual rye, he agreed with it that it should pay him \$1 per bushel for each bushel of rye hauled to the elevator, as he claimed it was necessary for him to have this amount to pay the threshing expense, etc., the balance of the selling price of the rye so delivered to be applied on the loss to which reference has heretofore been made. The Elevator Company did make certain advances to the defendant, which with interest, together with a note to the Nortonville Bank of \$150, aggregated \$2,486.85. This amount, deducted from the \$4,196.85, the selling price of the actual rye, left remaining \$1,710, \$1,505 of which was indorsed by the Elevator Company, on the loss account which had occurred from the time of the execution and delivery of the note of \$4,000 until the transaction was finally closed in July by the purchasing on the market of the 10,000 bushels. The remaining \$205 was indorsed by the Elevator Company on the note.

The defendant's testimony in substance is that he directed the \$1,710 to be applied upon

the \$4,000 note, while Steel testified in substance that it was to be applied first upon the loss account due to the rye transaction, and the balance on the note. The defendant testified in substance that he gave the plaintiff no direction to apply any of the money on the loss account, and that he knew of no charge or account against him except that represented by the note.

Defendant attempts to show that the loss at the date of execution and delivery of the note was \$3,000, while the testimony of Steel is that the losses equaled the amount of the note. The testimony of each shows that the total loss was \$5,505, \$25 of which was commission charged by the Tenney Company.

The testimony of the defendant is to the effect that the whole rye transaction except where the actual rye was delivered was a speculation. It will serve no useful purpose to set forth any of the evidence in detail. There is only one assignment of error, which may be divided into two important contentions:

(1) That the court erred in granting plaintiff's motion for a directed verdict made at the close of the trial, and in not submitting the issues to the jury.

(2) That there was a direct conflict in the evidence on a number of material issues, and for this reason it is claimed that the facts of the case should have been submitted to the jury for determination. It is the defendant's contention that the entire transaction with reference to the 10,000 bushels of rye was purely a gambling transaction, and that for this reason there was no consideration for the note. His contention in this regard is entirely without merit. The testimony clearly shows that he expected that, if his rye crop was normal, he would have about 12,000 bushels. At the time of the transaction rye was about \$1.49 per bushel. The defendant expected rye to be a lesser price in the fall, when the rye crop would be ready for sale; hence he desired to contract the sale of it. About the time the transaction took place, the Elevator Company declined to contract for purchase of the prospective crop of rye.

[1] The Elevator Company would, however, undertake to handle the transaction as a "hedge." The term "hedge" is well understood in connection with transactions on the grain market, and that term needs no further elucidation. If the transaction could be handled as a hedge, it would result in procuring for the defendant a price for his prospective crop of rye, at the time of marketing thereof, of not less than the amount for which the 10,000 bushels were sold on the market by the Elevator Company for defendant. In other words, the 10,000 bushels would represent a sale of defendant's prospective crop of rye which was then in existence, but which had yet not matured.

When consummated, the transaction would be what is denominated a "hedge."

The Elevator Company was at all times acting for the defendant in the hedging transactions. Defendant had the prospective crop of rye which, if normal, would exceed the number of bushels sold on the market for him by the Elevator Company, and which we think the record clearly shows was intended to be delivered to fulfill the contract of the sale of the 10,000 bushels above referred to. If this be true, and we think it is, the transaction was not a gambling one, but purely a hedging transaction, which is not unlawful, and does not partake of the nature of gambling. It is not difficult to perceive that defendant authorized the sale of the 10,000 bushels so that he would be assured of a good price for his crop of rye when it was ready to market, and that he expected to have more than that amount of actual rye at the maturity of his crop. He evidently expected that rye would be a great deal lower in price at marketing time than it was in March, the time of the transaction, and by selling the 10,000 bushels, and by being able to transfer the same on the market from July to September, the time would then have arrived when he could deliver an amount of rye equal to that which he had sold, and if at the time of the delivery the market price of rye was only \$.75 per bushel, it is not difficult to see that he would have gained about \$.75 per bushel by the transaction. But, unfortunately for defendant, and contrary to his expectations, rye was not a lower price at the time he expected to market same, but continued to advance over the price for which he had sold the 10,000 bushels until it reached \$2.05 per bushel, when defendant desired, no doubt, to terminate the loss, and procured the Elevator Company to purchase 10,000 bushels on the market, at which time his loss had reached \$5,505. His prospective crop of rye did not materialize as he expected, and hence he could not deliver a sufficient number of bushels to cover the sale of the 10,000 bushels which he had made, and hence the only thing he could do to stop his loss was to buy rye in amount equivalent to the number of bushels which he sold. This he did.

It must also be noticed that the Elevator Company never received any benefit or profit from the transaction, and as the transaction was handled, there was no way in which it could make a profit on it. Certainly it is unbelievable that it would entail a great loss on itself without expectation or any possibility of profit to it. It is clear that it was handling the matter for the defendant as a "hedge," and not otherwise.

Other transactions of the defendant on the grain market which occurred prior to the one in question, and which are claimed to have been speculation, need no consideration here,

as they have no bearing on the issues here involved.

[2, 3] As to defendant's second contention that there was a conflict of evidence on material issues which should have been submitted to a jury, it is only necessary to say that such conflict, if any, related only to the alleged direction of defendant to the Elevator Company relative to the application of a portion of the money received for the rye actually delivered to the Elevator Company. A certain amount of this money the Elevator Company applied upon defendant's account with it, and the balance upon the note as above stated. The defendant's contention is that he directed such money to be applied upon the note, and because the issues in this regard were not submitted to the jury, he contends there should be a new trial. Assuming, however, that the defendant is correct in his contention, and assuming further that this is the only relief a new trial would give defendant, and we think this assumption is true, we are clearly of the opinion that in the circumstances of this case, that would not be sufficient reason for granting a new trial. Instead thereof, this court could, with consent of plaintiff, order the judgment modified so that the defendant would obtain benefit equal to that which he claims he would have received had the money been indorsed on the note instead of applied to the payment of the account.

The note bore 7 per cent. interest before and 10 per cent. after maturity. The account drew the legal rate of 6 per cent. per annum. And assuming, but not deciding, that defendant directed the \$1,710, the balance of the price of rye sold to the Elevator Company, after deducting the amount it advanced him for expenses to which reference heretofore has been made, to be applied on the note, it is clear that he would be entitled only to a credit of the difference between the interest at the rate the note bore, and interest at the legal rate on the amount paid since the date of payment, and if the judgment is so modified there would be no issue remaining for a new trial. The plaintiff on oral argument consented that this modification might be made. Plainly, under the evidence the defendant is entitled to no other relief. The judgment is therefore directed to be modified as above indicated, and so modified it is affirmed. Respondent is entitled to his costs and disbursements on appeal.

BRONSON, BIRDZELL, and ROBINSON, JJ., concur.

CHRISTIANSON, J. (concurring). I agree with Mr. Chief Justice GRACE that the only question for the jury in this case was whether the defendant directed the plaintiff to apply the \$1,710 upon the note. Upon all other issues of fact there was no conflict in

the evidence, and no room for different conclusions to be drawn by reasonable men. Furthermore the evidence was such that it is manifest that there could be no different result upon another trial. In other words the disposition made of the case in the opinion prepared by the Chief Justice is the most favorable to the defendant that could possibly be made upon another trial. And upon the oral argument plaintiff's counsel stated that in event this court should hold that the question as to the proper application of the \$1,710 was one for, and should not have been withdrawn from, the jury, that then the plaintiff, in order to terminate the litigation, would and did consent that the issue might be determined against it, and the judgment modified accordingly by this court. Hence I concur in the disposition made of this cause in the opinion written by the Chief Justice.

WHEELER v. STATE. (No. 21828.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

Rape $\S$ 54(4)—In a prosecution for attempt to commit rape, facts held to corroborate prosecutrix's story.

In a prosecution, charging attempt to commit rape, where defendant admitted being with prosecutrix, but contended that what he did was with her consent, *held*, that her complaint to her mother, made immediately after the alleged assault, the condition of her clothing, the bruised, scratched and bleeding condition of her body, and the shattered condition of her nervous system, furnished sufficient corroboration of her story that the assault made upon her was against her will and felonious.

Error to District Court, Pawnee County; Stewart, Judge.

Joseph C. Wheeler was convicted of attempt to commit rape, and he brings error. Affirmed.

Matthew Gering, of Plattsmouth, and J. C. Dort, of Pawnee City, for plaintiff in error. Clarence A. Davis, Atty. Gen., and Mason Wheeler, Ass't Atty. Gen., for the State.

Heard before MORRISSEY, C. J. and ALDRICH, DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

FLANSBURG, J. Criminal prosecution on a charge of attempt to commit rape. Accused was convicted and brings the case here for review.

The contention is that the story of the prosecutrix is not corroborated.

The testimony of the prosecutrix is that she had met the defendant, who, during the absence of his wife from home, was board-

ing at the hotel where she was a waitress; that, after an acquaintance of a few days, defendant, about 8 o'clock in the evening, offered to drive her home in his automobile, which offer she accepted. As they approached the house where prosecutrix was living with her mother, defendant drove toward the country, and after they had been in the car about five minutes he exhibited his amorous inclinations by throwing his leg over hers, and continued his advances during the drive, grabbing her nose, biting and pinching her legs, and telling her that she "had to come across"; she in the meantime endeavoring to free herself from his embraces. After driving some distance the car stopped and the door was opened, either by the defendant or by the prosecutrix falling against it, and both parties got out of the car. Defendant then endeavored to throw her down, kicked her ankles and threw her legs out from under her. During the encounter her head struck the car door and she lost consciousness. When she recovered the defendant was on top of her and had a portion of her clothing off and her dress up around her waist. Prosecutrix believed that he had sexual intercourse with her while she was unconscious, but was unable to testify positively to the fact. She then endeavored to run away, but defendant shoved her in the car and took her back to town, stopping close to her mother's house.

The mother of prosecutrix testified that she saw the car draw up near her house about 10 o'clock in the evening, and saw her daughter run across the lawn; that the prosecutrix asked her to "open the door quick," that "old Wheeler had about killed her," and that when she did open the door she saw prosecutrix with her hair down and her clothes in her hand.

The prosecutrix was in an hysterical condition, described by the various witnesses as follows: Her hair was down on her shoulders; her face was bruised and scratched; most of her underclothing off; her dress torn; her stockings down to her feet. There was a swollen place on her head; one eye was nearly closed and her lip was mashed; her hands and wrist were scratched, and she appeared scratched all over from her waist up; her back was bruised and skinned in many places, and she was in an extremely nervous and hysterical condition.

Dr. E. L. McCrea, a physician of 20 years' practice, who was immediately called to render medical attention, described her condition as follows:

"This girl was scratched all over the chest and back in every way, blood oozing out of those scratches. She had a cut across the nose about where her glasses would come. She had a cut over an eye; she had a lump on the side of her head, on the right side. She had a large black spot at the angle of the jaw, the left

side. She had a large blue spot on the shoulder. All along down the spine there was a blue spot, as far as her short corset came. That I noticed. And that is all that I exposed, more than on the right limb, about six inches from the knee on the inside, was a spot about two by three inches denuded of the skin."

The doctor also testified that the woman was nervous and crying; shook all over and was in a state of excitement, and that her pulse was running very high. Three or four days later, this doctor again examined the prosecutrix, and found the upper portion of her body bruised, and upon an examination of her vagina found a tear of about a quarter of an inch at the lower part. Upon cross-examination the doctor testified that her breasts were scratched and bleeding, and that the injury to her sexual organ could have been caused by the male organ of a man in the act of intercourse, and that he had observed that effect from intercourse on many different occasions.

The aforementioned description of the woman's condition is substantiated by the testimony of her aunt, and by the testimony of John McClung, the sheriff, who was called in immediately after the assault and saw the parties about 2 o'clock in the morning.

The defendant took the stand in his own behalf; admitted he took the prosecutrix out riding the evening of May 13, 1920; insisted that she made all the advances to him; that she embraced him against his protest and also endeavored to kiss him; that the car stopped of its own accord because of some accident to the machinery; that she asked him whether they would get out or stay in, and that she agreed to everything that was done that night and made no protest whatever. Defendant, however, declined to say whether or not he had sexual intercourse with the prosecutrix, on the ground that to answer the question would tend to incriminate him.

The immediate complaint made by the prosecutrix to her mother; the condition of her clothing; the bruised, scratched and bleeding condition of her body; and the completely shattered condition of her nervous system, all shown to exist at the time defendant left her on the road near her home, directly following the alleged assault, are clearly sufficient to furnish corroboration of her story that a felonious assault had been made upon her, and, to our minds, quite conclusively refute the contention of defendant's counsel that prosecutrix had voluntarily engaged in sexual intercourse with the defendant. *Hammond v. State*, 39 Neb. 252, 58 N. W. 92; *Kotouc v. State*, 104 Neb. 580, 178 N. W. 174; *Robbins v. State*, 106 Neb. —, 184 N. W. 53.

We find no reversible error in the record, and the case is affirmed.

NEDELA v. MARES AUTO CO. (No. 21522.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

Master and servant §362—Employment in garage held not "casual employment" within compensation act.

One who is employed to work in an automobile garage without any understanding as to the time of his employment, or the particular character of labor he is to perform, and assembles and sets up automobiles and performs such other labor in and about the garage as he is directed to do by the foreman or manager, and such work is incident to, and in the usual course of, the business, is held not to be casually employed within the meaning of the Employers' Liability Act (Rev. St. 1913, §§ 3642-3696).

Appeal from District Court, Saline County; Brown, Judge.

Action by John Nedela against the Mares Auto Company for personal injuries. Verdict for plaintiff, motion for new trial overruled, and defendant appeals. Reversed.

Crofoot, Fraser, Connolly & Stryker, of Omaha, and B. V. Kohout, of Wilber, for appellant.

Bartos & Bartos, of Wilber, for appellee.

Heard before MORRISSEY, C. J., and ROSE and FLANSBURG, JJ., and BEGLEY and LESLIE, District Judges.

LESLIE, District Judge. Action for personal injuries alleged to have been sustained by the appellee, who will be referred to as the plaintiff, while employed by the appellant, who will be referred to as the defendant.

The plaintiff brought this action upon the theory that the accident was caused by negligence on the part of the manager of the garage, but the prayer is that his damages be assessed under the compensation act, should the facts call for an assessment of damages under that act, and, if not, then for judgment for \$10,450 and costs.

The defendant by its answer denies that the accident was due to its negligence, and alleges that both parties were subject to the provisions of the Employers' Liability Act; that neither had filed an election or declaration not to be bound thereby.

The jury found for the plaintiff in the sum of \$4,500. Motion for a new trial was overruled, and from this the defendant has appealed.

It appears from the evidence that on the 16th day of December, 1918, the manager of the defendant company solicited plaintiff to work for the defendant, and that on the following day he went to work in the defendant's garage. Nothing was said by either

party as to what particular work the plaintiff was to do, over what period of time his employment would extend, nor what his wages would be. The only evidence bearing upon the subject is found in the record of the plaintiff's testimony, and is as follows:

"Q. Now, did you have a talk with Charley Mares about going to work for him? Did you have a talk with him? A. Yes. Q. When was that talk? A. Sixteenth of December. Q. What year? A. 1918. * * * Q. Now, what did he say to you, and what did you say to him at that time and place? A. Why, he told me if I couldn't help him work. Q. What did you say? A. And I said yes. Q. At that time did he say what kind of work you was to do? A. No. Q. At that time did he say for how long you was to work for him? A. Nothing was said. Q. At that time was there anything said about what wages you were to get? A. No. Q. Is that all that was said at that time and place? A. Yes."

From the 17th to the 21st of December, five days, the plaintiff was engaged in assembling and putting together new cars, and whatever else he was directed to do in and about the garage. The evening of the 21st, and just before he left the garage, he was requested by the manager to hold a wheel while the manager took a hammer and chisel and attempted to do something to the wheel; just what is not disclosed. It seems, however, that he struck the chisel with the hammer while it was against some part of the wheel, and immediately a chip of steel struck the plaintiff in his right eye. As a result of this the plaintiff lost the sight of his eye, and later had the eye removed.

Two questions are raised by the appeal of the defendant: First, were the parties subject to the provisions of the Employers' Liability Act? Second, does the evidence disclose any actionable negligence on the part of the defendant?

Section 3653, Rev. St. 1913, provides:

"In the occupations described in section 97 of this chapter, and all contracts of employment made after the taking effect of this article shall be presumed to have been made with reference, and subject to the provisions of part II hereof unless otherwise expressly stated in the contract, or unless written or printed notice has been given by either party to the other, as hereinafter provided, that he does not accept the provisions of part II. Every such employer and every employee is presumed to accept and come under part II hereof, unless prior to accident he shall signify his election not to accept or be bound by the provisions of part II."

Section 3652 provides:

"Such agreement or the election hereinafter provided for shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in part II of this article."

Subdivision 3, § 3656, is as follows:

"It shall not be construed to include any persons whose employment is casual, or not for the purpose of gain or profit by the employer, or which is not in the usual course of the trade, business, profession or occupation of his employer. The term 'casual' shall be construed to mean 'occasional'; coming at certain times without regularity, in distinction from stated or regular."

The plaintiff was not hired for a limited or even definite period of time, nor to do a particular job or specific kind of work. He was asked to go to work for the defendant, agreed so to do, and entered the service of the defendant for an indefinite period of time. During the five days of his employment he assembled and put together new cars and performed whatever other duties he was directed to do by the foreman or manager of the garage. It is apparent from the record that he was expected to do and did do such labor as men employed about a garage would ordinarily do. His employment was in the usual course of the business of the employer, and it is clear that it was in furtherance of the defendant's gain or profit. Neither party had elected or declared that he or it would not accept or be bound by the provisions of part II of said act.

The plaintiff urges, however, that the defendant rested its case without making an effort to prove that the employment was casual, and also of showing that it had complied with section 3687, Rev. St. 1913, as amended Laws 1917, c. 85, § 21, which is as follows:

"Every employer in the occupations described in section 97 of this chapter shall either insure and keep insured his liability under this article in some corporation, association or organization authorized and licensed to transact the business of workmen's compensation insurance in this state, or shall furnish to the compensation commissioner satisfactory proof of his financial ability to pay direct the compensation in the amount and manner and when due as provided for in this act. In the latter case the compensation commissioner may in his discretion require the deposit of an acceptable security, indemnity or bond to secure the payment of compensation liabilities as they are incurred. Every employer who fails, neglects or refuses to comply with the conditions set forth in this section shall be deemed to have elected not to come under part II hereof and shall be required to respond in damages to an employee for personal injuries, or where personal injuries result in the death of an employee, then to his dependents, in like manner as if the employers had filed an election with the compensation commissioner rejecting the provisions of part II of the compensation act."

We cannot agree with plaintiff's contention in this regard. First, it was not necessary for the defendant to offer evidence to show that the plaintiff's employment was not cas-

ual if the evidence offered by the plaintiff himself established the elements necessary to bring the parties within the provisions of the Employers' Liability Act. Second, the defendant is presumed to have complied with the law and taken out liability insurance, or furnished the compensation commissioner satisfactory proof of its financial ability to meet claims for compensation made against it. In the absence of evidence rebutting this presumption, it was not necessary for the defendant to offer evidence that it had complied with the law.

Numerous courts have expressed themselves in various ways under the different Employers' Liability Acts as to what constitutes casual employment, but none of the cases that we have examined throw any light upon the situation developed by the facts in this case. As we view it, the employment of the plaintiff was not casual, but was regular and in the usual course of the business of the employer. This being true, both parties surrendered their rights to any other method of determination of the amount of compensation than that provided for under the Employers' Liability Act. The plaintiff was not entitled to maintain this action, but should have submitted his claim for compensation.

Taking this view of it, we shall not consider whether or not there was actionable negligence on the part of the defendant.

For the reasons herein stated, the judgment of the lower court is reversed, and the cause remanded for further proceedings.

Reversed.

BAYLOR v. HALL et al. (FOLSOM BAKERY et al., interveners). (No. 21433.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Contracts §152—Court will give due force to grammatical arrangement of words and clauses in construction unless varying with parties' intention.

In construing a contract a court will give due force to the grammatical arrangement of the words and clauses, unless by so doing it appears to be at variance with the intention of the parties as indicated by the contract as a whole.

2. Contracts §152—A relative word or clause will generally be construed as referring to its nearest antecedent.

It is a general rule of construction, unless the intention of the parties appears otherwise, that a relative word or clause will be construed as referring to its nearest antecedent.

3. Contracts §189—Clause construed as referring to its nearest antecedent.

The contract set out in the opinion construed, and held, that the clause, "to be used

in the liquidation of the indebtedness of said Lindell Hotel existing on and prior to August 1, 1916," refers to the nearest antecedent, namely, that the accounts assigned to the Lindell Service Company should be so used, and does not include the 48 shares of stock assigned to Hall.

Appeal from District Court, Lancaster County; E. J. Clemments, Judge.

Action in equity by F. B. Baylor, as trustee, against Henry J. Hall and others, in which the Folsom Bakery and others intervened. From a judgment in favor of defendants Hall and the Lindell Service Company, plaintiff and the interveners appeal. Reversed and remanded.

Claude S. Wilson, of Lincoln, for appellant Baylor.

C. L. Clark and Fawcett & Mockett, all of Lincoln, for appellants Folsom Bakery and others.

Doyle, Halligan & Doyle, H. N. Mattley, and C. C. Flansburg, all of Lincoln, for appellees.

Heard before MORRISSEY, C. J., and LETTON, DEAN, and DAY, JJ.

DAY, J. This is an action in equity, somewhat in the nature of an accounting, brought by F. B. Baylor, trustee for certain creditors of Robert W. Johnston, against Henry J. Hall, Lindell Service Company, a corporation, and Robert W. Johnston. The action, in so far as it affected the defendant Johnston, was based upon certain accounts due and owing by Johnston to the creditors represented by the trustee. The action, in so far as it sought to charge defendants Hall and the Lindell Service Company with liability for the debts of Johnston, was based upon certain contracts, reference to which will hereafter be made. After the action was commenced other creditors of Johnston were permitted to intervene, charging substantially the same facts as alleged by the plaintiff, and joining the plaintiff in the relief prayed. The trial court found the issues in favor of the plaintiff and the interveners, as against the defendant Johnston, and rendered a judgment against him for the amount found to be due the plaintiff and the respective interveners. The trial court further found the issues in favor of the defendants Hall and the Lindell Service Company, and, as to these defendants, the petitions of the plaintiff and the interveners were dismissed. From the judgment in favor of Hall and the Lindell Service Company, the plaintiff and the interveners have appealed.

A brief reference to the circumstances leading up to the making of the contracts will serve to a better understanding of the precise point in controversy. It appears that for some years prior to August 1, 1916, Robert

W. Johnston had conducted the Lindell Hotel in the city of Lincoln, Neb., and had become indebted in considerable sums to various creditors. At that time he held the title to the hotel property in his own name, but it was incumbered by a mortgage for approximately the purchase price. He was in arrears with the interest payment, and the mortgagees were considering taking steps to repossess themselves of the property. Negotiations were entered into between Hall and Johnston, which resulted in a contract between the parties dated August 1, 1916, by the terms of which they agreed to organize a corporation to be known as the Lindell Service Company, to succeed Johnston in the proprietorship of the Lindell Hotel. Arrangements were perfected by which Johnston was to deed the hotel property back to the original owners, and they in turn were to lease the premises to the Lindell Service Company for a period of 10 years, no rent to be paid for the first year. Under the agreement Hall was to pay into the treasury of the corporation \$5,100, and was to receive therefor 51 shares of the capital stock. Johnston was to transfer to the corporation the provisions on hand, purchased for the operation of the hotel, and also to turn over to the corporation a café owned by him at Capital Beach, a pleasure resort near Lincoln, for which he was to receive 49 shares of the stock in the corporation. Johnston further agreed to assign 1 share of his stock to an employee designated by Hall. Pursuant to the agreement the corporation was organized and entered upon the operation of the hotel. The contract of August 1, 1916, recognized that Johnston was owing certain accounts incurred in the operation of the hotel, and in that behalf provided as follows:

"It is further agreed that inasmuch as there are now certain bills owed to divers parties for provisions, laundry and other matters pertaining to the management and operation of the said hotel, to the present date, which are believed to be in excess of \$11,500, the exact amount thereof is not known, that said bills will be paid from time to time, after current expenses are paid, from the revenues derived from the operation of said hotel, as rapidly as the revenues so derived will permit the payment of said bills. The money expended in the payment of said bills will be charged to the said Robert W. Johnston, and deducted from his share of the profits resulting from the operation of said hotel."

Acting under this contract the Lindell Service Company paid out from time to time on Johnston's debts, up to April, 11, 1917, the sum of \$15,584.73. Through an error of the bookkeeper the corporation had advanced on account of these debts several thousand dollars more than the net earnings of the corporation. An audit of the books then disclosed that Johnston's debts on August 1,

1916, amounted to approximately \$33,000. Other complications arose in the affairs of the corporation, and Johnston, who had managed the hotel, took employment elsewhere. At this stage of the business affairs of the corporation, Hall and Johnston entered into another contract of date April 11, 1917. The provisions of this contract which bear upon the present controversy are paragraphs 1, 5, and 6, and are as follows:

"(1) That said Robert W. Johnston will assign to the first party (Henry J. Hall) forty-eight (48) shares of the capital stock in the Lindell Service Company, a corporation of Lincoln, Nebraska; will assign to said Lindell Service Company all unpaid bills and accounts receivable, now due the Lindell Hotel under the former management by Robert W. Johnston, to be used in the liquidation of the indebtedness of the said Lindell Hotel, existing on and prior to August 1, 1916."

"(5) First party, (Hall) further agrees that the Lindell Service Company, at a meeting of its stockholders, will authorize the making of a contract by said Lindell Service Company, a corporation, to assume and pay that certain indebtedness of Robert W. Johnston, described in a certain written agreement between Henry J. Hall and Robert W. Johnston, to incorporate the Lindell Service Company, dated August 1, 1916, pursuant to the terms of said written contract, as more fully set forth in said contract.

"(6) First party further agrees that neither he, the said Henry J. Hall, nor the Lindell Service Company, will make any claims against the said Robert W. Johnston on account of advances made by said Lindell Service Company, in payment of the indebtedness of said Robert W. Johnston, incurred and existing prior to August 1, 1916."

Johnston complied with the terms of the contract. Hall took no steps to have the provisions of paragraph 5 of the contract carried out, but continued to operate the hotel until June 1, 1917, at which time he sold all of the corporate property including the lease, realizing therefor, net, \$7,480. With this sum he paid his note of \$5,100 given for borrowed money to pay for his shares of stock, and used the balance in paying indebtedness of the Lindell Service Company. None of the accounts assigned to the Lindell Service Company under the provisions of paragraph 1 were collected.

[1, 2] The plaintiff, as well as the interveners, state that the whole question presented by the record turns upon the interpretation to be given to paragraph 1 of the contract of April 11, 1917. It is their contention that the contract requires that the 48 shares of stock assigned to Hall should be used by him in liquidation of Johnston's debts contracted prior to August 1, 1916, and it is argued that, inasmuch as Hall has converted the assets of the corporation into money, therefore 48/100 of the net proceeds derived from the sale of the corporate prop-

erty should be applied in the payment of Johnston's old debts. We are unable to agree with counsel in this interpretation of the contract. As we view it, the first paragraph of the contract does not mean that the 48 shares should be applied in payment of the debts. The phrase in the contract, "to be used in the liquidation of the indebtedness of the said Lindell Hotel, existing on and prior to August 1, 1916," refers only to the first antecedent, namely, that the assigned accounts should be so used. Ordinarily in construing a contract a court will give due force to the grammatical arrangement of the clauses, unless by so doing it appears to be at variance with the intent of the parties as indicated by the contract as a whole. The cardinal rule is to carry out, if possible, the intention of the parties. If a clause contained in a written contract would by grammatical construction have one application, and from the whole tenor of the instrument it is manifest that the parties to it intended it to have a more extended application, it will be construed according to the intended intention of the parties. Thus it is the general rule that, unless the intention appears otherwise, a relative word or clause will be construed as referring to its nearest antecedent. But where the context of the writing shows that the relative word or clause is not intended to apply to its nearest antecedent it will be construed in such a way as to carry out the intention of the parties. 6 R. C. L. 845, § 234.

[3] Applying these general principles to the contract in question, it seems clear to us that the clause, "to be used in the liquidation of the indebtedness of the said Lindell Hotel, existing on and prior to August 1, 1916," refers only to its nearest antecedent, namely, that the accounts assigned should be so used. By paragraph 5 of the contract, Hall agrees that he will have the stockholders of the Lindell Service Company authorize the corporation to make a contract to assume and pay Johnston's indebtedness arising out of the former management of the Lindell Hotel, the same to be paid in accordance with the terms of the contract of August 1, 1916. By that contract the debts of Johnston were to be paid off from time to time after current expenses were paid from the revenues derived from the operation of the hotel, as fast as the revenues would permit, and that the money so paid out on bills was to be charged to Johnston's account. By the contract of April 11, 1917, Hall and the Lindell Service Company agreed to waive any claim against Johnston by reason of the advances so made. While we are of the view that the contract does not require that Hall should use the 48 shares of stock in the payment of Johnston's old debts, it is quite apparent, we think, that Hall has breached the contract. He made no effort to have the stockholders

authorize the Lindell Service Company to assume and pay Johnston's old debts out of the revenues derived from the conduct of the business after deducting current expenses. This he could easily have done, because he owned 99 shares of the stock, and controlled the other share. On the contrary, within six weeks after acquiring the stock, he sold all of the corporate property, and thus effectively put it out of his power to fulfill the contract. From the record before us we are unable to determine whether there were any profits after deducting current expenses arising from the conduct of the business between April 11 and June 1, 1917, at which time Hall disposed of the corporate property. Neither is there testimony from which we could draw a conclusion as to what, if any, damages would reasonably follow from Hall's breach of the contract. It was evidently the intention of the parties that the Lindell Service Company should continue operating the hotel, and it was not contemplated that the corporate property would be sold. In this state of the record, we hold that there is not enough before us upon which we can base a judgment for more than nominal damages, arising from the breach of the contract. We think, however, in view of the breach of the contract by Hall, he should be charged with nominal damages at least, as the law presumes some damages to follow from a breach of a contract. The judgment of the lower court is reversed, and the cause is remanded to enter judgment in favor of the plaintiff and interveners for nominal damages, and for costs.

Reversed.

FLANSBURG, J., not participating.

KNUFFKE v. BARTHOLOMEW.
(No. 22171.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Trial $\S$ 36—Facts one party's evidence tends to establish may be considered proved, where other offers no proof.

All issuable facts which the evidence properly admitted on behalf of one party to an action tends to establish may be considered proved, where the other party offers no proof.

2. Master and servant $\S$ 367—Compensation claimant's relation as employee or independent contractor determined from all facts.

On the issue as to whether a workman is an employee as distinguished from independent contractor, his relation to his employer should be determined from all of the facts, rather than from any particular feature of the employment or service.

3. Master and servant $\S$ 405(6)—Evidence in compensation case held to sustain finding of disability.

Under the Workmen's Compensation Law the percentage of a permanent partial loss of normal efficiency is an ultimate fact and may be determined by the trial court from all of the evidence showing the nature and permanency of the injuries and the conditions before and after, without direct evidence of such percentage.

Appeal from District Court, Cheyenne County; Westover, Judge.

Proceeding by Edward W. Bartholomew under the Workmen's Compensation Act, opposed by Michael A. Knuffke, employer. From an award therein, the employer appealed to the District Court, which found for the servant, and the employer appeals. Judgment construed and affirmed.

Gurley, Fitch, West & Hickman, of Omaha, for appellant.

McIntosh & Martin, of Sidney, for appellee.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

ROSE, J. This is a proceeding under the Workmen's Compensation Law (Laws 1913, c. 193). While defendant was engaged in plastering a panel on the outside of the Reimuth Implement Building in Sidney, he fell from a scaffold July 9, 1920. To procure an award for resulting injuries he filed with the compensation commissioner a claim against plaintiff, the contractor by whom the building was being constructed. That officer found that defendant, when injured, was an employee of plaintiff and was entitled to \$15 a week for a period not yet determinable. From this award plaintiff appealed to the district court and there pleaded that defendant, when injured, was an independent contractor, as distinguished from an employee, and therefore not entitled to compensation for his injuries. Plaintiff pleaded further that defendant's disability was not total or permanent and prayed for a dismissal of the proceeding. The trial court found that defendant was an employee of plaintiff and was entitled to \$15 a week for a total disability from the date of the accident, July 9, 1920, until the date of the decree, May 17, 1921, and thereafter to \$12 a week for a permanent partial loss for 183 weeks, both periods being 225 weeks. Plaintiff has appealed.

[1] It is first argued that defendant was an independent contractor and not an employee. The question is one of fact. Plaintiff offered no evidence and the issues were determined alone on the proofs adduced by defendant. It follows that all the issuable facts which the evidence tends to establish may be considered proved.

[2] On the issue as to whether a workman is an employee as distinguished from an independent contractor, his relation to his employer should be determined from all the facts, rather than from any particular feature of the employment or service. *Barrett v. Selden-Breck Construction Co.*, 103 Neb. 850, 174 N. W. 866.

[3] There is evidence tending to prove the following facts; Defendant entered into an oral contract with plaintiff to plaster the interior of the building for 17 cents a yard and the contract was fully performed. During the negotiations the plastering of an exterior panel for a sign was mentioned, but defendant said it was doubtful if he could do it, owing to another engagement. Later defendant orally promised, for \$1.25 an hour, to plaster the panel, plaintiff to construct the scaffold and to furnish a helper. Plaintiff agreed to these terms and constructed the scaffold. Defendant commenced work on the panel and was attended by his former helper, who used defendant's mortar box. Plaintiff told how he wanted the panel plastered, but was not present when the work was done. His foreman was there, however, and defendant would have been under him, had changes or information been wanted. On account of a defect in the scaffold, defendant, while using it in plastering the panel, fell head foremost to the pavement below. In the settlement for work and materials he received 17 cents a yard for the interior plastering and paid his helper 65 cents an hour. He received \$1.25 an hour for his work on the exterior panel and collected 65 cents an hour for his helper. There was no attempt to contradict the evidence from which these facts are inferred. There is no proof that plaintiff surrendered his right to direct or discharge defendant. It was the understanding that the latter should do the plastering himself and there is nothing to indicate that he made any profit out of the services of his helper. In an economic sense the compensation of \$1.25 an hour may be considered wages.

Evidence of the nature outlined does not seem to be insufficient to sustain the trial court's finding that defendant, when injured, was an employee within the meaning of the Workmen's Compensation Act. This assignment of error is therefore overruled.

Insufficiency of the evidence to sustain the award is also urged. The principal complaint under this head is the absence of testimony showing definitely the percentage of the permanent partial loss. That there was a total disability for a time is shown beyond question, and the evidence sustains the finding below that it continued to the time of the decree. The proof of a permanent partial loss is equally clear, but the extent or percentage thereof is not so definite and cer-

tain. The determination of the issue requires the finding of an ultimate fact—a question for the trial court. The injured person and his physician may testify to the injury and to resulting conditions, but the deduction as to the percentage of loss is for the trial court. The conclusion may be reached from all the evidential facts and circumstances, without direct testimony as to the proportion of loss. *Harper, Workmen's Compensation* (2d Ed.) § 161; *International Coal & Mining Co. v. Nicholas*, 293 Ill. 524, 127 N. E. 703, 10 A. L. R. 1010. In the exercise of judicial discretion a reasonable estimate based on such evidence meets the requirements of the law. Otherwise the mission of the statute in this respect would fail.

Defendant's brain was injured and he was unconscious for nearly a month. There was a compound fracture of the upper bone of his right arm and the action thereof was limited. Atrophy weakened the power muscles of his shoulder. The condition of the arm as the result of the injury was shown. Motion, speed and strength were impaired. He was fit for his trade before the accident and unfit for it afterward. The trial judge saw the arm in motion after atrophy had done its work. He heard the testimony of a physician that the injuries were permanent. He seems to have found in effect that the permanent partial loss was 80 per cent. of normal efficiency and the evidence seems to justify the conclusion.

The judgment below is somewhat ambiguous, but it is construed to require the payment of \$15 a week for 42 weeks and thereafter \$12 a week for 183 weeks, 225 weeks in all, and, as thus construed, is Affirmed.

SEATON v. STATE. (No. 21928.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Criminal law §603(2)—Motion and affidavit for continuance for absence of witness held insufficient.

Defendant's motion and affidavit for a continuance on the ground of the absence of a material witness, or for time to take his testimony, examined, and held insufficient.

2. Criminal law §589(5) — Competency of venieman cannot be raised by motion for continuance.

The question of the competency of a venieman to sit in the trial of a criminal case cannot be raised by a motion for a continuance.

3. Jury §95—Jurors sitting in trial of one jointly indicted may not sit in the trial of the others.

Where two or more persons are jointly indicted or informed against for the commission

of a single offense and sever in their trials, jurors who sat in the trial of one are thereby disqualified to sit in the trial of another.

Error to District Court, Otoe County; Begley, Judge.

John Seaton was convicted of burglary, and he brings error. Reversed and remanded for new trial.

D. W. Livingston, of Nebraska City, for plaintiff in error.

Clarence A. Davis, Atty. Gen., and Jackson B. Chase, Asst. Atty. Gen., for the State.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., and ALLEN and RED-IOK, District Judges.

ALLEN, District Judge. May 7, 1920, about 2:30 a. m., the residence of Edwin A. Duff, in Nebraska City, was burglarized, and the plaintiff in error, herein called the defendant, and one William Holmes were arrested as participants therein. June 4, 1920, the county attorney filed an information in the district court for Otoe county against "John Seaton, William Holmes, John Doe, real and true name unknown, John Stiles, real and true name unknown, Richard Roe, real and true name unknown," charging them with having jointly committed the offense, and the defendant and Holmes entered pleas of not guilty, the other defendants not being apprehended. The defendant and Holmes severed in their trials, Holmes' trial being concluded September 16, 1920, and the defendant was tried and found guilty on the same day, the jury consisting of Henry Reese, James Meek, William Ottens, Ed South, Mike Roddy, J. H. Carlson, R. R. Booth, Richard Arends, Al Patten, George Roos, C. C. Heck, and Ed Smallfoot. Before the jury were impaneled, the defendant filed a motion for a continuance to the next term because of the absence of Schull, said to be a material witness for the defendant, but then in South Dakota, and because Holmes had been tried by 12 of the panel summoned for the term, 23 of whom were present, while the other 11 were in court and listened to the trial, which he claims rendered them incompetent to try him. The substance of that part of the defendant's affidavit which was filed in support of his motion respecting Schull's absence is to the effect that he was then at an unknown place in South Dakota, but, "if present, would testify that this defendant was hired by him on the evening of May 6th to drive him, the said Schull, in an automobile to Nebraska City, which the said defendant did; that the business of the said Schull at Nebraska City was not made known to this defendant; that, if the said Schull had anything to do with the alleged burglary, this defendant had absolutely no knowledge of that fact," and

"that he has made diligent search and effort to locate the said witness, Schull; that the best information he can get with reference to his whereabouts is that the said Schull is working with a threshing crew in South Dakota, but just where, or with whom in said state, he has been unable to learn; that he expects and intends to locate the said Schull and have his testimony for use upon the trial of this case at the next term of this court."

[1,2] In so far as a continuance was sought on account of Schull's absence, we think the affidavit was insufficient. It fails to show that the defendant was ignorant of any other person or persons within the jurisdiction of the court by whom the same facts could be proved. The statement that Schull hired the defendant to drive him to Nebraska City, but that his business there was not made known to the defendant, and that, if Schull had anything to do with the alleged burglary, the defendant had no knowledge of it, has no bearing on the case. The defendant does not negative the charge that he committed or participated in the commission of the crime. Instead of stating in general terms that he had made diligent search and effort to locate Schull, he should have set out the facts, so that the court could determine whether he was diligent or not. When charged with the offense, he should have taken prompt steps to secure Schull's presence at the trial, or to take his deposition, if his presence could not be obtained, but he did not do so. He could not wait until the last moment and expect the court to grant a continuance on the showing made. Respecting that part of the affidavit for a continuance on the ground that nine of the jurors who sat in the trial of Holmes and were retained in the trial of the defendant were, by reason of that fact, incompetent, it is sufficient to say that it afforded no ground for a continuance. *Humphries v. State*, 100 Ga. 260, 28 S. E. 25. If these jurors were disqualified, a motion to discharge them and to summon others under section 9106, Rev. St. 1913, would probably have been sustained; but, as the defendant fully presented and preserved the question in his challenges, the denial of his motion was without prejudice.

[3] Having disposed of the defendant's application for a continuance, we turn to a more difficult question raised by his fourth assignment of error in these words:

"The court erred in forcing the plaintiff in error to be tried by the same jury who had tried one of his codefendants upon substantially the same testimony."

The list from which the jury were selected, consisted of 23 names of which 3 were excused for cause, the defendant challenged 6 peremptorily and the state 1, and 1 was probably excused by the court itself, leaving 13, 9 of whom, Ottens, South, Roddy,

Booth, Carlson, Arends, Patten, Roos, and Smallfoot had served in the Holmes trial. Smallfoot, being called after the defendant had exhausted his peremptory challenges, was retained over the defendant's objection. It is evident that, when the panel was completed in the Holmes trial, the name slips were replaced in the receptacle containing the names of veniremen who had appeared, and, when the clerk drew for the defendant's trial, they were taken therefrom.

The information charges in apt language that the defendants named jointly burglarized the house of Mr. Duff, and the state claims that Holmes and the defendant were of the number. The identical transaction, the single corpus delicti, the body or essence of the crime in the Holmes trial, is the foundation of the defendant's trial. The testimony tends to show that the persons engaged in the burglary stopped near the Duff home, and, while some were ransacking the house, the defendant and another stood as an armed guard. Each of the 9 jurors stated on his voir dire examination that he had served on the Holmes panel; that he had not formed or expressed an opinion as to the defendant's guilt or innocence, and believed that he could try the defendant fairly and impartially and give him the benefit of any reasonable doubt in the case. It is urged that, by reason of their service on the Holmes jury, these gentlemen were disqualified to sit in the trial of the defendant. In our judgment, it was impossible to separate the defendant from Holmes in the commission of the crime, and it is inconceivable that Holmes could have been tried without proving the corpus delicti necessary to be proved in this trial, and the evidence in the Holmes trial must, of necessity, to that extent at least, have been the same on the trial of the defendant. The witnesses for the state on the Holmes trial, to wit, Mrs. Frank Chapin, R. H. Fischer, Edwin A. Duff, Jess Palmer, and Paul Jessen were witnesses for the state on the trial of the defendant. It is possible, but not probable, that Holmes was tried without the name of the defendant being mentioned in connection with the offense, although Ottens, South, Roddy, Booth, Carlson, Arends, Patten and Smallfoot remember the substance of the testimony in that trial, and South, Carlson, Arends, Patten, and Smallfoot recollect that the prosecuting attorney and some of the witnesses mentioned the name of the defendant.

In section 11, art. 1, of the Constitution, it is provided that one charged with a crime is entitled to "a speedy public trial by an impartial jury," which provision is to be construed with subdivision 2, § 9109, Rev. St. 1913, which provides, inter alia, that, if a proposed jurymen "has formed or expressed an opinion as to the guilt or innocence of the accused," he may be challeng-

ed for that reason. *Curry v. State*, 5 Neb. 412.

The trial by jury took on a divine hue when the "sworn twelve" were chosen in memory of the Twelve Apostles on the twelve thrones, the twelve tribes of Israel, the twelve patriarchs, and the twelve officers of Solomon. The right was wrested from King John at Runnymede in 1215 and incorporated in Magna Charta and subsequent revisions thereof, but it was denied for many centuries by his successors. It was transplanted to the United States by the Pilgrims, and, when not refused by royal governors, was the settled practice of the colonists. It found lodgment in the Declaration of Rights of the first Congress in 1774, and in the Declaration of Independence in 1776. It was guaranteed by the ordinance for the government of the Northwest Territory in 1787. It was insisted on in the ratifying conventions of the respective states. It was written in the Sixth Amendment of the Constitution of the United States that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," and it is imbedded in the Constitution of every state of the Union. The struggle for its recognition and preservation was long, bitter, and sometimes bloody. It has been a safe refuge against the invasion of an aggressive and arbitrary power on the one hand, and a sometimes turbulent populace on the other. Speaking of its sanctity, Mr. Sedgwick in his work on Statutory and Constitutional Law (2d Ed.) 482, says:

"The trial by jury is very dear to the race to which we belong. There can hardly be named any institution which has survived so many changes, or existed under such various forms of government. * * * When this country threw off the government of England, the passionate attachment of our people to this form of procedure was repeatedly and energetically declared; and the Constitution of the youngest state of the American confederacy adopts the trial by jury as a part of its fundamental law. Springing up under the feudal despotism of the Plantagenets, it has survived alike their rule, that of the house of Tudor, and of the house of Stuart, and now flourishes with all its original vigor under the mildest and wisest form of monarchy of which history makes mention; while during the same period, transplanted to a different hemisphere, it has struck deep its roots into the new soil, and is, perhaps, the most cherished institution of the greatest exemplar of free and intelligent government that the world has ever known."

President Jefferson in his first inaugural address in 1804, speaks of "trial by juries impartially selected" as one of the blessings of the American people. Mr. Hume in his history speaks of it as "an institution admirable in itself, and the best calculated for the preservation of liberty and the ad-

ministration of justice that ever was devised by the wit of man."

Mr. Starkie says in his work on Evidence (10th Ed.) p. 9:

"It is obvious, that the experience which would best enable those whose duty it is to decide on matters of fact, arising out of the concerns and dealings of society, to discharge that duty, must be that which results, and which can only result, from an intimate intercourse with society, and an actual knowledge of the habits and dealings of mankind; and that the reasoning faculties best adapted to apply such knowledge and experience to the best advantage in the investigation of a doubtful state of facts, are the natural powers of strong and vigorous minds, unencumbered and unfettered by the technical and artificial rules by which permanent tribunals would be apt to regulate their decisions. Nor is the trial by jury less recommended by considerations of extrinsic policy. It constitutes the strongest security to the liberties of the people that human sagacity can devise; for, in effect, it confides the keeping and guardianship of their liberties to those whose interest it is to preserve them inviolate; and any temptation to misapply so great an authority for unworthy purposes, which might sway a permanent tribunal, can have no influence when intrusted to the mass of the people, to be exercised by particular individuals but occasionally."

And Sir William Blackstone says in 4 Blackstone (Jones, 1916) § 895:

"The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary for preserving the admirable balance of our constitution to vest the executive power of the laws in the prince, and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control by justices of oyer and terminer occasionally named by the crown, who might then, as in France or Turkey, imprison, dispatch or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived that no man should be called to answer to the king for any capital crime unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury, and that the truth of every accusation, whether preferred in the shape of indictment, information or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this palladium remains sacred and inviolate, not only from

all open attacks (which none will be so hardy as to make), but also from all secret machinations which may sap and undermine it, by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue and courts of conscience. And however convenient these may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern. What was said of juries in general, and the trial thereby, in civil cases, will greatly shorten our present remarks with regard to the trial of criminal suits; indictments, informations and appeals; which trial I shall consider in the same method that I did the former, by following the order and course of the proceedings themselves as the most clear and perspicuous way of treating it."

In respect of the qualifications of a juror, Mr. Bishop, who is confessedly one of the ablest and most thoughtful writers on the criminal law of this country, in 1 Bishop, Criminal Procedure, § 910, has this to say:

"The true view would seem to be that, since the law presumes every man to be innocent until he is by judicial evidence proved in a court of justice to be guilty, and since the burden is on the prosecuting power to make the guilt appear affirmatively by proofs produced at the trial if a man leaps in advance of the law, and settles in his own mind the question of guilt against the prisoner, whether by reason of what he has read or heard, or by reason of an inner impulse which condemns before it hears, he is not a fit person to be a juror in the cause; for his mind, which ought at least to be a blank on which the evidence might write its conclusions, is already preoccupied. It is vain for a man to say, or even believe, that he can judge impartially of a matter which he has already determined. Human nature, as developed in the average of men, does not permit this. The juror is to hear, and then say what he believes; but, if he believes before hearing that only which can lawfully affect his belief—namely, the testimony of the witness in open court—he is, in legal reason, disqualified to hear and be swayed by the testimony. It is immaterial, therefore, whether the belief which comes not according to the law is derived from rumor, or from listening to statements of a more reliable sort. Likewise, if the juror has not expressed his belief, he is still unfit, though the expression of it might render him unfit in a yet higher degree. Such is the legal reason which should govern the question."

In impaneling the jury in the great case of United States v. Burr, 25 Fed. Cas. 55, 77, No. 14,608, Chief Justice Marshall observed:

"The Chief Justice observed that it might save some altercation if the court were to

deliver its opinion at the present time; that it was certainly one of the clearest principles of natural justice, that a jurymen should come to a trial of a man for life with a perfect freedom from previous impressions, that it was clearly the duty of the court to obtain, if possible, men free from such bias; but that if it were not possible from the very circumstances of the case—if rumors had reached and prepossessed their judgments, still the court was bound to obtain as large a portion of impartiality as possible, but this was not more a principle of natural justice, than a maxim of the common law, which we have inherited from our forefathers, that the same right was secured by the Constitution of the United States, which entitles every man under a criminal prosecution to a fair trial by an 'impartial jury.' Can it be said, however, that any man is an impartial jurymen who has declared the prisoner to be guilty and to have deserved punishment? If it be said that he has made up this opinion, but has not heard the testimony, such an excuse only makes the case worse; for if the man has decided upon insufficient testimony, it manifests a bias that completely disqualifies himself from the functions of a jurymen."

And Owen, J., says in *Scribner v. State of Oklahoma*, 3 Okl. Cr. 601, 604, 108 Pac. 422, 424, 35 L. R. A. (N. S.) 985, 991, quoting from *Johnson v. State*, 1 Okl. Cr. 321, 343, 97 Pac. 1059, 1068 (18 Ann. Cas. 300):

"But the enumerated causes of challenge in the statute are not exclusive of all others not enumerated. When the juror has any opinion as to the guilt of the defendant, it matters not how this opinion was formed, the closing paragraph of the statute provides that it must appear to the court that the juror can and will act fairly and impartially in the case. But, if this provision was not in the statute, we would be forced to place this construction upon the first part of the statute, because section 29 of our Constitution * * * is in this language: 'In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury.' * * * Any statute which would even tend to deprive a defendant of a trial by an impartial jury would be unconstitutional and void. Although a juror may know absolutely nothing about the facts of the case, and may not have the slightest opinion as to the guilt of the defendant, yet if, from any cause or upon any ground, it appears to the trial court that the juror is biased or prejudiced against the defendant, it cannot be said that he would be a fair and impartial juror, and he should be excluded from the jury; otherwise the Constitution of the state would be disregarded and trampled upon. The trial court should resolve all doubts upon this matter in favor of the defendant."

In 2 Lieber, *Political Ethics* (2d Ed.) 405, the learned author observes:

"By the institution of the jury two great ends, the one of liberty, the other of the administration of justice, have been untied, namely, direct participation of the people in the dispensing of justice and the preventing of it from falling entirely into the hands of the executive or of a separate and closed caste. From whatever point of view we may examine this pe-

culiar institution as it has developed itself in the Anglican race—and it may be viewed in a great many, all equally important—it will always appear that the citizen cannot act in any more solemn capacity than that of a juror; in my opinion, in no capacity so solemn and important. Society requires the state; the state acts through laws; the laws are the great organs of human society, of combined reason; and now, when the very moment ultimately arrives for which the law was made, when it is finally to be applied as a general rule to a practical and concrete case, when, in short, the abstract principle is to be realized in practical life, for weal or woe, for the protection of some or the punishment of others, all this is in a great measure left to the juror, to the citizen taken fresh from the people. The jurors, therefore, are justly called by the British law the country. There is a deep meaning in this expression, as it has grown in the course of centuries; for the jury truly and practically represent the country to the person that is to be tried. The law is the expression of public will, and the jury represent the jural society, in judging whether in the given case the facts warrant the application of the law. The jury represent the country, not the government; they judge of facts according to rules and laws indeed, but also with the feelings of living men, and not merely as if they represented the abstract law as it is written down. To represent this a learned judge would be sufficient. The jury represents, or rather is, whenever faithful, the living, operating law. Indeed, it may justly be said that though for a brief time, yet, for this brief time, a jury represents more fully and entirely human society as formed into a state, with its great objects, than any other person or body of men, even the monarch's person not excepted. Not that I mean to intimate the idea as if on this account the jury were released either from strict obedience to law or proper advice. Even though they were the very sovereign, we have seen on a previous occasion that sovereignty and absolute power are very different. On the contrary, the jury according to the essence of their character are strictly bound by the law, yet by the law as their country requires it, or must be supposed to require it, applied to the particular and, probably, complex case before them."

Having shown that a jury is, under our form of government, indispensable in the administration of the criminal law, it will probably be accepted as a truism that freedom from bias is as indispensable in that body as it is in the presiding judge. We cannot have two kinds of juries, one for the guilty and another for the innocent, as every defendant enters upon the trial with the presumption of innocence in his favor, which continues with him as a matter of evidence until such time as his guilt may be proved beyond a reasonable doubt. *Garrison v. People*, 6 Neb. 274, 285; *Olive v. State*, 11 Neb. 1, 20, 7 N. W. 444; *Long v. State*, 23 Neb. 33, 55, 36 N. W. 310; *Flège v. State*, 90 Neb. 390, 133 N. W. 431. Verdicts can be set aside and new trials granted in both civil and criminal cases, except a verdict of

not guilty where the Constitution protects the accused from being "twice put in jeopardy for the same offense"; and a verdict of acquittal of a guilty person has met with the approval of no less a jurist than Lord Mansfield. 2 Lieber, Political Ethics (2d Ed.) 408.

And now we come directly to the pivotal question in the case: Were the nine jurymen who sat in the trial of Holmes, jointly informed against with the defendant and three other persons for the commission of a single offense, qualified, over objection, to sit in the trial of the defendant? We think not. If that were true, these gentlemen would be eligible as jurymen in the separate trials of each of the other defendants. This conclusion is supported by the weight of authority and the better considered cases. Thus in *People v. Troy*, 96 Mich. 530, 56 N. W. 102, it is said:

"We think, however, that the court erred in permitting the jury who sat in the Flanders case to sit in the present. The facts are nearly identical, and must necessarily have all been called forth in the Flanders trial. The jury in that case must have considered them, and reached some opinion as to the merits of the controversy in the present case. The respondent was entitled to a fair and impartial trial by an impartial jury, who had no preconceived opinions of his guilt or innocence. We are aware that some English and American authorities hold that jurors who have sat in one case are not disqualified from sitting in a case against another joint respondent, who has taken a separate trial, and involving the same state of facts. We are not inclined to follow that doctrine. Where the issue is the same in both cases, it is but fair to the respondent that he have another panel of jurors to try his cause. For this reason the verdict must be set aside, and a new trial ordered."

So in *Priestly v. State*, 19 Ariz. 371, 377, 171 Pac. 137, 139, 3 A. L. R. 1201, 1205, Chief Justice Franklin says:

"The tendency of legislation is to increase the dignity of the jury and lessen the power of the courts to influence or control their verdicts. It is indispensable, therefore, to the due administration of the law that this important right be carefully guarded. No higher duty rests upon the trial judge than to see that an unbiased, unprejudiced, and impartial jury should in every case be provided. If jurors objectionable in the particulars here stated are permitted to serve, this case must become a precedent for others sure to follow, and thus the impairment of the right will insidiously gain such a foothold that the right itself would in time become the mere echo of a voice, a shadow, not substance, and as 'idle as a painted ship upon a painted ocean.' These objectionable jurors are no doubt good men and representative citizens, perfectly conscientious in the belief they expressed of an ability to be indifferent between the state and the defendant, notwithstanding the knowledge they had obtained of the facts and witnesses in a court of justice where they had sat as jurors and given

their verdict. So, too, the action of the learned trial judge, we are persuaded, was dictated by a proper sense of propriety and decorum. But the weakness and error in the ruling lay in the trial judge having that confidence in the ability of the jurors to be entirely impartial under the circumstances, which confidence the jurors had expressed, each in himself. Having passed upon the credibility of witnesses in a similar case upon substantially the same testimony, and having theretofore rendered a verdict on their oaths, it is not to be believed that they could sit upon this case with such an opinion previously formed without it influencing their action."

And in *McKay v. State*, 6 Ga. App. 527, 65 S. E. 306, the defendant and one Hickman were jointly accused of an offense but severed on the trial. Hickman was convicted, and, on the defendant's trial, the court permitted the state to ask each juror on his voir dire examination if he had formed or expressed an opinion as to the guilt of the defendant, and four stated that they had and eight that they had not. The court discharged the four, but permitted the eight to serve, and this ruling was assigned as error. In reversing the judgment, Russell, J., speaking for the court, said:

"In the case at bar it plainly appears that the two offenses do involve the same transaction, inasmuch as the two defendants were jointly accused; and it further appears that the other defendant had been convicted. Jurors should go into the jury box entirely free from even a suspicion of having prejudged the defendant or formed any opinion upon his guilt; and where a juror has participated in a verdict of guilty against another person charged with the same offense, growing out of the same transaction, and necessarily to some extent depending upon the same evidence, he has, in some degree at least, prejudged the defendant. See *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063, wherein this court said: 'It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof.' Unless the jury be absolutely impartial, the jury system becomes an 'awkward instrument of justice,' and the constitutional guaranty that 'every person charged with an offense against the laws of this state * * * shall have a public and speedy trial by an impartial jury' * * * is worthless."

This rule is recognized in 17 Standard Ency. of Procedure, 347:

"A juror," it is said, "is incompetent where he has sat on a jury that tried another jointly indicted defendant, even though he says he has formed no opinion and can try defendant impartially."

To the same effect, see section 9106, Rev. St. 1913; *United States v. Smith*, 27 Fed. Cas. p. 1246, No. 16342b; *People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871, 4 Ann. Cas. 960; *Burns v. State*, 145 Wis.

373, 128 N. W. 987, 140 Am. St. Rep. 1081; *Scribner v. State of Oklahoma*, 3 Okl. Cr. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985, and notes; notes to *Priestly v. State*, 19 Ariz. 371, 171 Pac. 137, 3 A. L. R. 1201; 24 Cyc. 278, 279.

We hold that this case presents an instance of implied bias, and that the learned trial judge erred in denying the defendant's challenges to the jurors who sat in the Holmes trial. The judgment of the district court is therefore reversed and the cause remanded for a new trial.

Reversed.

STATE ex rel. TANNER et al. v. WARRICK et al. (No. 22021.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Schools and school districts §42(2)—Approval of annexation by board of high school district to which territory is annexed sufficient.

In a proceeding to annex territory to an existing high school district under the proviso in section 6, c. 243, Laws 1919, the approval of such annexation by the board of education of the district to which it is sought to annex such territory, is, after the declaration of annexation by the county superintendent of schools, the only approval or consent necessary to be given, and no action is required to be taken by the authorities of other school districts affected.

2. Schools and school districts §42(2)—Notice to boards of other districts affected not required in high school district annexation proceedings.

In such proceedings notice to the school boards of the other districts affected is not required.

3. Schools and school districts §42(2)—Terms of statute held to furnish sufficient notice of proposed boundaries of consolidated district.

The terms of the statute which provide for a hearing on the initial question of fixing the boundaries of consolidated districts by the redistricting committee furnish sufficient notice to all parties interested of the proposed boundaries of the district.

4. Schools and school districts §42(2)—Petitioners for annexation to high school district may withdraw names before action taken.

Petitioners for the annexation of territory to an existing high school district, under section 6 of the act above mentioned, may withdraw their names from the petition by written request at any time before action has been taken by the county superintendent.

5. Schools and school districts §42(2)—Petitioners cannot withdraw their names after declaration and communication to parties mainly interested.

After such declaration has been made and communicated to the parties mainly interested, it is too late to withdraw their names, even though the declaration was not reduced to writing immediately.

6. Evidence §157(5)—Where statute does not require record of official acts, parol proof is competent to show action.

Where the statute does not require a record to be made of official acts of a public officer, parol proof is competent and admissible to show that action was taken and the nature of such action.

7. Schools and school districts §42(2)—Withdrawals from petition for annexation to high school district before approval by board of education of existing district not material.

The fact that withdrawals from such a petition were made before approval by the board of education of the "existing high school district" to which it is sought to annex territory, is not material, since the determination of the number and eligibility of the signers of such a petition is committed to the county superintendent, and his or her action upon the petition is final.

Rose, J., dissenting.

Appeal from District Court, Scotts Bluff County; Raper, Judge.

Action in the nature of quo warranto by the State, on the relation of Frank Tanner and others, against S. K. Warrick and others, and from an adverse judgment, the relators appeal. Affirmed.

Morrow & Morrow, of Scotts Bluff, for appellants.

Mothersead & York, of Scotts Bluff, for appellees.

Heard before MORRISSEY, C. J., and LETTON, ROSE, DEAN, DAY, ALDRICH, and FLANSBURG, JJ.

LETTON, J. This is an action in the nature of quo warranto brought by the appellants, who are residents and taxpayers respectively in school districts numbered 3, 10, and 39 of Scotts Bluff county. They pray for an order ousting the defendants from exercising any jurisdiction as a board of education over the territory embraced in the respective districts named. From an adverse judgment, relators appeal.

The real purpose and object of the suit is to challenge the validity of the organization of "the consolidated school district of Scotts Bluff."

[1] Chapter 243, Laws 1919, so far as material here, provides, in substance, that all the territory in any county of the state shall be districted into districts for high school

and consolidated school purposes; that within 20 days after the act becomes a law the county board in each county shall appoint two school electors of the county, who, with the county superintendent, shall constitute a committee to make such surveys and investigation as will determine an equitable adjustment of the boundaries of districts for high and consolidated schools within the county; that within 10 days after the adjournment of a state conference of such committees provided for by the act, each county committee shall meet in the office of the county superintendent and proceed to plat and establish the schoolhouse site and boundary line of the proposed districts within the county. Within 10 days after the report is completed and maps of the new district prepared, the county superintendent shall designate a time for a hearing at the county seat, where any school elector may file objections to the plan as recommended. After the hearing the committee are given power to make such changes in the report and maps as they deem advisable, and within 30 days after the completion of the survey they are required to transmit the final report and order to the county board, who shall record the same in the minutes of their proceedings.

After the filing of the report with the county board 25 per cent. of the school electors may within 40 days file a written protest with the state superintendent, who, after a hearing is had, provided for in the act, shall then approve the boundaries established by the county committee, or order a rearrangement of such boundaries as in his judgment may seem best. In section 6 is found the following proviso:

"Provided, that if the proposed new district contains an organized consolidated, or high school district, when a petition of not less than 51 per cent. of the school electors in said new district residing outside of the existing organized consolidated or high school districts shall be filed with the county superintendent, then he shall declare such territory to be so annexed, conditioned upon the approval of the board of education of said existing districts. Blank petitions for this purpose shall be furnished by the state superintendents. Provided, further, any parts or fragments of old districts which may be left outside of the boundaries of the new districts, in the adjustment and operation of this act, shall be provided for by the districting committee, which may add temporarily such parts or fragments to other districts."

It is under this proviso that the consolidated district whose organization is challenged was created.

The gist of the petition is the allegation that no action was taken by the county superintendent until after the remonstrance and withdrawal of names had been filed, and the further allegation that the withdrawals were effective to reduce the number of law-

ful signers to less than the jurisdictional number. The latter allegation is sustained by the evidence. The defense is that, prior to the time of filing the remonstrance and attempted withdrawals, the county superintendent had acted and declared the territory annexed to the school district of Scotts Bluff, conditioned upon the approval of the board of education of said district, and that the withdrawals came too late and were ineffectual.

[2, 3] The errors assigned are, in substance, that the court erred in holding that approval of the school boards of the territories sought to be annexed to the school district of the city of Scotts Bluff was not necessary before consolidation could be effected, and in holding that the petition could be legally acted upon without first giving notice to all districts affected of the presentation of the petition. The other assignments virtually are that the court erred in finding that the county superintendent verbally declared the annexation of the outlying territory of Scotts Bluff district on the 29th day of June, 1920, and in holding that such verbal declaration was sufficient to prevent the withdrawal of names from the petition. It is also assigned that the court erred in holding that the petitioners could not remove their names from the petition after the same had been acted upon by the county superintendent and before the board of education of the city of Scotts Bluff approved the same.

The statute does not require approval by the school boards of the territory sought to be annexed to a high school district, nor does it require notice of the presentation of such a petition to the county superintendent to be given to all districts affected. The statutory provisions with regard to the time the initial action to be taken by the committee on redistricting, and the recording of their proceedings in the minutes of the county board, whose proceedings are required by law to be published, were evidently designed to furnish sufficient notice of the action of the committee to all persons residing within the territory affected. The approval by the board of any district except that of the consolidated or high school district to which it is desired to annex outside of the territory is not essential. The words, "the approval of the board of education of said existing districts," clearly refer to "the existing organized consolidated or high school districts" mentioned in the proviso.

[4] The main question in the case is whether the evidence shows that the county superintendent had acted upon the petitions and declared the territory to be annexed before the withdrawals were filed. The evidence for relators shows that on June 5 some of those objecting to the consolidation made an inspection of the records in the office of the

county superintendent but found no written record of any action having been taken on the petition. The county superintendent at that time was out of the city. On July 7, and on the morning of July 8, certain protests and remonstrances against the annexation of the territory in districts 3, 6, 10, and 39, and withdrawals of the names of 36 persons who had signed the original petition, were filed in the office of the county superintendent. The protests were signed by 86 others not signers to the petition.

On the 8th day of July a record of the approval of the board of education of the school district of the city of Scotts Bluff was filed in the office of the county superintendent. On August 5 the county superintendent in writing reported to the county clerk and the president of the board of education of Scotts Bluff that she had declared all the territory described in the petition to be annexed, and the consolidated school district created; the notification being in part as follows:

"I hereby certify that on June 26, 1920, petitions were filed in my office from 51 per cent. of the electors of the territory proposed by the redistricting committee for annexation to the school district of Scotts Bluff praying that said territory be annexed to the school district of Scotts Bluff.

"And I further certify that at the same time A. C. Davis and S. P. Lacy requested that the west half of section 1 and the northwest quarter of section 12, township 23 north, range 55 west, be also permitted to come into the Scotts Bluff consolidated district.

"And I further certify that on June 29 I declared my verbal approval of the boundaries as made by the county redistricting committee, and petition for annexation to the Scotts Bluff school district, to include, however, said parts of sections 1 and 12 if they might be accepted by the Scotts Bluff school board and petitioned in by the interested parties by July 7."

Before the petition for annexation was filed with the county superintendent, S. P. Lacy and A. C. Davis had been removed from school district No. 10 and annexed to consolidated district No. 67. They preferred to be included in the Scotts Bluff district. The county superintendent prepared petitions for them to circulate to effect this purpose. These petitions were returned to the county superintendent on June 28. Lacy and Davis testified that the county superintendent then said she had made a mistake, and it would be necessary to post notices in the districts affected by their petitions, and told them to post the notices and return the petitions before July 6, and she would act on their petitions and the petition for the annexation of the other territory to the Scotts Bluff district at the same time, on her return from Denver. The county superintendent testified that she took final action on the petition on June 29. She further testified

that after she approved the petition she informed certain members of the Scotts Bluff board of education of the approval, and also called by telephone certain electors in the annexed territory, and also the county clerk, or his deputy, and a member of the redistricting committee, and notified them of the action taken, and that this was done before she went to Denver, which was on June 30. She denies that Lacy and Davis returned petitions at a time when they had failed to put up the proper notice, but says they took the notices out on Saturday the 26th. She testifies she told Davis and Lacy that they must get the assent of the Scotts Bluff board before they went any further. Two members of the board of education of Scotts Bluff testified that in the latter part of June the county superintendent told them she had approved the boundaries as laid out by the redistricting committee.

The superintendent of schools of the city of Scotts Bluff testified that on June 29—

"I went to her office and learned that she was going to Denver, and I wanted to know if her action was final—the action she had taken on the 26th. I wanted to know so that we might go ahead. She told me that her action was final in the matter, and that we were authorized to go ahead."

He further testified that between June 29 and July 8 he received the written acceptance that she had declared; it came into his possession several days before the board of education acted upon it, and the board on the strength of this declaration has expended about \$10,000 in furnishing extra school accommodations.

The president of the Scotts Bluff school board testified that the county superintendent called him from Denver on July 7; and stated she had learned that a remonstrance had been filed against the redistricting, and assured him that the petition had been approved and the matter was settled.

On rebuttal there was testimony to the effect that after the superintendent returned from Denver the relators called at her office to ascertain what had been done with the remonstrance. Some of them testified that they asked her why she did not give them a hearing on the remonstrance, and she told them she had already acted on the other petition; that she had acted verbally, and told the different members of the Scotts Bluff school board that she would accept it, but was holding the petition on account of the Davis and Lacy petitions. When asked why the blanks were not filed (apparently referring to some printed blank forms of approval in evidence), she said she was holding them on account of the Lacy and Davis petitions, so she could act on all of them together. It was also shown that some of the relators had protested against the consolidation at the

hearing before the redistricting committee, and that the petition had not been presented to them for signature; but it is also shown that some of them knew of it being circulated, while others only heard of it a short time before the remonstrance was filed.

[5, 6] The most important question in the case is whether the failure of the county superintendent to place upon record at the time it was made her approval of the petition, left the matter still open so that petitioners might withdraw in the interval between her oral declaration and the making of the record. We have found no case exactly in point. The decisions cited by relators are to the effect that, unless a complaint in writing was filed before a board of equalization, it had no jurisdiction to raise or lower assessments in the particular circumstances of each case; but this we think does not aid us in this case. A judgment of a court is valid and effective when it is declared and announced by the judge, although it may not be reduced to writing until afterwards. *Mandamus* will lie to compel the entry of a judgment already rendered, but which has not been made a matter of record; and parol evidence is not admissible in other cases to show that a judgment has been rendered. Where there is no statute requiring proceedings to be made a matter of record, such as in the case of non-judicial board or office, and of merely ministerial acts in an inferior court, the strict rule as to court records does not apply, and they may be proved by parol. *Van Kleek v. Eggleston*, 7 Mich. 511; *Dehority v. Wright*, 101 Ind. 382; *Jolley v. Foltz*, 34 Cal. 321; *Richardson v. Hitchcock*, 28 Vt. 757; *Farnsworth Co. v. Rand*, 65 Me. 19; 22 C. J. 1011, § 1294.

But, even if we apply the law relating to courts of record, it would seem that, where the officers to whose judgment is committed the approval or rejection of a petition to form a consolidated school district, has considered the question involved and has announced to a number of the parties mainly interested her decision upon the matter, the mere fact that a record of her action was not made immediately, but was reduced to writing afterwards, does not prevent the act and declaration from becoming effective and binding. There is no evidence to show that any other declaration was ever made than that announced by the county superintendent to several members of the board of education of the city of Scotts Bluff on June 29, and afterwards embodied in two statements, one directed to the president of the board of education, and the other to the county clerk. These statements recite and declare the facts as found by the district court to exist.

It was held in *Biart v. Myers*, 3 Neb. (Unof.) 196, 91 N. W. 573, that, while a superintendent of public instruction acts judicially in forming a new school district

from territory embraced within the boundaries of other districts, it does not follow that his findings and orders in the premises must be entered with all the formality of a judgment of a court of law; if the record shows a substantial compliance with the statute it is sufficient. There is no time or place fixed by the statute for the declaration of approval by the county superintendent; it is enough that the approval be made, and it should, of course, be shown in writing within a reasonable time after the declaration is made; but the essential thing is the approval, which is a mental act, and the declaration either oral or written, which is physical. The mental determination would be insufficient if unaccompanied by any act evidencing that it had been made; but, when made and declared, it becomes effective, notwithstanding the fact that the written evidence was not recorded until later. While the statute in terms does not require the recording of the act, the proper conduct of official affairs requires that such a record be made.

[7] The argument is made that, since the last withdrawal from the petition was filed on the morning of July 8, and the board of education of the school district of Scotts Bluff did not meet to approve the boundaries as defined in the petition, until the afternoon of that day, final action had not been taken, and therefore the right of withdrawal still existed. But this loses sight of the fact that the board of education has nothing whatever to do with the determination of the validity of the petition, or the number of qualified signers upon the same. The function of examination of the petition, and decision as to whether it should be allowed and approved, rests entirely with the county superintendent. The board of education has no power to act until after the approval of the petition has been certified to it by the county superintendent, and, hence, the action of the county superintendent with respect to the approval of the petition is the determining and final act so far as the petitioners are concerned. When a petition approved by the county superintendent has been presented to the board of education, the only act necessary to be done to effectuate a consolidation is the approval by the board. If this approval is withheld, the whole proceedings under this proviso are of no avail.

In *State v. Cox*, 105 Neb. —, 178 N. W. 913, it is said, speaking of the act under consideration:

"The bill does not purport to be an amendment of the former sections, but enacts entirely new legislation upon the same subject-matter, and repeals the former sections covering that matter."

This is a sufficient answer to the contention that the requirements of the former

general statute governing the division of school districts must be complied with in proceedings under the new act.

It is conceded that petitioners might withdraw at any time before action was taken by the county superintendent. The evidence sustains the district court finding that no withdrawals had taken place before action by the county superintendent.

We find no error in the judgment. It is therefore

Affirmed.

ROSE, J., dissents.

SOLE v. CITY OF GENEVA. (No. 21662.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Pleading $\S$ 59—Party seeking privilege or right conferred must allege facts essential to strict compliance.

When a privilege or right is conferred by statute, on certain prescribed conditions, and a party desiring to avail himself of such privilege or right brings action for the enforcement thereof, he must allege and prove all the facts that are essential to a strict compliance with the prescribed conditions.

2. Municipal corporations $\S$ 33(1)—Act relating to detachment of territory does not provide exclusive remedy.

Section 5090, Rev. St. 1913, relating to the detachment of territory from the corporate limits of cities and villages, does not provide an exclusive remedy for detaching territory from such cities and villages.

3. Municipal corporations $\S$ 33(1)—District courts under chancery and common-law powers may determine whether agricultural land should be disconnected from city.

Under the general chancery and common-law powers conferred by the Constitution, and without reference to statute, district courts are vested with jurisdiction to hear and determine whether an owner of agricultural lands included within the corporate limits of a city is entitled to have the same disconnected therefrom.

Appeal from District Court, Fillmore County; Brown, Judge.

Petition by George Sole against the City of Geneva, to disconnect certain land from the City. Decree for the plaintiff, and the defendant appeals. Affirmed.

Chas. H. & F. W. Sloan and T. J. Keenan, all of Geneva, for appellant.

John K. Waring and Robert B. Waring, both of Geneva, for appellee.

Heard before LETTON, DEAN, and DAY, JJ., and GOOD and RAPER, District Judges.

GOOD, District Judge. This is an appeal from a decree of the district court for Fillmore county, disconnecting from the corporate limits of the city of Geneva a tract of land comprising approximately 41 acres, owned by appellee.

Appellant insists that the petition of plaintiff, appellee herein, did not state facts sufficient to entitle him to the relief demanded of, and granted by, the district court; that the decree is not supported by sufficient evidence, nor is it supported by proper findings of fact by the trial court. Appellant's contention is founded on the assumption that the action is based on section 5090, Rev. St. 1913, which is in part as follows:

"Whenever a majority of the legal voters residing on any territory within and adjacent to the corporate limits of any city or village, or the owner or owners of any unoccupied territory so situated, shall desire to have the same disconnected therefrom, they may file their petition in the district court of the county in which such city or village is situated praying that such territory be detached therefrom. * * * If the court find in favor of the petitioners, and that justice and equity require that such territory, or any part thereof, be disconnected from such city or village, it shall enter a decree accordingly."

[1] The allegations of plaintiff's petition showed that the land was owned and occupied by him, but did not show that he was the only voter or a majority of the legal voters residing on the territory sought to be disconnected, nor did the evidence show that the plaintiff was the only legal voter or that he was a majority of the legal voters residing on the territory, and the trial court did not make the findings prescribed by the statute, viz., "That justice and equity require that such territory shall be disconnected from such city."

When a privilege or right is conferred by statute on certain prescribed conditions, and a party desires to avail himself of such privilege or right by bringing action for the enforcement thereof, he must allege and prove all the facts essential to a strict compliance with the prescribed conditions. So that if the action is founded on the statute above quoted, appellant's contention is well taken and plaintiff is not entitled to have the land disconnected. The views herein expressed find support in the following cases: Delozier v. Village of Magnet, 104 Neb. 765, 178 N. W. 620; McCullough v. Colfax County, 4 Neb. (Unof.) 543, 95 N. W. 29; 31 Cyc. 115; Haskins v. Alcott & Horton, 13 Ohio St. 210; Dye v. Dye, 11 Cal. 163; Village of Osmond v. Smathers, 62 Neb. 509, 87 N. W. 310.

[2, 3] But the statute above referred to does not provide an exclusive remedy for disconnecting territory from a city or village. Such relief may on proper pleading and proof

be granted by the district court in the exercise of the general chancery and common-law powers conferred upon it by the Constitution. This power of the district court has been exercised heretofore and approved by this court. *State v. Diamond*, 44 Neb. 154 62 N. W. 498; *Village of Osmond v. Smathers*, 62 Neb. 509, 87 N. W. 310; *Village of Osmond v. Matteson*, 62 Neb. 512, 87 N. W. 311.

In *Village of Osmond v. Smathers*, supra, it is said:

"Said section 101 is not a limitation upon the right to institute proceedings to have territory taken out of the corporate limits of a city or village. That section merely conferred the right to a petition for the detachment of territory upon a majority of the legal voters within the boundaries thereof, and it would seem that such voters need not necessarily be owners of real estate. It was not the intention of the Legislature in passing said section, nor could it lawfully do so, to take away the right of the owner of real estate included in the boundaries of a city or village, to invoke the powers of the court to determine whether such real estate is properly included within the corporate limits of such municipality. This principle was held and applied in *State v. Diamond*, supra. Plaintiff, being the exclusive owner and in possession of the tract of land in question, had a right to bring this suit."

The section 101 referred to in the above quotation was the one that then provided for the disconnecting of territory from a city or village, and was quite similar to section 5090, Rev. St. 1913. It was necessary, therefore, only for the plaintiff to allege and prove that he was the owner and in possession of the tract of land, and to allege and prove such other facts as would show that it was inequitable to retain the territory within the corporate limits of the city.

Plaintiff in his petition alleged that the land in question had never been platted or divided into lots or parcels, nor had any streets or alleys ever been surveyed or located thereon, but that all of said real estate has at all times been used exclusively for agricultural purposes as one complete body of land: that the premises are situated on the extreme west boundary of said corporate limits, and that by reason of its character and location it is in no wise benefited by being so included within said corporate limits.

The evidence discloses that while the city has a system of waterworks, electric lights, a sewer system, paving, sidewalks, and other improvements, none of them reach to the premises of the plaintiff. Plaintiff's premises are entirely without the sewer district; the nearest approach of the water system to plaintiff's premises is about 600 or 700 feet and a still greater distance to the buildings upon his farm. It appears that the

electric lights reach to the street that runs in front or on the east side of plaintiff's farm. It further appears that the town is divided by a railroad running north and south, and that practically all the business portion of the town is on the east side of the railroad, and that of the ten or twelve blocks of paving now completed all except one-half block is on the east side, and that all of the new paving in process of construction is on the east side. It further appears that there has practically been no buildings of any consequence constructed on the west side of the track for more than ten years, and that new additions to the town and new buildings have all been upon the east side of the track. There is nothing to indicate that there is any likelihood of city growth to the west of the railroad track.

There are other details that need not be mentioned, but from a careful consideration of all the evidence it appears that plaintiff's farm derives no benefit from the city government, other than that of any other farm located adjacent or near a city or village. Under the circumstances we hold that it is inequitable that plaintiff's land should remain within the corporate limits of the city.

The judgment of the district court is right, and is affirmed.

STATE ex rel. POLK COUNTY v. MARSH, State Auditor of Public Accounts. (No. 22377.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Elections ~~§~~ 85—Votes of women in courthouse bond election are of equal validity with those of male voters.

Since the Nineteenth Amendment to the Constitution of the United States became effective, the votes of women cast at an election for the submission of a proposition to issue bonds of a county for the purpose of erecting a courthouse are of equal validity with, and are as much entitled to be counted as, those of male voters.

2. Counties ~~§~~ 178—Special provision for submitting to voters proposition for bonds for county courthouse controls rather than general provisions.

The special provision contained in section 954, Rev. St. 1913, as amended by Laws 1919, c. 67, for the submission to the voters of a proposition to issue bonds of a county for the erection of a courthouse controls such an election, and not the general provision contained in sections 956-960.

Original action in mandamus by the State, on the relation of the County of Polk, against George W. Marsh, Auditor of Pub-

lic Accounts of the State of Nebraska. Writ allowed.

M. A. Mills, Jr., of Osceola, and Stout, Rose, Wells & Martin, of Omaha, for plaintiff.

Clarence A. Davis, Atty. Gen., and Mason Wheeler, Asst. Atty. Gen., for defendant.

Heard before LETTON, DAY, and DEAN, JJ., and CORCORAN and GOSS, District Judges.

LETTON, J. This is an original action in mandamus upon the relation of Polk county against the auditor of public accounts to compel him to register \$125,000 of bonds of that county voted for the purpose of erecting a courthouse at a special election. The board of canvassers certified the returns of the election as follows:

"For said bonds and tax:	
Women's vote, six hundred sixty.....	660
Men's vote, nine hundred forty-one.....	941
Total votes for	1,601
"Against said bonds and tax:	
Women's vote, four hundred eighty-seven..	487
Men's vote, nine hundred sixty-two.....	962
Total votes against.....	1,449"

The county board declared the proposition adopted. A transcript of all the proceedings was made, certified by the county clerk, and filed with the auditor of public accounts, who refuses to register the bonds. The auditor denies that the issuance of the bonds had been ordered by a majority of the legal voters of the county voting thereon, and alleges that the women voting at the election were not legally entitled to vote on the proposition, and that in fact a majority of the legal voters of the county voted against the bonds and taxes. He also pleads that two-thirds of the votes cast are necessary under the statute and were not cast in favor of the proposition.

It is argued in the brief that the notice of the special election was insufficient in that the polling places were not lawfully designated. The answer admits the allegations of the petition that due and proper notice was given of the time and place of the election, and that it was held at the places designated. A notice that an election would be held "at the regular polling places in the city" was held sufficient, in the absence of pleading and proof that there were no regular polling places in the city, or that the electors were in some way deprived of their opportunity to vote. This principle applies. *Hurd v. Fairbury*, 87 Neb. 745, 128 N. W. 638; *State v. Marsh*, 106 Neb. —, 184 N. W. 135.

[1] Were women eligible to vote at the election? The election was held on September 21, 1920. The Nineteenth Amendment to the Constitution of the United States had been proclaimed and became effective August

26, 1920. Fed. St. Ann. Supp. 1920 (2d Ed.) p. 821. This provides:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex."

Under the decisions of the United States Supreme Court construing the Fifteenth Amendment to the Constitution of the United States, it is held that all discriminations in the elective franchise based upon "race, color, or previous condition of servitude" are absolutely without force or effect; that distinctions may be made between classes of citizens upon other grounds, but that as to the grounds inhibited such restrictions are absolutely void. The decisions are strictly in point, and apply to the question presented here. *Neal v. Delaware*, 103 U. S. 370, 339, 26 L. Ed. 567; *Guinn v. United States*, 238 U. S. 347, 35 Sup. Ct. 926, 59 L. Ed. 1340, L. R. A. 1916A, 1124; *Myers v. Anderson*, 238 U. S. 368, 35 Sup. Ct. 932, 59 L. Ed. 1349. It appears that at the special election at which the proposition to issue the bonds was submitted, women were allowed to vote, but that their votes were separately counted and returned. The difference or distinction made or sought to be made by the election or canvassing board was "on account of sex." Their rights as to the deposit of ballots at the election were not "denied or abridged," but if, as contended, their votes should not be counted, this would be an effectual denial of their right to vote. A vote which is uncounted amounts to nothing. A refusal to count such vote or to recognize it as having full force and effect would be a clear violation of the Nineteenth Amendment. The votes cast by the women at the election are as much entitled to be counted as those cast by the men, and there is a clear majority for the affirmative.

[2] It is also objected that two-thirds of the votes cast were not in favor of the proposition, as required by section 959, Rev. St. 1913. Section 956 is a general law governing "the mode of submitting questions to the people for any purpose authorized by law." Sections 956 to 960 inclusive show that the raising of money is one of the questions which may thus be submitted to the people of a county. For its adoption such a proposition requires that two-thirds of the voters voting at the election vote affirmatively. Section 954, though a part of the same act, contains a special provision authorizing the county board to provide a suitable courthouse, and for that purpose to borrow money and to issue the bonds of the county to pay the same.

"But no appropriation exceeding \$1,500 shall be made for the erection of any county building except as hereinafter provided, without first submitting the proposition to a vote of the people of the county at a general election or

(184 N.W.)

a special election ordered by said board for that purpose, and the same is ordered by a majority of the legal voters voting thereon."

The special provision controls. There is a restriction in the same section that—

"In no case shall the levy of taxes made by the county board for all purposes, including the taxes levied herein provided for the erection of a courthouse or jail, exceed in any one year the sum of fifteen mills on the dollar of the assessed valuation of said county." Section 954, as amended by chapter 67, Laws 1919.

Attached to the transcript is a certificate of the county clerk of Polk county that the rate of taxes levied for county purposes in 1920, including 1.48 mills for a courthouse building fund, amounted in all to 12.61 mills. It is apparent, therefore, that the levy of taxes to be made in the future may well be within the 15-mill limitation of the statute without interfering with ordinary running expenses.

We find no sufficient reason assigned for the refusal to register the bonds. A peremptory mandamus is allowed as prayed.

Writ allowed.

RATHBUN v. GLOBE INDEMNITY CO. (No. 21692.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Insurance —146(3)—Construction against forfeiture favored.

The several provisions contained in an accident insurance policy will be given a practical and rational construction, one consistent with reason and common fairness, and with a view to avoiding, rather than enforcing, a forfeiture, if the terms of the instrument will fairly and justly permit it.

2. Insurance —146(1)—Inconsistent accident policy provision will be ignored.

Where the language of a special provision in an accident insurance policy is susceptible of but one construction, and that construction inevitably leads to an unreasonable or absurd result, and substantially defeats the object and purpose of the entire contract, such provision will be rejected as inoperative, and, ignoring the same, the court will look to the whole instrument, and gather therefrom the manifest intention and purpose of the parties and adjudicate accordingly.

3. Insurance —524—Insured held totally and continuously unable to transact business duties from date of accident, as provided in accident policy.

Where one insured under an accident policy received an injury to his hip through accident, from which he suffered severe pain and lameness for the first 3 days thereafter, when a 2 weeks' respite from any conscious ill effects from the injury intervened, during which time

the insured attended to the most, if not all, of his professional duties as a surgeon, but at the end of which time pain and lameness reoccurred, and continued with increasing severity for a period of about 2½ months, during which time the insured performed some of his professional labors, but under more or less stress of pain and discomfort, being compelled to have his assistants do many things in the course of operations upon patients that always before he had been accustomed to do himself, and at the end of which 2½ months the insured retired entirely from any attempt in the performance of any and every duty, because of pain and suffering from the injury, and continued to suffer with increased severity until 3 months later, when he died of sarcoma, a malignant disease, involving the hip joint, which the evidence conclusively shows was the direct and immediate result of the accident sustained 6 months previous, the insured held "to be totally and continuously unable to transact all business duties from date of accident," as this language, properly construed, is employed in the policy.

4. Insurance —675—In action on accident policy attorney's fees reduced to ten per cent. of recovery.

The sum allowed plaintiff as attorney's fees by the lower court considered, and same reduced to an amount equal to 10 per cent. of the judgment recovered, exclusive of costs, and without interest.

Flansburg, J., dissenting.

Appeal from District Court, Dodge County; Button, Judge.

Action by Mollie Rathbun against the Globe Indemnity Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Montgomery, Hall & Young, of Omaha, for appellant.

Courtright, Sidner, Lee & Jones, of Fremont, for appellee.

Heard before MORRISSEY, C. J., ROSE and FLANSBURG, JJ., and DICKSON and TROUP, District Judges.

TROUP, District Judge. This is a suit by the beneficiary upon an accident insurance policy indemnifying the insured against loss from disability resulting from an accident, including loss of life, hospital and surgical expenses. The insured sustained an accident, and, it is alleged by the plaintiff, died as a direct result thereof.

The following brief history of the accident and events following may be considered established by the evidence: At about noon on a day between the 1st and the 5th of March, 1919 (no witness being able to give the exact date), Dr. Rathbun, the deceased, then a practicing physician and surgeon in the city of Fremont, Neb., being alone in his automobile, drove up in front of the Fremont Hospital. Upon alighting from the foot-

board of his car, either from a misstep or by slipping upon the ice on the pavement, he was caused to fall, striking his right hip either upon the pavement in the street or the curb close by. For a moment he lay where he had fallen, then arose and, slightly limping, entered the hospital. For the next two or three days he suffered severe pain in his right hip; the pain then subsided, and for a period of two weeks it was such that he gave it little or no attention. At the end of two weeks the pain and lameness returned, causing much inconvenience when moving from a sitting to a standing posture. This was followed by pains in the rectum on the right side of the pelvis. From that time on he continued to suffer increasing pain and lameness; submitting himself to a rectal examination, both by Fremont and Omaha surgeons, but without a discovery of the trouble, and, growing worse, he retired to his bed for two weeks, at which time another examination was made and revealed a tender swelling or mass in the region of the hip, which gave the patient much pain. In company with another physician he went to Mayo Bros. and submitted himself to examination and treatment, but returned unimproved, and soon thereafter became decidedly worse. Upon another examination by local surgeons the tender mass before mentioned had increased four or five times in size and was extremely tender. The patient was then taken to Drs. Oxnard and Percy, of Chicago, and was again operated upon, this time by an entrance into the abdominal cavity and down deep into the hip, where was readily located this tender mass, pronounced malignant in nature; removing this and properly preparing the parts, radium was applied by a radium specialist. At the end of two weeks the patient returned to Omaha, where he underwent further X-ray treatment, and after spending a week at his home in Fremont he returned to Omaha and the Clarkson Hospital, where he lingered until his death, September 5, 1919. A post mortem examination made by Dr. Johnson, of the University of Nebraska, and witnessed by some of the leading surgeons of Omaha, revealed malignant growths along the sinus, a complete disintegration and destruction of the bony floor or bottom of the articular cavity of the head and neck of the hip bone, and other like conditions of malignant disease, which all the physicians and surgeons present pronounced sarcoma; the same being the direct result of the injury to his hip received by his fall in March, 1919.

These facts, among others, are in substance set forth in plaintiff's petition, wherein it is further alleged that the deceased was totally and continuously unable to transact all business duties of his profession from the date of the accident until his death, although for a time he undertook to do, and

occasionally did, some surgical work until the month of June, 1919; that plaintiff made proper proofs of death of the insured and the cause thereof, and demanded payment of all disability claimed by the plaintiff, amounting to \$8,242.90, composed of the following items alleged to be due and payable under the various provisions of the policy: Hospital expense, \$125; disability from March 1 to September 5 at \$25 a week, \$617.90; and for loss of life, \$7,500—totaling \$8,242.90, together with a reasonable attorney's fee.

The defendant, in its answer, admits the issuance of the policy to deceased, notice of the death of the insured occurring on September 5, 1919, from sarcoma, but denies all other allegations in plaintiff's petition and any and all liability under the policy.

By agreement of parties the case was tried to the court without a jury. The only testimony at the trial was that adduced on behalf of the plaintiff. The defendant cross-examined plaintiff's witnesses, but otherwise offered no evidence. Upon submission of the case, the court found for the plaintiff for the full amount prayed for, with interest and costs, together with an attorney's fee, with interest thereon, and rendered judgment accordingly. The defendant appeals.

Several errors are relied upon by the defendant for either the reversal or modification of the judgment of the court below, and, first, because it is established by the evidence that the insured died of sarcoma, a disease which was the direct result of the bodily injury sustained by the fall of the deceased in March, 1919, and that under special provision A of the policy no recovery for death or disability can be had in such case. Special provision A, in so far as it applies to the instant case, is as follows:

"This policy does not cover * * * loss resulting from bodily injury caused or contributed to, directly or indirectly, by disease, or vice versa."

The "vice versa" provision, as interpreted by the defendant company, and we presume correctly, is as follows:

"This policy does not cover * * * loss resulting from disease caused or contributed to, directly or indirectly, by bodily injury."

[1, 2] It is urgently insisted by the defendant that the evidence establishes all that is claimed for it, as above stated, that the language of the above-quoted provisions of the policy is perfectly plain and unambiguous, and must be held to mean exactly what they say, and that, if so construed, plaintiff cannot recover for the disability or death of the insured. We must agree with the defendant that the evidence conclusively shows that the insured died of sarcoma, a disease, and that the disease from which he died was the direct result of the bodily injury sustained from the accident occurring to him

in March; but we are not able to agree that the provisions of the policy above quoted forbid a recovery for the disability and death of the insured in this instance. We will, however, cordially agree with counsel for defendant in their argument that, in approaching the construction of an insurance policy, the court should have in mind the same general principles which obtain in the construction of any other contract, in so far as that the language employed should be given its plain, natural and ordinary meaning, and not be twisted into an unnatural or exceptional meaning merely to avoid a forfeiture, and that, when such construction is demanded by the plain and unequivocal terms of the instrument, the courts, of course, should have the moral courage to so construe it, regardless of the consequences. But this rule, of course, presupposes the nonexistence of two very important factors in the equation: First, that such construction will not end in an unreasonable or absurd result; and, second, that it will not defeat the manifest intention of the parties and the very object and purpose they had in entering into the contract at all. If the construction indicated will inevitably lead to either one or both of the results above stated, then such construction will be avoided, and, if the provision to be construed will admit of no other construction than the one leading to and ending in such result, the provision itself will be rejected as inoperative, and, ignoring the special provision, the court will look to the whole instrument, and, if possible, in justice to all parties concerned, gather therefrom the real and evident intention and purpose of the parties in respect to the particular question involved, and thus enforce or decline to enforce the contract accordingly. This much would seem to result from very necessities of the situation. See on this subject 13 C. J. 521, §§ 482, 486, and cases cited. *L'Engle v. Scottish Union & Nat. Fire Ins. Co.*, 48 Fla. 82, 37 South. 462, 67 L. R. A. (N. S.) 581, 111 Am. St. Rep. 70, 5 Ann. Cas. 748, *Merrill v. Bell*, 6 Smedes & M. (Miss.) 730, and *Stockton v. Turner*, 7 J. J. Marsh. (Ky.) 192.

Let us consider the effect of this "vice versa" provision in the light of the evidence in the case before us. One of the medical witnesses testifying for plaintiff defined the term "disease" as "any abnormality of the body resulting in a disturbance of the function or functions of the particular part affected; any general disturbance of the general functions of the body; a cut finger would be a disease." While it seems to the writer that the definition thus given is somewhat extreme and almost too comprehensive in its scope, yet the defendant has not seen fit to controvert it, nor are we prepared now to say that it is not sustained, in a substantial measure, by the standard medical au-

thorities and leading lexicographers, as well as by decisions of some of the courts. See *Mutual Life Ins. Co. v. Simpson*, 88 Tex. 333, 31 S. W. 501, 28 L. R. A. 765, 53 Am. St. Rep. 757.

Assuming then, that the definition as above given is acceptable to the defendant and applicable to the term in question, as used in its policy, then, except accidents which result in instant, or almost instant, death, we can scarcely conceive of a case arising where the insured sustained a bodily injury by accident in which the insurer would not be absolutely exempt from liability for disability or death by virtue of the so-called "vice versa" clause of the policy above quoted, under the interpretation insisted upon by the defendant company. We think it is fair to say that the number of persons insured who sustain an accident resulting in instant, or almost, death, as compared with the number insured who sustain bodily injury by accident resulting in disease, in one form or another, more or less prolonged, and yet directly traceable to the accident and in consequence of which disability, and perhaps death follow, is certainly not greater than a ratio of 1 to 10; so that for every 1, 10 or 100 would be entitled to recover under defendant's policy, there would be 9, 90 and 900 who could not recover a dollar for either disability or death because of this special provision referred to.

It seems to us that a theory which inevitably leads to such damaging results to the insured as would this is so unreasonable, absurd and destructive of the very object and purpose of the contract, as well as the manifest intention, or at least the supposed manifest intention and understanding of the parties who entered into it, that such a construction cannot be allowed; and, if the language of the provision is susceptible of no other construction, then that the provision itself cannot stand. We are of the opinion that in this instance there is no alternative, and that the clause in the defendant's policy known as the "vice versa" clause is inoperative and of no effect. But, taking another view of it; we think it must be conceded that all the authorities hold that a loss resulting from disease which is the direct and immediate result of a bodily injury sustained through accident is precisely the same as a loss resulting from the bodily injury itself. So, then, this provision will be precisely the same as though it read:

"This policy does not cover * * * loss resulting from bodily injury caused or contributed to, directly or indirectly, by bodily injury"—which of course is a palpable absurdity.

If this disposition of the provision in question is the inevitable result of a just consideration of the same, the defendant company has less reason to complain from the fact

that it did not express in words in its policy the interpretation it expected to place upon the words "vice versa." This much at least the company should have done in fairness to the assured, so that he might at least have had the opportunity to read its interpretations as expressed in exact words, and thus act with knowledge in that regard. This the company did not do, but at best left it to conjecture, so far as the assured is concerned, as to what interpretation should be given to this phrase. So that, even in this view, the insured would be justified in believing that no interpretation would be given this phrase that would, except by a rare chance, wholly defeat the sole purpose and object of the contract.

But, as before stated, eliminating the provision in question does not necessarily affect the validity and operation of the contract as a whole, but the whole instrument may be examined to determine, if possible, the real intention of the parties to the contract and the object and purpose they had in entering into it. Such an examination of the policy introduced in evidence readily discloses ample provisions whereby the defendant company undertakes to indemnify the insured against loss caused by bodily injury sustained through accidental means, including loss of life, and inasmuch as the defendant frankly admits that the evidence conclusively shows that the insured died from sarcoma, a malignant disease, which disease was the direct and immediate result of a bodily injury sustained by the insured through the accident alleged, this is all that is necessary to establish the defendant's liability, so far as the point now under consideration is concerned.

In this view of the case, it becomes unnecessary to inquire what facts and circumstances are necessary to exist in order that the disease of which the insured died will be held to be the result of a bodily injury sustained through accident. If authorities upon that point were necessary, they may be found in *Ward v. Aetna Life Ins. Co.*, 82 Neb. 506, 118 N. W. 70, and *Delaney v. Modern Accident Club*, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603, and cases therein cited.

[3] The second assignment of error is that the court erred in allowing the item of \$7,500 for the death of the insured, because claimant may not recover therefor for the reason that death did not occur within 90 days from date of accident. The provision of the policy sought to be invoked reads:

"Section 1 (a). If such injury, within 90 days from date of accident, irrespective of disability, causes the insured to sustain a loss enumerated in this section, the company will pay the sum specified for such loss as follows: For loss of life, \$7,500."

The plaintiff, however, disclaims any attempt to recover under the above provision,

admitting that the insured did not die within 90 days from date of accident, but relies wholly upon subdivision (d) of the same section, which reads as follows:

"(d) If such injury, from date of accident, causes the insured to be totally and continuously unable to transact all business duties and, during the period of such disability and within 208 weeks, results in a loss enumerated in this section, the company will pay the sum specified for such loss and in addition, until the loss occurs, indemnity at the rate per week of \$25."

We are of the opinion that if claimant shows herself entitled to recover under subdivision (d), if that subdivision stood alone, then she may recover under said subdivision, notwithstanding more than 90 days had elapsed from the date of accident to the date of death, the limitation in subdivision (a), for the reason that subdivision (d) imposes new and additional conditions precedent to a recovery not contained in subdivision (a). Passing over the defendant's second assignment, we come then to the consideration of subdivision (d), as above quoted, which is involved in the defendant's third assignment of error.

The defendant claims the court erred in holding that the insured was totally and continuously unable to perform all of his business duties from date of accident, about March 1, 1919, until his death, September 5, of the same year, and that it is impossible to correctly so hold under the uncontradicted evidence in the case.

A proper solution of the controversy on this point, therefore, must depend upon determining, under the facts and circumstances disclosed by the evidence, when one insured sustaining an injury through accident may be said to be rendered "totally and continuously unable to perform all of his business duties from date of accident." The evidence upon this point shows that, prior to the injury in question, Dr. Rathbun had enjoyed excellent physical and mental health and was unusually active and industrious in the practice of his profession of surgery; that for the first few days following the injury he suffered much pain, at the end of which time the pain subsided for the space of about two weeks, the doctor, in the meantime, continuing the practice of his profession as before, performing various operations coming to him, both of major and minor character, in the city, as also in surrounding towns and country, but at the end of that time, upon the pain and lameness returning, the doctor, although endeavoring to continue much of his work, was compelled to do so under more or less stress and discomfort by reason of his injured hip, and as his pain and discomfort increased his professional labors gradually decreased until the month of June, 1919, when he left his office and never returned, and from which time he grew worse

and worse until his death, September 5, of the same year.

Of course, this provision of the contract, as all other parts thereof, must be given a practical and rational construction—one consistent with reason and common fairness, and with a view to avoiding a forfeiture, rather than enforcing one, if the terms of the instrument will fairly and justly permit it.

It appears from the evidence that after the first three days of severe pains there was an intermission of about two weeks in which the doctor suffered but little or no inconvenience from the injury, and during which time he was able to, and did, perform his professional duties much the same as before the accident, but at the end of which time the pains and lameness returned and increased in severity to the end. Passing for the present the two weeks intermission, and coming to the time when pain and lameness reoccurred, the detailed evidence of Dr. Buchanan, who was with him every day after the 22d of March, and who, with one Dr. Painter, was closely associated with Dr. Rathbun, shows that whatever professional duties Dr. Rathbun undertook from that time on he did with difficulty and much discomfort to himself; he would sit down while in the performance of some part of an operation, a thing he was never known to do before; he would ask his associates to do many things in and about the operation that always before he was accustomed to do himself, at which time he would "go off and sit down or lie down," also a thing he had never been known to do before, and that, in the opinion of Dr. Buchanan, Dr. Rathbun, during this period, was not in a fit condition, either physically or mentally, to perform a surgical operation, notwithstanding the operations performed during that period for the most part proved successful.

Now, shall it be said that because Dr. Rathbun performed some professional duties after his injury, under the stressful conditions it is shown he did perform them, and which conditions continued to increase until they culminated in his death, a recovery for his death shall be wholly defeated by this "total disability" clause in the policy? We think not. As was said in the case of *Fidelity & Casualty Co. v. Joiner* (Tex. Civ. App.) 178 S. W. 806:

"We agree it conclusively appeared, as claimed, that the assured after he suffered the injuries performed duties pertaining to his occupation, but we do not agree that his doing so established as matter of law that he was not 'totally disabled' within the meaning of those words as used in the policy. It not infrequently happens that one suffering from injuries to his person performs duties pertaining to his occupation which he is wholly unable, in the reasonable and proper sense of those words so used, to perform; and that, as a consequence, because he was unable to do same, he suffers

death or an aggravation of his injuries. In a case in which such a result follows the performance of the duty, the performance thereof, instead of establishing that the assured was able to perform it, it seems to us, would establish the contrary. We think therefore that to construe the language in the policy what appellant contends it means would be unreasonable."

Surely the defendant will not contend that it is entitled to an absolutely literal construction of the clause in question, and that the performance, by the insured, of anything whatsoever in the line of his business, or professional duties, no matter how trivial, or under what circumstances it may have been performed, would bar a recovery. Such a claim would be unreasonable, yes, even absurd. To illustrate: Suppose Dr. Rathbun had been confined to his bed unable to rise therefrom because of severe pains and lameness he was suffering from the injury, yet under these conditions he might still be able to consult with and prescribe for patients, and even perhaps have dressed a wound, and that he had done so, would the defendant or any one say that for that reason he was not a subject of "total disability," under a proper and reasonable construction of these words as employed in the policy. We think no one could contend for a thing so unreasonable. To do so would be equivalent to a claim that—

"The defendants would be liable in no case unless, by the accident, the insured should lose his life or his reason." *Thayer v. Standard Life & Accident Ins. Co.*, 68 N. H. 577, 41 Atl. 182.

We think the evidence shows that the condition under which the insured undertook to prosecute his professional duties after the latter part of March were much the same in character as those suggested in the illustration, which he might have done in bed, although perhaps not so extreme. Except for the part the doctor took in actual operations, what he might have done in bed he undertook to do upon his feet and while sitting down at a time when under all probability he ought to have been in bed. Should the insured be penalized because, in total ignorance of the serious character of the injury he had received, he undertook to perform, as best he could, under distressing conditions, some of his professional duties, when he might reasonably not have attempted to do any work at all, and thus, without question, have held the insurer liable for loss from disability. Upon this point what the Appellate Court of Indiana said in the case of *American Liability Co. v. Bowman*, 114 N. E. 992, 65 Ind. App. 109, is apt:

"Under an accident policy providing for indemnity for total disability during the period that the insured was totally and continuously from the day of the accident disabled and pre-

vented from performing every duty pertaining to any business or occupation as a necessary result of the injury received, an injured workman can recover for the entire period in which he was, as a matter of fact, totally disabled, though he returned to work for a short time after the accident, when he was in such a condition that he could perform only part of his duties and he might reasonably not have attempted to do any work, since a construction of the policy which would defeat recovery because of a bona fide attempt to work would tend to penalize such attempt and encourage fraud and imposition on the company by remaining away from work when able to perform it."

For further illustrations upon this point, as well as to the construction the courts have given to the words "every" duty and "all" business duties, and to the phrase "any and every" kind of business, and other similar words and phrases frequently contained in accident insurance policies, see *Metropolitan Casualty Ins. Co. v. Cato*, 113 Miss. 283, 74 South. 114; *Commonwealth Bonding & Casualty Ins. Co. v. Bryant* (Tex. Civ. App.) 185 S. W. 979; *Gross v. Commercial Casualty Ins. Co.*, 90 N. J. Law, 594, 101 Atl. 169; *National Life & Accident Ins. Co. v. O'Brien's Ex'x*, 155 Ky. 498, 159 S. W. 1134; *North American Accident Ins. Co. v. Miller* (Tex. Civ. App.) 193 S. W. 750.

Recurring now to the two weeks' intermission in which the insured suffered but little or no pain, and consequently but little or no interruption in the prosecution of his ordinary professional labors, between the first three days of severe pain and the end of the two weeks, when pain and lameness returned, it is claimed by the defendant that this fact itself conclusively shows that the insured was not "continuously unable to transact all business duties from date of accident," and that the plaintiff is therefore not entitled to recover for the death loss under the provision above quoted. But, again, we feel compelled to hold, under the authorities above cited and others to be cited hereafter, that neither can this point be sustained.

We think it may be said to be a matter of common knowledge that in a great many, perhaps in a large majority of, instances in which bodily injuries are received, the real nature and extent of said injuries do not reveal themselves until a greater or less time in the future and after the first pains from the hurt shall have passed away. The injured part often lies dormant for an indefinite period, with but little or no consciousness of its existence by the person injured, although from the very moment of the accident, perhaps, the processes of nature may be busily engaged in developing what may have seemed to be but a slight hurt into a most serious and perhaps fatal injury. In such a case it cannot be said that the injury is not continuous and from the date of the

accident, nor can it fairly or justly be said that the disability is not continuous and from the date of the accident, because the injured party enjoys a brief respite from pain and suffering, only to be endured to a greater degree when perverted nature again asserts itself. Occurring then under the circumstances stated, to hold that a brief respite from the conscious ill effects of an injury during which respite the insured was able to transact the most, if not all, of his ordinary business should bar recovery, seems to us neither reasonable nor just. It is the undisputed evidence that at the end of two weeks the injury to the insured grew worse and worse until it culminated in his death five months later. All of the medical witnesses testified that the insured died of sarcoma, a malignant disease, and that the disease had its origin in the injury sustained, and that it was a gradual development from the date of injury to the date of death.

In the case of *Order of United Commercial Travelers v. Barnes*, 72 Kan. 293, 80 Pac. 1020, 82 Pac. 1099, 7 Ann. Cas. 809, "immediately" was the word employed in the policy, instead of "date of accident" in the case at bar. It must be admitted that the former term bears as strong, or even stronger, significance as to the time of beginning than does the latter, and yet in that case the court held:

"The word 'immediately,' as applied to the language of the indemnity contract, stated in the first paragraph of this syllabus, is not synonymous with 'instantly,' 'at once,' and 'without delay.' A disability is immediate, within the meaning of such contracts, when it follows directly from accidental hurt, within such time as the processes of nature consume in bringing the person affected to a state of total incapacity to prosecute every kind of business pertaining to his occupation." In the opinion the court said (page 305): "If the conditions of the contract can be extended, so that the word 'immediately' does not mean 'instantaneously,' 'at once,' and 'without delay' (as all courts agree), then a greater stretch of the conditions cannot be said to be unreasonable in allowing for the period that nature halts before inflicting penalties for her violated laws. In such cases the disability is immediate, within the meaning of the policy."

See, also, *Continental Casualty Co. v. Mathis*, 150 Ky. 477, 150 S. W. 507.

The defendant has cited a variety of cases in which the words "all," "each" and "every" and other similar terms have been construed, but we think in most instances in a different class of cases than the instant one and under different circumstances than those existing in the case at bar. It likewise cites some in which the terms of the policy have been construed more strictly against the insured, but we think the rules we have applied in this case, supported as they are by the authorities herein cited, are less technical and more consonant with reason and practical

justice than are those applied in the cases cited by defendant. For the reasons given, therefore, we think the defendant's third assignment of error should be overruled.

Another complaint of defendant is that the court allowed an item of \$125 for hospital expense, without any proof thereof. Hospital indemnity was one of the items provided for in the policy, and plaintiff made proof of the fact that the insured was actually confined in a hospital for the full time for which charge was made, but did not prove actual payment therefor or that a debt was actually incurred thereby. The provisions in the policy did not require either of these as a prerequisite to indemnity. And, as it is proved that the insured actually occupied a place in a hospital for the required time, an obligation on his part, or on the part of his estate, to make reasonable compensation therefor will be presumed; and, as the policy fixes what the compensation to the insured shall be, that is sufficient to require payment of this item by the defendant.

[4] The court rendered judgment for plaintiff in the sum of \$8,659 and costs of suit, to which was added an attorney's fee in the sum of \$1,167.67, to be taxed as part of the costs, and the same to bear interest at 7 per cent. per annum from date of allowance. The defendant complains of the amount allowed as attorney's fees as excessive, and that the court erred in holding that the same should draw interest. As was stated in the early part of this opinion, the defendant offered no direct testimony in its own behalf, but contented itself with the cross-examination of plaintiff's witnesses, and there was but little or no controversy upon the facts. It is claimed by counsel for plaintiff, however, that he was not aware that defendant would take this course until he had prepared for a serious contest. However, without disparagement of counsel's ability or belittling the importance or amount of labor bestowed by him in the case, we are of the opinion that in justice to all concerned this amount might well be reduced to a sum equivalent to 10 per cent. on the judgment recovered, or \$865.90. See *Bruner Co. v. Fidelity & Casualty Co.*, 101 Neb. 825, 166 N. W. 242. The court below allowed interest on this item, but we are of the opinion that no interest should be allowed. An additional sum of \$150 will be allowed the plaintiff for attorney's fees in this court.

The judgment of the lower court, modified as above indicated, will therefore be Affirmed.

FLANSBURG, J. (dissenting). It seems to me there can be no recovery in any event in this case, for the reason that the policy provides that there shall be no liability unless the injury shall, *from the date of the accident*, cause the insured to be totally and continuously unable to transact all business duties. The fact here was that for a period of two weeks after the injury the insured was about his business as usual. It was not the original injury, standing alone, which produced and brought about the death of the insured. It was the cancer resulting from, and no doubt brought on by, the original injury.

As to the question of the proximate cause of death, the injury may be considered to have been that proximate cause, since, through that injury and the processes of nature following it, death resulted; but, in order to determine whether or not that resulting death, even though it may be held to have been proximately caused by the original injury, is covered by the policy we must look alone to the terms and limitations contained in the policy itself.

It is quite clear that the insured was not totally and continuously, from the date of the accident, disabled. From all outward manifestations, the cancer did not have its inception or begin its growth for two weeks or even a longer period, after the accident had been sustained. It is entirely legitimate that the company should limit its liability, in case of death, to those occasions where death results within a given period from the date of accident, such as a 90-day period, or where death results from an accident which continuously and totally disables the insured. Such provisions are reasonable. Where liability is confined to death resulting from such accidental injuries, some proof is furnished, by the fact of continuous and total disability immediately following and continuing from the date of the accident, that the accident was, itself, the cause of death, and that death was not due to some new and later intervening or contributing cause. The company may desire to write a policy to cover those deaths only which in such manner appear to be more directly connected with the accident, and this it is entirely free to do.

It seems to me, under this provision alone, and more especially when considered in the light of the clause providing that the company should not be liable where death was contributed to by disease, that the loss in this case is not covered, and that the beneficiary is not entitled to a judgment.

MULLALLY v. HASLAM. (No. 21689.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Municipal corporations $\S$ 706(8)—Instructions on negligence held warranted by evidence.

Record examined, and held that the court did not, in instructions Nos. 1 and 6 given on its own motion, and referred to in the opinion, submit allegations of negligence where no evidence was offered in support thereof.

2. Appeal and error $\S$ 216(3) — Defendant, failing to ask more specific instructions on negligence, cannot complain.

Where the basis of plaintiff's cause of action was the alleged negligent operation by defendant of his car in violation of an ordinance, and where the court's instructions did not specifically point out the particular provisions of the ordinance alleged to have been violated, but did in a general way submit their violation as alleged in the petition, and the defendant having failed to ask specific instructions thereon, he cannot, on appeal, complain of the court's instructions.

3. Appeal and error $\S$ 882(12) — Defendant cannot complain of court's instructions substantially similar to those requested.

Error cannot be predicated upon the giving of an instruction substantially similar to one requested by the party seeking to reverse the judgment. Instructions given by the court on its own motion and those given by the court at the request of the defendant and appearing in the opinion, held to present to the jury substantially the same issues.

4. Damages $\S$ 132(1)—\$6,000 for minor injuries from which plaintiff had recovered and a permanent injury to left shoulder and arm held excessive by \$2,000.

Evidence examined, and held that, while the verdict is excessive, it was not the result of passion or prejudice, and, if a remittitur be filed in the amount stated in the opinion, the judgment of the lower court will be affirmed in that amount.

(Additional Syllabus by Editorial Staff.)

5. Municipal corporations $\S$ 706(6)—Evidence held to sustain verdict for personal injuries received in street collision.

In an action for personal injuries from a street collision between defendant's automobile and a coal wagon on which plaintiff was riding, held that refusal to direct a verdict for defendant was not error.

6. Damages $\S$ 163(4)—It will not be presumed plaintiff, suing for personal injury, could continue to command highest price for his labor throughout his expectancy.

Where plaintiff, seeking damages for personal injuries, was a laboring man and at the time of injury as well as trial, labor was commanding the highest price in the history of the country, it will not be presumed that he could continue to command such price for the remain-

der of his expectancy, in determining the amount of damage.

Appeal from District Court, Dodge County; Button, Judge.

Action by Michael Mullally against George Haslam. Verdict and judgment for plaintiff, and the defendant appeals. Affirmed on condition of filing remittitur, otherwise reversed and new trial granted.

Courtright, Sidner, Lee & Jones, of Fremont, and Kennedy, Holland, De Lacy & McLaughlin, of Omaha, for appellant.

J. E. Daly and J. C. Cook, both of Fremont, for appellee.

Heard before MORRISSEY, C. J., ROSE and FLANSBURG, JJ., and DICKSON and TROUP, District Judges.

DICKSON, District Judge. This case was begun in the district court for Dodge county to recover damages. The plaintiff alleged that the defendant negligently and carelessly ran into and collided with the coal wagon in which he was riding, thereby permanently injuring him. A trial was had to a jury, which resulted in a verdict for plaintiff for \$6,000, upon which judgment was entered, and defendant appeals to this court.

It appears that plaintiff was assisting his son in hauling coal to the electric light plant situated on the west side of Main street in the city of Fremont, the son doing the hauling and unloading, and the father loading the wagons from the cars at the railroad track. Access to the light plant was by an alley running east and west and to the south and leading to and from Main street. After delivering the last load of coal, which was about midnight, the plaintiff and his son started for home, traveling the alley from the light plant to Main street, where they turned south along the west side. At this time the defendant was driving to the north on Main street in his automobile, and at a point where the team and wagon was turned into Main street, the defendant's car struck the tongue of the wagon, knocking down one or both horses, and throwing the plaintiff down in the wagon, injuring him.

Plaintiff predicates his cause of action upon a violation by defendant of certain ordinances of the city of Fremont, as well as the laws of the state. It is charged by plaintiff in his petition that the defendant negligently and carelessly, and in violation of the ordinances and the laws of the state, drove his car along the west side of Main street at a high and dangerous rate of speed, and failed to keep a vigilant watch ahead for other vehicles which were entering upon the street, and failed to stop or attempt to stop or check the speed of his car in the shortest time and space possible when the defendant saw, or could by the exercise of ordinary

care, have seen, the team and wagon in time to stop his car and avoid the collision.

The ordinance referred to in the petition and offered in evidence contains many provisions that are not material in the consideration of this case, and only those that bear upon the issues will be noticed. The ordinance provides that vehicles shall be driven in a careful manner, with due regard for the safety and convenience of other vehicles; that vehicles shall keep to the right of the center of the street; that vehicles meeting shall pass to the right; that drivers of motor vehicles shall have their cars under control; that no vehicle shall be operated at a greater rate of speed than is reasonable or proper, having regard to the traffic and use of the highway, or so as to endanger the life and limb of any person, or in any event at a greater rate than 10 miles an hour in the congested district, and outside of the congested district no car shall be operated at a greater speed than 12 miles an hour.

Many errors are assigned, but only those presented by the appellant's brief will be considered. It is contended by the appellant in his brief that the court erred in giving instructions Nos. 1, 4, and 6, and in refusing to give instructions Nos. 1, 3, 4, and 5, requested by him; that the verdict of the jury is not supported by and is contrary to, the evidence, and is the result of passion and prejudice. The assignments of error will be considered in the order named.

The jury are told in instruction No. 3 that the matters contained in instruction No. 1 are taken from the pleadings and are not evidence. By instruction No. 4 the jury were instructed that the burden is upon the plaintiff to prove, by a preponderance of the evidence that the defendant was guilty of negligence in some way or ways set out in instruction No. 1, and that such negligence was the proximate cause of plaintiff's injury, if any. By instruction No. 1, the jury were instructed:

"Plaintiff claims the cause of said collision was the negligence of the defendant in operating his automobile in violation of the law and the ordinances of the city of Fremont, and in driving his machine on the wrong side of the street at a high and dangerous rate of speed."

In instruction No. 6 the court instructed the jury:

"It is the duty of parties driving vehicles upon the streets to obey the ordinances of the city and the laws of the state with reference to such use of public thoroughfares. And, in this case, it was the duty of defendant to obey the ordinances of the city of Fremont with reference to the use of its streets for automobiles, and also the laws of the state and the usual rules of the road. If you find the defendant failed in any or all the above particulars, such fact or facts should be considered by you with all other evidence as tending to prove negligence."

[1, 2] The appellant insists that the court, by these instructions (Nos. 1 and 6) submitted allegations of negligence where no evidence was introduced in support thereof, and cites many decisions of this court in support of this contention. We have no fault to find with the rule announced in these cases; they state the rule correctly. But were allegations of negligence submitted without evidence to support them? We think not. The theory of the plaintiff's case was that the defendant was negligent in driving on the wrong side of the street at a dangerous and excessive rate of speed, and his failure to have his car under control, to keep a vigilant watch ahead, and that he failed to stop or check the speed of his car after seeing the team and wagon, or, by the exercise of ordinary care, could have seen them. The evidence was confined to these issues as nearly as possible in the trial of a case. There was, however, evidence as to the lights on the defendant's car, and other matters pertaining to the car, its occupants, their places of residence, the course of travel before entering upon Main street, the purpose for which defendant was traveling this street and many facts preceding and succeeding the collision, not directly an issue in the case or alleged as a ground for recovery. Some of these acts may have been in violation of some provision of the city ordinance or laws of the state, but no recovery thereon was sought either in the pleadings or the evidence; and, while these were not specifically eliminated by the court in its instructions to the jury, they were not presented as issues. The basis of plaintiff's cause of action was the alleged operation by defendant of his car in violation of the ordinances and the laws of the state; and, while the court's instructions did not specifically point out the particular provisions of the ordinance alleged to have been violated, yet the instructions did, in a general way, submit their violation as alleged in the petition, and the defendant cannot now complain, he having failed to ask specific instructions thereon. *Olmsted v. Noll*, 82 Neb. 147, 117 N. W. 102.

[3] Again, before a reversal could be had for submitting allegations of negligence where no evidence was introduced in support thereof, it must appear that the jury were misled in their consideration of the facts of the case. *Mannion v. Talvo*, 76 Neb. 570, 107 N. W. 750. Instructions must be considered as a whole. A consideration of the instructions given by the court on its own motion in connection with those given at the request of the defendant leaves him without complaint.

The following instruction (No. 6) was given by the court at the request of the defendant:

"You are instructed that unless you find the defendant guilty of negligence, in whole or in part, as charged in his petition, then your verdict must be for the defendant, and the burden

is on the plaintiff to prove, by a preponderance of the evidence, that the defendant was negligent, and that such negligence was the proximate cause of plaintiff's injury, and that plaintiff sustained injuries as a result thereof."

And, again, the court was requested by defendant and gave instruction No. 7, which reads as follows:

"You are instructed that certain ordinances of the city of Fremont have been introduced in evidence, and as to these you are instructed that the violation of such ordinances, if you find there was, does not amount to negligence as a matter of law, but is a fact to be considered, together with all the rest of the evidence in the case, in determining whether the defendant exercised care."

By these instructions the defendant presented to the jury substantially the same issue as stated by the court in its instruction No. 6, and thereby adopted and approved the theory of the court and, having done so, he cannot now complain. Error cannot be predicated upon the giving of an instruction substantially similar to one requested by the party seeking to reverse the judgment. *Jonasen v. Kennedy*, 39 Neb. 313, 58 N. W. 122. The complained-of instructions, when considered with those given by the court on its own motion, fairly presented to the jury the issues as made by the pleadings and the evidence and are far from being prejudicial to the defendant.

Did the court err in refusing to give instructions Nos. 1, 3, 4, and 5, requested by defendant? Instruction No. 1 was a peremptory instruction to find for the defendant. By No. 3 the jury are instructed that, as to the allegation that the defendant was operating his car at a dangerous and excessive rate of speed, they should find for the defendant. By No. 4 the jury are instructed that, as to the allegation that the defendant failed to keep vigilant watch ahead, they should find for the defendant. And by No. 5 the jury are instructed to find for the defendant on the allegation that the defendant failed to stop or check his speed and avoid the collision. The giving of instructions Nos. 3, 4, and 5 would have eliminated every question of negligence alleged in the petition, other than the allegation that the defendant was negligent in traveling on the wrong side of the street. As to whether the defendant was driving at a dangerous rate of speed, and whether he was looking ahead, and whether he had his car under control, and whether he failed to stop his car when he discovered the presence of the team and wagon in the street, or by the exercise of due care he could have discovered them, were questions of fact for the consideration of the jury, and are largely dependent upon the part of the street he was traveling upon and the rate of speed. To a great extent, they are dependent upon each other, and not subject to separation, and

must be considered together. These requested instructions presented to the court the sufficiency of the evidence on the issues, thus presented. As to these issues, the evidence was conflicting and it was for the jury to pass upon them under proper instructions. The plaintiff's son, the driver of the team, testified that the defendant's car struck the wagon tongue, knocking down both of his horses; that this happened as he was driving on the street and just as the horse stepped on the pavement, the hind wheels of the wagon being on the sidewalk; he says he noticed the car one-half block away (190 feet) to the south, about the middle of the street, and that he just let the wagon drop down on the street and turned the horses south and close to the curb; that the car was traveling 30 miles an hour; that when it struck the tongue of the wagon it drove the wagon back to the curb, knocking down both horses, one falling back under the wagon, the other falling out on the street, the tongue being pulled over him; that the tongue was driven into the car, and that fire flew out of it and glass fell on the street; that he turned the team as fast as he could after he saw the light of the approaching car; that the car stopped 100 feet from the place of collision; that the first thing he did after he saw the car approaching was to jerk the horses around to the right; that he got them to the curb, the right-hand horse having his hind feet against it; that when he came out of the alley he looked first to the north, and, just as the horses were going down the slope, he noticed the lights from a car coming from the south on the west side of the street.

The plaintiff called as a witness an employee in the Monich garage, which was across the street from the place of collision, who testified he heard a crash; that he saw the defendant's car up the street in the middle or west of the middle of the street; that the hind wheels of the wagon were on the sidewalk and the front wheels in the gutter, and the horses were swung sharp to the right over against the curbing. An employee of the electric light plant testified that about 12:30 a. m. he was sitting by the side door, and a coal wagon had just passed; a few minutes later he heard a terrific smash; that it frightened his wife; that he opened the door and looked out and saw the back wheels of the coal wagon on the sidewalk, and noticed the left-hand horse down on the pavement. The owner of the electric garage, where the defendant's car was taken, testified that he saw the defendant's car after the collision; identified the radiator in court; said that the hood of the engine was wrinkled up "some awful bad;" that the main leaf of the spring was doubled back, letting the front wheel slide back and jamming the bolts that held the spring to the front axle; that the front lights were tipped back, smashed

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completely; that the wheel struck something, evidently, and that enough weight came on it that doubled the spring, kind of put a kink in it; that the front axle was out of line from four to seven inches, so it was impossible to steer.

The defendant testified that from Military avenue he was driving principally in the middle of the street; that he slowed up a little at the Cronin residence (this was on the west side of Main street and fronting Main street), as he thought of putting one of the occupants of the car out there, but that he decided to go on and put her down coming back; that he saw nothing of the team until it was possibly 4 or 5 feet away; that he was then traveling 12 miles an hour; that he put on the brakes and turned to the east; that by the time he struck the pole of the wagon he was going not more than half that rate. The defendant's stenographer was called by the defendant and testified that she rode in the front seat of the car; that she did not notice the team until they were within 2 or 3 feet of it, and that she thought they were in about the center of the street; that she put her hands up to her face, being afraid of glass from the windshield, and defendant made a quick turn to the right and stopped the car; that the tongue went into the radiator, and the collision knocked one of the horses down. The other two occupants of the car were ladies, riding in the back seat: They say they saw nothing until they heard the crash: One testified that she was looking west towards the Bronin residence, where she lived, at the time of the collision, and that the car was traveling in about the middle of the street.

[5] As to whether the defendant was driving on the wrong side of the street, and as to whether he was travelling at a high and dangerous rate of speed, and as to whether he had his car under control, were disputed questions of fact and properly for the consideration of the jury; and for the trial court to have instructed the jury as requested by the defendant would have been error. The rule in this state is:

"Where the facts are disputed, it is solely the province of the jury to determine the same; and, whether the facts be disputed or undisputed, if different minds might honestly draw different conclusions from them, the case is properly left to the jury." *Ogden v. Sovereign Camp*, W. O. W., 78 Neb. 806, 118 N. W. 524.

From a careful examination of the evidence in this case, we are convinced that the trial court did not err in refusing to direct the jury to return a verdict for the defendant, and that the evidence was sufficient to

sustain a verdict for the plaintiff. "A verdict will not be set aside on the ground of want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong." *Union P. R. Co. v. Fickenscher*, 74 Neb. 497, 105 N. W. 39, 110 N. W. 561.

[4, 6] This leaves for consideration the question: Is the verdict excessive and the result of passion or prejudice? That the plaintiff sustained numerous minor injuries from which he recovered is not questioned, leaving no permanent injury other than to his shoulder. The extent of his injuries was fully presented to the jury by proper instructions. His physician testified that his permanent injury was a fracture of the coracoid process of the left shoulder, impairing the strength and limiting the action and use of his arm, and that he was also permanently affected with hysteria resulting from the injury to his shoulder.

The plaintiff is a laboring man, 65 years of age, with an expectancy of 11 years, depending upon his day's labor for a livelihood. He testified that he had no use of his left arm. At the time of the injury, he was earning, and had been for some time, \$7 to \$10 a day helping his son in delivering coal to the light company. The record is silent as to his occupation prior to his coming to Fremont about a year before, except for a short time he drove a team for Swift & Company in Sioux City, and before that he was engaged in farming. We must take judicial notice of the change of the times. At the time of the injury, as well as at the trial of the case, labor of all kind was commanding the highest price in the history of our country. This man had been and was engaged in the very hardest kind of manual labor. It is not reasonable or fair to presume that he could continue to do so the remainder of his expected days. While the verdict of the jury was much more than would compensate the plaintiff for the damages sustained, yet we do not think it was the result of passion or prejudice, but rather due to the times and conditions existing at and before the trial—the seeming little value placed upon the dollar. The plaintiff is entitled to be fully compensated for all damages sustained, and we are convinced that, under the evidence and the changed conditions of the time, \$4,000 will fully compensate him for all damages suffered. And, if he will, within 20 days from the filing of this opinion, file a remittitur in this court of \$2,000, the judgment, so reduced, will be affirmed; otherwise the case will be reversed and a new trial granted.

Affirmed on condition.

BERLINER v. DIRECTOR GENERAL OF RAILROADS et al. (No. 21619.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Carriers $\S$ 219(4)—A notice to a shipper, after failure to make connections held to constitute delay under original shipping agreement.

Where live stock is tendered to a carrier for shipment and the shipment is received and accepted and transportation begun, and where the carrier, through its default, fails to make connections with another carrier and returns the cattle to its pens at the originating point of shipment, to hold them until the next day, for the purpose of delivery to the other carrier then, the fact that it notifies the shipper of its failure to ship and informs him that the stock will be forwarded the following day, if agreeable, does not alone amount to a complete breach and a termination by the parties of the original shipping agreement and constitute a redelivery of the stock to the shipper, so as to give rise to a new agreement for shipment to be made on the following day, but constitutes only a delay in transportation under the original shipping agreement.

2. Carriers $\S$ 229(2)—Measure of damages for delayed shipment stated.

The measure of damages in such a case is the difference between the value of the live stock at the time and place they ought to have been delivered and their value at the time of their actual delivery, or at the first available market after they were actually delivered.

3. Appeal and error $\S$ 1050(1)—Where conflicting testimony was evenly balanced, admitting improper evidence of expert held prejudicial error.

In an action to recover for damages sustained during delay in transportation of live stock, where the testimony of plaintiff and defendant, on the question of the amount of damages, is in sharp conflict and evenly balanced, the improper admission of the testimony of one offered as an expert, purporting to show that the damages were in the amount contended for by plaintiff, held prejudicial error.

4. Evidence $\S$ 553(2)—Admitting expert's answer to hypothetical question containing insufficient facts is error.

It is error to allow a witness, offered as an expert, to give his conclusions on the values of live stock, bearing upon the measure of damages, where the hypothetical question put to him does not contain sufficient facts, based upon some evidence introduced, to fairly reflect an issue tendered by the case, and to furnish a sufficient premise upon which to base an intelligent conclusion.

Appeal from District Court, Douglas County; Leslie, Judge.

Action by David Berliner against the Director General of Railroads and the Union

Stockyards Company. Verdict and judgment in favor of plaintiff and against the Stockyards Company, but dismissing the action as to the Railroad Company, and the Union Stockyards Company appeals. Judgment dismissing action against Railroad Company affirmed, judgment against Union Stockyards Company reversed, and cause remanded.

Brown, Baxter & Van Dusen, of Omaha, for appellant.

Walter W. Hoyer, of Omaha, for appellee Berliner.

Byron Clark, Jesse L. Root, and J. W. Weingarten, all of Omaha, for appellee Director General of Railroads.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

FLANSBURG, J. This was an action brought by the plaintiff against the Union Stockyards Company, of South Omaha, and the Chicago, Burlington & Quincy Railroad Company, to recover for damages caused by an alleged unreasonable delay in transportation of live stock. Verdict and judgment was in favor of the plaintiff and against the Union Stockyards Company, but against the plaintiff and in favor of the railroad company. The action as to the railroad company has been dismissed. The defendant Union Stockyards Company appeals.

The defendant urges two grounds for reversal: (1) That the court erroneously instructed the jury as to the measure of damages; and (2) improperly admitted certain testimony.

The jury were instructed that the measure of damages would be the difference between the value of the cattle at St. Joseph at the time they should, without any unreasonable delay, have been delivered, and their value upon the first available market after delivery. Defendant concedes that such measure of damages is the correct one in cases of a delay in transportation, but contends that this is not a case of delay in transportation but one of a complete failure to perform a contract, or undertaking of carriage, and, in fact, a refusal to carry, and that the measure of damages should have been the difference between the market value of the stock at South Omaha at the time of breach and the market value at St. Joseph at the time the stock should have arrived.

[1] The testimony relative to that question shows that the plaintiff, a dealer in live stock, on October 10, 1918, was holding, in the yards of the defendant company at South Omaha, two carloads of beef cattle. Plaintiff had been unable to make a desirable sale of the cattle in Omaha and decided to ship to St. Joseph, Mo. In order to conceal his identity as owner and shipper of the

stock, he acted through the live stock commission firm of Donohue & Randall, of South Omaha, and used the name of Hylen, book-keeper of that firm, as shipper and consignor. The stock was tendered to the defendant stockyards company, for shipment to St. Joseph, on October 10, 1918. The defendant accepted the shipment in ample time, under its rules, to have allowed delivery to the railroad for the train scheduled to leave at 8:40 that evening. Defendant, however, through some fault or neglect, did not get the cattle loaded and the cars switched upon the proper tracks until between 9 and 10 o'clock, and after this train had departed. The cattle were left in the cars until 3:10 a. m., when they were unloaded by the defendant and returned to the pens of the stockyards company.

On the following morning the agent of the defendant Union Stockyards Company telephoned to Hylen, whom he properly believed to be the owner and shipper of the stock, that defendant had failed to load the stock in time for shipment on the train of the previous evening, and informed Hylen that defendant "would see that the stock were fed and watered, and that they would go out that night." To this Hylen said, "That was all right." The uncontradicted testimony is that Hylen gave no instructions as to shipment, disposal, care or custody of the stock, nor did he agree to assume to take charge of it. The defendant did not, on the other hand, disclaim any obligation to continue to care for the stock, or to continue in the complete performance of its agreement, already partially undertaken. The telephone conversation outlined above seems to have been all that was said upon the subject.

During the day the cattle were placed in the yards belonging to the defendant company, customarily used by the commission firm above mentioned, but it does not appear that the commission firm, nor that Hylen, was given any notice as to the exact disposal of the stock. The exclusive control of the defendant company over the stock during that day was in no way interfered with nor interrupted.

We do not think these facts bear out the contention of the defendant that the obligation, arising out of the agreement to ship, made on October 10, had been terminated by the telephone conversation on the 11th, and that a redelivery of the stock had been tendered and accepted by the shipper, and that the shipment of the stock on October 11 became a new shipment. On the other hand, it appears that the stock had been, on October 10, tendered for shipment; that it had been accepted for shipment by defendant, and that transportation had begun; that, through the failure of the defendant, a delay of one day had been caused, and that the defendant had notified the shipper of that delay.

Though the plaintiff may be said to have

had an opportunity to retake the stock and sell it upon the Omaha market, he was not bound to do so. He had the right to expect and demand a complete performance of his agreement, which had been undertaken by the defendant, and to require an entire transportation. The conversation between the parties would indicate that they construed their relation as a continuing one, and that the occasion was considered by them as a mere delay in transportation, and not as a complete breach of the agreement to transport and redelivery to the shipper of the live stock agreed to be transported. The shipment, furthermore, went out on the original billing made on the previous day. Under the facts stated, it seems clear to us to be a case of delay in transportation merely. The defendant knew that the stock was being shipped to St. Joseph, to be tendered on the market there, and the plaintiff, by reason of the unreasonable delay caused by the defendant, was entitled to those damages which naturally followed, and as would fairly and reasonably be supposed to have been in contemplation of the parties when the shipping contract was made.

[2] The court's instruction, therefore, that the plaintiff was entitled to recover the difference between what the cattle would have sold for on the market at St. Joseph, had there been no unreasonable delay, and what such cattle would have sold for on the first available market after they actually did arrive, was the proper measure of damages.

Even where a shipping contract has been entered upon between the parties and where there has been a failure to accept and receive the shipment according to the agreement, there are decisions holding that the plaintiff is entitled to recover according to the measure of damages just stated. *Chicago, B. & Q. R. Co. v. Todd*, 74 Neb. 712, 105 N. W. 83, and *Levy v. Nevada-California-Oregon R. Co.*, 81 Or. 673, 160 Pac. 808, L. R. A. 1917B, 564.

[3] The defendant further contends that certain testimony, offered as that of an expert, of one Pruss, a dealer and shipper of live stock, and given in response to a hypothetical question, should have been excluded.

The question propounded to the witness was as follows:

"Assuming, Mr. Pruss, that 47 head of cattle, weighing—Western cattle of a class of good to choice—weighing in Omaha on October 8th about 53,590 pounds, were shipped on the 11th, the evening of the 11th day of October, 1918, to South St. Joseph, arriving there on October 12, 1918, being held in the stockyards pens Saturday, Sunday, and were placed on the market Monday morning following, and assuming further that the market for that class of cattle in South St. Joseph on October 11, 1918, was \$13.50 to \$14.75, could you state what the difference in value of such cattle would be on Monday as against Friday?"

The witness was allowed to answer this question and to give his conclusions on value over the objection of the defendant. The question put to the witness called for his opinion as to the depreciation in value of the stock, but was quite incomplete as a hypothetical question, by reason of its failure to inform the witness of the weight of the cattle at the time of delivery to defendant on October 10, the condition of the cattle then as compared to the condition after arrival at St. Joseph, the amount of shrinkage or excess shrinkage which they had sustained, their appearance after their arrival, the condition and circumstances surrounding the shipment, the care and attention they had received, the time consumed in transit and in pens, and the prevailing market prices on October 14, the time of the first available market after arrival at St. Joseph, as compared to the market price at the time the cattle should have arrived on October 11. In other words, the question calls for the comparison in value of the cattle on the St. Joseph market on October 11 and on October 14, without in any way explaining to the witness or giving sufficient data from which the witness could ascertain the difference in weight or condition of the cattle on those two respective dates, and without informing the witness what the market price of cattle was at St. Joseph on one of the dates in question. Of these facts the record does not show that the witness had any knowledge.

[4] The answer of the witness, therefore, to the question appears to have been purely guess and conjecture on his part. His answers to the questions tendered should have been excluded. The testimony of this witness was to the effect that there would have been a depreciation in value of the cattle from October 11 to October 14 of somewhere between \$800 and \$1,100.

The only other testimony in behalf of the plaintiff, upon the condition and value of the stock, was the testimony of plaintiff himself. His testimony was somewhat uncertain and indefinite, but, in its final analysis, was to the effect that there had been a shrinkage in weight to the extent of 40 pounds a head between the time, on October 11, when the stock was delivered to the defendant, and the time, on October 14, when the first available market was obtainable after delivery at St. Joseph, and that the normal shrinkage between Omaha and St. Joseph would not have been more than 20 pounds. His testimony, therefore, showed that there had been a loss of 20 pounds a head, due alone to excess shrinkage. He further testified that the hides of the cattle were muddy and that the cattle appeared stale, and that the value of the stock was from \$800 to \$1,200 less on Monday, October 14, in their then condition, than their value would have been on Friday, October 11, in the condition in which they should have arrived.

In behalf of the defendant, a commission agent at St. Joseph, the one to whom the plaintiff had shipped his stock, who saw the cattle while they were there in the pens at St. Joseph, testified to the effect that the stale appearance of the cattle would have depreciated their value from 25 to 50 cents a hundred pounds only, making a total depreciation on that amount of somewhere from \$184 to \$268, and he further testified that the normal average shrinkage in weight of such cattle, shipped from Omaha to St. Joseph, was in the neighborhood of 40 pounds a head. His testimony, therefore, in direct contradiction to that of the plaintiff, was to the effect that there had been no excess shrinkage in the weight of the cattle, due to delay in transit, and that their depreciation in value, owing to their stale appearance, would be no more than \$268.

It is the contention of the plaintiff that, though the testimony of Pruss may have been improperly admitted, it could not have been prejudicial, since the testimony given by the plaintiff stands uncontradicted in the record. In view of the testimony of the plaintiff's commission agent, who testified in behalf of the defendant, as we have above outlined, we are unable to agree with plaintiff that plaintiff's testimony stands uncontradicted, nor can we come to the conclusion that the wrongful admission of the incompetent testimony, given by the witness Pruss, should, under the ruling in Pullman Palace Car Co. v. Woods, 76 Neb. 694, 107 N. W. 858, be held to be harmless error.

The vital question in this case, and practically the only question left for the jury to determine as the case finally resolved itself, was the question of the amount of damages—the extent of the depreciation in value, due to excess shrinkage and the cattle becoming stale. With the sharp conflict between the testimony of the plaintiff and that of the commission merchant at St. Joseph, we cannot say that the defendant was not prejudiced by the incompetent testimony of Pruss, purporting to show that the depreciation in value of the stock was from \$800 to \$1,100. 4 O. J. 997, § 2980. The plaintiff's testimony, being that of an interested witness, would no doubt have been given less weight by the jury had it not been corroborated and supported by the testimony of the witness Pruss, testifying as an expert, and who, by his testimony, showed that he had no interest or concern in the outcome of the case.

The judgment of the lower court dismissing the action against the Director General of Railroads is affirmed, but the judgment against the Union Stockyards Company is reversed, and the cause remanded for further proceedings.

Reversed.

BEELER et al. v. SUPREME TRIBE OF BEN HUR. (No. 21600.)*

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Insurance $\S$ 253, 265, 723(6)—Questions and answers in application for insurance held representations, not warranties; representations and warranties distinguished; it is necessary in defense for falsity of statements that defendant prove the alleged fraud.

Certain statements, consisting of questions and answers in an application for insurance, set out in the opinion, examined, and held to be representations, and not warranties; that, in order to establish a defense based on the alleged falsity of said statements, it is incumbent on the defendant to prove that said questions were asked and answered by assured as written in the application; that they were false in some respect material to the risk; that they were made by the assured knowingly with the intent to deceive; that the defendant relied upon said representations and was deceived by them to its injury.

(Additional Syllabus by Editorial Staff.)

2. Appeal and error $\S$ 994(2)—Credibility of witnesses for jury.

In an action on a beneficiary certificate defended on the ground of false representation in the application as to insured's prior illness, held that the credibility of the witnesses and weight to be given their testimony as to such matter was for the jury.

3. Trial $\S$ 349(2)—Submission of special interrogatories discretionary.

The submission of special interrogatories when requested is within the discretion of the court.

4. Trial $\S$ 260(1)—Refusal of instructions on matters covered by others not error.

Refusal of instructions on matters covered in substance by instructions given is not error.

5. Trial $\S$ 191(1)—Instructions assuming facts are properly refused.

Refusal of instructions invading the jury's province by assuming facts was proper.

6. Insurance $\S$ 817(2)—In an action on life beneficiary certificate, the burden rested on defendant to prove defense of insured's false representations.

In an action on a beneficiary certificate, the burden of proving every material allegation in the amended answer rested upon the defendant insurer, including the allegations that assured made a written application containing false answers to questions.

7. Appeal and error $\S$ 1066—Erroneous instruction will not warrant reversal unless prejudicial to appellant.

The giving of an instruction not applicable to the issues or evidence will not work reversal of a judgment, where the rights of the complaining party are not prejudiced thereby.

Appeal from District Court, Furnas County; Eldred, Judge.

Action by Cornelius F. Beeler and another, as guardians of the person and estate of Margaret E. Axtell, a minor, against the Supreme Tribe of Ben Hur, a fraternal beneficiary society. Verdict and judgment for plaintiff, and the defendant appeals. Judgment modified and affirmed.

Garlow & Long, of Columbus, and R. J. Harper, of Beaver City, for appellant.

Lambe & Butler and J. F. Fuhs, all of Beaver City, for appellees.

Heard before LETTON, DEAN, and DAY, JJ., and CLEMENTS and MORNING, District Judges.

ELLIOTT J. CLEMENTS, District Judge. This action was brought by the plaintiffs, as guardians of Margaret E. Axtell, minor daughter and beneficiary of J. Edward Axtell, deceased, on a beneficiary certificate for \$2,000 issued on June 23, 1916, by defendant to said J. Edward Axtell, who died April 1, 1917. From a verdict and judgment in favor of plaintiffs, defendant appeals.

The petition is in the usual form employed in such a case, and all the material allegations thereof are admitted in defendant's amended answer. Defendant pleads fraud on the part of the assured in procuring said insurance as a defense to the action. The substance of the allegations in the answer on which this defense is based is that Axtell made a written application for membership, which is a part of the insurance contract, in which appears the following questions and answers thereto by applicant, to wit:

"How long since you consulted or were attended by a physician? One year." "For what disease? La grippe." "Have you had any severe illness or injury not mentioned above? No."

That said answers were false and fraudulent; that assured well knew that he had been treated shortly before for bronchitis and pneumonia; but prior to the date of said application applicant was suffering from heart trouble and was in a weakened condition, which he well knew, and failed to reveal said facts to defendant, all of which were unknown to it; that said fraudulent misrepresentations and concealment were intentional for the purpose of deceiving defendant; and that, if it had known the truth in regard to said matters, it would not have accepted said Axtell as a beneficiary member. In the reply plaintiffs deny every allegation in the answer, and allege that at the time said certificate was issued, prior thereto, and during the lifetime thereof, defendant had full knowledge of the true physical condition of assured, and with such knowledge collect-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Modified on rehearing December 12, 1921.

ed and retained all monthly dues on said certificate.

[1] Under the rule for distinguishing between representations and warranties in an application for insurance laid down in *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, and followed in *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, 69 N. W. 135, *Ætna Life Ins. Co. v. Rehlaender*, 68 Neb. 284, 94 N. W. 129, 4 Ann. Cas. 251, *Goff v. Supreme Lodge, Royal Achates*, 90 Neb. 579, 134 N. W. 239, 37 L. R. A. (N. S.) 1191, and *Yonda v. Royal Neighbors of America*, 96 Neb. 730, 148 N. W. 926, and other cases, we have no hesitancy in holding that the statements of assured in the application complained of are representations, and not warranties. It is apparent that defendant entertained the same opinion when it filed its amended answer herein, for the defense therein pleaded is not that of a breach of warranty, but is that of fraud and deceit on the part of the applicant in making said alleged false answers and misrepresentations, which defendant alleges were made intentionally for the purpose of deceiving defendant.

The chief distinction between a warranty and a representation in insurance law is that the former is the assertion by the assured of some fact, on the literal truth of which the validity of the policy depends, without regard to the materiality of such fact; while a representation is also the assertion by the assured of a fact, but the validity of the policy does not depend upon the literal truth of said assertion. *Ætna Ins. Co. v. Simmons*, supra.

In the case at bar the defendant treated the answers complained of as representations, pleaded their falsity, alleged that said false statements were knowingly and intentionally made to deceive defendant; and, in order to establish such defense, it was incumbent on the defendant to prove that said questions were asked and answered by assured as written in the application; that they were false in some respect material to the risk; that they were made by the assured knowingly with the intent to deceive; that the defendant relied upon said representations and was deceived by them to its injury. *Kettenbach v. Omaha Life Ass'n*, supra; *Ætna Life Ins. Co. v. Rehlaender*, supra; Rev. St. 1913, § 3187. Defendant recognized the correctness of the foregoing propositions and on the trial assumed the burden and introduced evidence tending to prove all of them.

In their brief counsel for defendant have abstracted the evidence introduced by them to prove the answers to the questions complained of were false and that assured knew that they were false. The only evidence referred to or offered to prove that it had not been one year before the date of the application since Axtell had consulted or was attended by a physician is the testimony of Dr. Barta. This witness testified that he

made an examination of assured some time in the year 1916; that he did not know and would not say whether it was before June or not. On being asked whether he would say it was in the first or last half of the year 1916, he answered that, if he was to guess, he would put it in the first half, but that he could not say definitely when it was. Fraud is not presumed and cannot be established by the guess of a witness. This evidence falls far short of proving conclusively the falsity of said answer.

[2] To prove the falsity of assured's answer to the question, "Have you had any severe illness or injury not mentioned above?" counsel refer to the testimony of the witness Beranek to the effect that in the fall of 1915 Axtell was sick and told witness that he had dropsy; also the testimony of Drs. Brewster, Green, and Week. Dr. Brewster testified that he had treated assured for heart trouble in September, 1914; Dr. Green that he had treated him about the same time for bronchial pneumonia; and Dr. Week that he had treated him in the spring of 1915 for pneumonia. There is no evidence to show whether the sickness testified to by the witness Beranek was of long or short duration. It evidently was not very serious, as it is not shown that a doctor was called, and none of the physicians testified that Axtell had dropsy or that he was ever treated therefor. Not one of said physicians testified that he informed assured what he was treating him for, and the only competent evidence to show that assured knew he had, or had been treated for, any of the diseases mentioned by the doctors is wholly circumstantial. Assured did not die of dropsy or pneumonia, but of mitral and bicuspid insufficiency and tuberculosis. None of the doctors claim to have treated assured for tuberculosis before the date of his application, and only one, Dr. Brewster, for heart trouble, and his treatment was in September, 1914. This doctor does not state whether the trouble was severe or not, whether it was of short or prolonged duration, whether assured was confined to his bed or not, and whether the doctor saw or treated him on more than one day. If assured did have heart trouble in September, 1914, it would seem that it was not serious, as Dr. Newbecker's examination, made in June, 1916, shows the heart to have then been in good condition, and the doctor said that, if assured had heart trouble at that time, it was latent, as she was unable to detect it. If a trained physician was unable to discover any heart trouble, how can it be said that assured's heart was diseased, and that he knew it?

The question of whether assured had had any severe illness is one of fact for the jury. "A jury is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, but neither are they required to accept and give effect to testimony which they

find to be unreliable, although it may be uncontradicted." *State v. Woods*, 102 Kan. 499, 170 Pac. 986, L. R. A. 1918C, 889. The credibility of the witnesses and the weight to be given to their testimony was for the jury to determine, and we are not prepared to say that its finding on this question of fact is so clearly wrong as to require a reversal of the judgment.

We have read all the evidence received, that offered and excluded, the objections thereto, and find no prejudicial error in the rulings of the court thereon.

[3] Defendant requested the court to submit four special interrogatories to the jury, which request was refused, and this refusal is alleged to be error. The submission of special interrogatories, when requested, is within the discretion of the court (*Huxoll v. Union P. R. Co.*, 99 Neb. 170, 155 N. W. 900), and the refusal to submit the interrogatories requested by defendant herein was not an abuse of such discretion.

[4] Defendant's contention that the court erred in refusing to give its requested instruction No. 5, and in giving instructions Nos. 3 and 4 by the court, may be properly considered together. The substance of said requested instruction is embodied in instruction No. 3, given by the court. It contains a clause which appears to be, in substance, the same as the clauses in said instructions Nos. 3 and 4, given by the court, complained of; and the defendant will not be permitted to take advantage of an alleged error in giving instructions because of a proposition therein which is substantially like the one in the instruction requested by it.

[5] Counsel's assignment and presentation in this brief of the alleged errors of the court in refusing to give instructions Nos. 6, 7, 8, and 9, requested by defendant, are so vague and indefinite that they do not merit consideration. However, an examination of said instructions shows that some of them are based on the theory that the answers to the questions in the application complained of are warranties; that some assume facts, and thus invade the province of the jury; and that all of the correct legal propositions stated therein applicable in this case are embodied in and covered by the instructions given by the court.

[6, 7] Counsel do not contend that instruction No. 5, given by the court, is not a correct statement of the law, but insist that it is not supported by the evidence. This instruction is evidently based upon plaintiff's theory that defendant failed to prove that the answers written in the application by Dr. Newbecker were made by deceased, or that he signed part II of said application. The reply contained a general denial. The burden of proving every material allegation in the amended answer rested upon defendant.

Among these are the allegations that assured made a written application in which were his answers to questions alleged to be false; and counsel for plaintiff contend that Dr. Newbecker's testimony proves that the answers in the application are the answers of the doctor, and not those of assured. However, the giving of an instruction which is not applicable to the issues or evidence will not work a reversal of a judgment unless the rights of the complaining party were prejudiced thereby. *Burlington & M. R. R. Co. v. Gorsuch*, 47 Neb. 767, 68 N. W. 831; *McClellan v. Hein*, 56 Neb. 600, 77 N. W. 120. We perceive no prejudice resulting to defendant from the giving of said instructions which requires a reversal of the judgment herein.

We do not think that counsel's criticism of instructions Nos. 6, 7, 8, and 9, given by the court, are justified, or that the giving of same constitutes prejudicial error. It devolved upon defendant to prove that the answers complained of were made by assured, and that he had theretofore had a "severe illness" within the correct meaning of that term; and it was not error for the court to define "severe illness," nor to put the burden of proof upon defendant, as was done in instructions Nos. 6 and 7.

Instruction No. 8 appears to correctly state the law; and counsel's criticism of instruction No. 9, which they say "in general terms states the law," is hypercritical.

We find that the amount allowed the plaintiffs by the trial court as attorneys' fees is excessive and should be reduced to \$350. It is therefore ordered that said amount for attorneys' fees be, and the same is, hereby reduced to \$350 and the judgment of the trial court, as thus modified, is affirmed; and an attorney fee of \$150 allowed plaintiffs' attorneys in this court.

Affirmed as modified.

NOTE.

(U.S.Sup.1916) Where policy provided that statements by insured should in the absence of fraud be deemed representations and not warranties, false representations *held* not to avoid policy unless fraudulent, with actual or imputed knowledge of their falsity, and material to the risk.—(*Fla. 1914*) *Mutual Life Ins. Co. of New York v. Hilton-Green*, 211 Fed. 31, 127 C. C. A. 467, judgment reversed 38 Sup. Ct. 676, 241 U. S. 613, 60 L. Ed. 1202.

(U.S.C.C.A.Or.1913) Answers to questions concerning previous diseases of an applicant for insurance *held* representations, and not warranties, and nothing more being required of him than that he answer in good faith.—*New York Life Ins. Co. v. Moats*, 207 Fed. 431, 125 C. C. A. 143.

(*Ala.1916*) Where insured, before receiving a policy was required to execute a certificate of continued good health, such certificate was a representation and not a warranty.—*Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 70 South. 768, 195 Ala. 263.

(*Ala.App.1914*) A warranty is a statement, the truth of which is made a condition to the

validity of the policy, while a representation is a statement made as an inducement to the proposed contract and collateral to it.—*Metropolitan Life Ins. Co. v. Goodman*, 65 South. 449, 10 Ala. App. 446.

A provision in a life policy that it should be void if insured, before its date, had been attended by a physician for any serious disease, is a warranty rather than a condition, and so falls within Code 1907, § 4572.—*Id.*

(Ark.1912) Whether statements by insured are warranties or representations depends on the language in which they are expressed, their apparent purpose, and the relation they bear to other parts of the policy or application.—*Metropolitan Life Ins. Co. v. Johnson*, 150 S. W. 393, 105 Ark. 101.

A warranty as distinguished from a representation must either appear in the policy itself, or be so referred to as to indicate that it was intended to form a part of the contract.—*Id.*

Statements contained in an application for life insurance concerning the health of insured and of her family held representations only, and not warranties, and therefore any error therein would not avoid the policy, unless it was knowingly false.—*Id.*

A warranty in an insurance policy differs from a representation, in that a warranty creates an absolute liability, whether made in good faith or not.—*Id.*

(Ark.1914) A statement, in an application for accident insurance, that the applicant's habits of life were correct and temperate is not a warranty.—*Maloney v. Maryland Casualty Co.*, 167 S. W. 845, 113 Ark. 174.

(Del.1915) "Warranty" held an agreement constituting part of contract of insurance, as distinguished from "representation," which is a statement incident or collateral thereto.—*Baltimore Life Ins. Co. v. Floyd*, 94 Atl. 515, 5 Boyce, 431, affirming judgment (Super. 1914) 91 Atl. 653, 5 Boyce, 201.

Statement in application for policy, of life insurance that the beneficiary was the applicant's uncle held not intended as a warranty the falsity of which would relieve from liability on the policy.—*Id.*

Under policy of life insurance making statements in application part of the policy, held, that it was not intended that insured's false statement as to the relationship of the beneficiary, immaterial to the risk, should be a warranty which would avoid the policy.—*Id.*

(Del.Super.1914) A false statement by an insured in his application for a life policy to the effect that he was then carrying insurance in no other company, was a warranty, and vitiated the policy.—*Floyd v. Metropolitan Life Ins. Co.*, 90 Atl. 404, 5 Boyce, 51.

DAILEY et al. v. SOVEREIGN CAMP, W. O. W. (No. 21667.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Carriers ⇨283(5)—Building owner liable for injury of person without fault by elevator operated by unskilled and inexperienced person.

When the owner of a building employs an unskilled and inexperienced person to operate a passenger elevator therein and personal in-

juries are inflicted upon another without his fault by reason of the operator's inexperience and lack of skill, the owner will be held liable in damages for such injury.

2. Appeal and error ⇨1002—Verdict on conflicting evidence supported by evidence not reversed.

Where the testimony conflicts with respect to material matter, the verdict will not be disturbed, when there is sufficient evidence to support it, unless the verdict is clearly wrong.

3. Damages ⇨96 — For personal injuries largely discretionary with jury.

There is no fixed or exact rule known or recognized in our system of jurisprudence in which the same measure of damages for personal injury may be applied to all cases alike. Much must be left to the good sense and reason of the jury.

4. Damages ⇨30—Permanency of injury and decreased value of money properly considered by jury.

In an action to recover for personal injuries, the physical pain, the mental anguish and the humiliation that is suffered by plaintiff, and the permanency of the injury and the decreased purchasing power of money, are all proper elements of damage to be considered by the jury in deliberating upon their verdict.

5. Carriers ⇨280(4)—Owner of passenger elevator must use same care as common carriers.

The owner of a passenger elevator that is installed in his building for the use of tenants and the public is bound to use the same degree of care with respect to those using the elevator that is imposed upon common carriers.

(Additional Syllabus by Editorial Staff.)

6. Appeal and error ⇨1004(3) — Excessive award held cured by remittitur.

In an action for personal injuries received in an elevator accident, where the jury made an excessive award for medical and hospital expenses, such error is cured by a remittitur of the excess.

7. Master and servant ⇨389—Employer subrogated to amount of compensation paid.

An employer who has paid compensation under the Workmen's Compensation Law to an employee recovering judgment against a negligent third person is entitled to be subrogated to the employee's right in the judgment to the amount of compensation paid.

8. Damages ⇨132(7) — \$52,000 for broken bones, distorted foot, shortened leg, and other injuries held excessive.

Where plaintiff was severely and permanently injured in an elevator accident, having some bones broken and his foot distorted and his leg shortened, and other injuries, held that a verdict for \$50,931 was excessive, and should be reduced by a remittitur in the sum of \$10,000.

Appeal from District Court, Douglas County; Estelle, Judge.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by William R. Dailey and another against the Sovereign Camp of the Woodmen of the World. Judgment for plaintiffs, and defendant appeals. Affirmed on condition of filing remittitur.

Gaines, Ziegler, Van Orsdel & Gaines, De E. Bradshaw, and Brome & Ramsey, all of Omaha, for appellant.

Kennedy, Holland, De Lacy & McLaughlin, of Omaha, for appellees.

Heard before LETTON, Acting C. J., DEAN, ALDRICH, and DAY, JJ., and GOOD, District Judge.

DEAN, J. William R. Dailey sued to recover damages for personal injuries sustained by reason of defendant's alleged negligent operation of a passenger elevator in its 17-story office building situated at Farnam and Fifteenth streets in Omaha, known as the Woodmen building. He recovered a verdict for \$52,000. On defendant's motion a remittitur of \$1,069 was filed, that sum representing certain alleged medical and hospital expenses which plaintiff was unable clearly to establish. Judgment was thereupon rendered in plaintiff's favor for \$50,931, and defendant appealed.

On the part of plaintiff the evidence tends to show that July 19, 1919, while he was in the prosecution of his business as a salesman and solicitor for an Omaha stationery company, he went to the Woodmen building at 10:30 in the forenoon to call upon his employer's customers, and while he was stepping into one of six passenger elevators operated by defendant, and before gaining an entrance, the conductor started the car at a high rate of speed, thereby causing him to lose his balance and fall. In an effort to save himself from injury he grasped the ascending floor of the elevator and was carried rapidly upward, coming in violent contact with the upper part of the iron shaft inclosure. From that point he was swept from the car and fell into the elevator shaft, a depth of 20 or 25 feet, striking iron beams and the cement floor at the bottom of the pit and thereby sustaining the injuries of which he complains.

On this feature of the case plaintiff's testimony in substance is that when he approached the car he paused a moment to allow a lady to enter, and that he immediately followed. He testified:

"I proceeded to enter it; got my right foot in, and was in the act of bringing the left foot in, when the elevator started up with a sudden jolt, and threw me down, just simply threw me right down, then slipped out of the elevator, the elevator doors still being open; feet slipped out, the elevator moved upward, and both of my feet slipped off, curled in under the elevator, and dropped into the pit."

Plaintiff further testified that the door of the car was open when he started to enter

and the elevator was standing still. He said there was no car starter in the corridor that day when the accident happened, though he had seen one there when in the building on former occasions.

[1] There is evidence tending to prove that defendant employed an unskilled, inefficient and inexperienced young lady, a novice, to operate the elevator car, and that the accident was caused by her negligence in starting the car before she closed the door and while plaintiff was in the act of stepping inside, and that she failed to stop the car immediately upon plaintiff's failure to gain an entrance. On this point she was called by plaintiff as a witness and testified that the day of the accident was the first time she operated the car alone; that the operators were supposed to close the doors of the cars before starting; that she started the car on the trip in question at a high rate of speed without closing the door; that she estimated the door was three feet ajar when Dailey tried to enter; that almost immediately she saw him sliding off the car; that the car was hard to operate and older operators had warned her to be careful with it.

With respect to plaintiff's injuries the physician who first attended him immediately after the accident testified:

"I found distortion of the left foot, due to a fracture at the junction of the lower and middle third of the left tibia and fibula; an incised wound about one and a half inches in length. Q. Go ahead. A. And one inch in breadth at the middle third of the inner aspect of the right tibia; an abrasion of the skin over the lower and inner portion of the right patella; * * * a slight amount of rigidity over lower left abdomen; and an incised wound just below the posterior and anterior superior spine; no fracture of this spine, in my opinion; skin abrasion on the right jaw; skin abrasion on the right nipple; skin abrasion on both hands and the left forearm just below the elbow on the anterior aspect; abrasion of the skin of the back, extending from the middle of right scapula down the entire length of the back to the gluteal muscles; scalp wound about the size of half a dollar, just below the occiput. Q. Just state to the jury what the appearance of the left leg was at the time you examined Mr. Dailey? A. The left leg was distorted, turned outward, due to a fracture of both bones at about the junction of the lower and middle third of those bones. Q. That is, the left foot was turned outward beginning at a point about two-thirds of the distance below the knee? A. Yes, sir. Q. What did that disclose in the way of bone injury? A. Fracture. Q. What sort of a fracture did you discover this to be? A. Comminuted fracture. * * * Q. What did the rigidity of the left side of the abdomen indicate to you, if anything? A. Indicated severe trauma, in my opinion; at that time it was significant of hemorrhage. Q. Internal hemorrhage? A. Yes, sir. Q. Did the patient, Mr. Dailey, seem to be suffering from shock at that time? A. Yes, sir."

The doctor further testified that there was fracture of the fifth lumbar vertebra and—"a separation of the symphysis pubes, which are the two bones that come down in front, making this arch in the lower part of the abdomen here; that is the separation. Q. That is the pelvic arch? A. Yes, sir; pelvic arch. Q. Describe what further you found. A. I found an obliteration, or practical obliteration, of the obturator foramen; which is a ring over all the arches of these bones; the separation in the left side of this arch causes a pushing up of this bone, obliterating that foramen. Q. This part of the pelvis? A. Yes, sir. * * * Q. Did you finally operate on Mr. Dailey? A. Yes, sir. Q. When did the operation take place? A. September 1, 1919. * * * Q. What was the nature of that operation? A. Bone graft of the tibia. Q. That is the bone of the lower leg? A. Yes, sir. Q. What was the purpose of that operation? Why was that operation necessary? A. To secure union of the fracture. * * * From the fracture this bone was broken in several pieces and the two shafts of the bone overriding, causing a shortening; those pieces were removed, and a piece of bone taken from the upper portion of the shaft of the bone. * * * The leg was iodized, that is, sterilized with iodine, and removed immediately with alcohol; an incision is made over the interior aspect of the tibia here through the skin and fascia, that is the covering underneath the skin; the bone is made bare, and with a twin saw that is run by electricity a piece of the bone is taken out from above this fracture covering a distance of about four and a half or five inches, and the saws continue to cross this fracture."

The witness testified that plaintiff's leg was placed in a plaster cast and he remained in the hospital three and a half months; that his leg was shortened not quite an inch, and that it was permanent.

"The junction of the symphysis, in order to regain the normal, will necessitate another operation. As to the amount of permanency of disability there will be, that will have to be determined a little later. As to how much bone absorption will take place there in a man of Mr. Dailey's age, as to the amount of immobility around the ankle joint and the knee joint, will have to be worked out, but, in my opinion, around the knee joint and the ankle joint will be 30 per cent. totally impaired."

The doctor further testified that another operation upon the bones surrounding the ankle would in time become necessary.

Two surgeons were called in consultation. They testified that they assisted in the examination of plaintiff, using an X-ray as an aid. With respect to the injuries, their evidence substantially corroborates that of the physician whose evidence is detailed herein. One physician testified that plaintiff was ill about a month from an attack of pneumonia that he contracted because of low physical resistance that resulted from his injuries. This doctor said that he suffered great pain while under his care; that he lost weight and became emaciated; that he was delirious at

intervals and could not speak above a whisper. The hospital nurse who had him in charge from July 19 until September 30 testified that when plaintiff was brought into the hospital he had symptoms of shock, and syncope and had bruises all over his body; that his back was "black and blue all over;" that his hands were cut up; that he was unable to move himself at all without great pain; that he could not sleep at night and was delirious at times and very weak; that when it was necessary to move him she did it with assistance; that he was placed on "a fracture bed" with his left leg placed between sandbags keeping it in one position so that it could not be moved; that he suffered pain in the pelvic region; that the pelvic bone on the right side was very much bruised; that they administered opiates to quiet him and to make him sleep; that they injected about three quarts of salt solution into his chest to sustain him and for a number of days they could not get his pulse; that in a case of this character in which there is weakness, the salt solution "is about the last resort that we have." She further testified that plaintiff "was bruised from the top of his head and below the pelvic region"; and that he had "a bruise on the right leg"; that he was unable to talk above a whisper and became very much emaciated; that part of the bone was taken from his left leg and grafted into the place where the break occurred; that owing to weakness they had to have a "cradle" over the bed to keep the pressure of the bed clothes from his body.

Plaintiff's wife testified that they had been married 15 years, and that he was in the employ of one firm during all of that time; that he had not known a day's illness during their married life; that she was summoned to his side about an hour and a half after the injury; that he recognized her, but could not speak; that he was not removed from the hospital for about two and one-half months; that when he arrived at his home he was placed in bed, where he lay propped up with pillows more than a week; that he was unable to move himself; that his suffering was severe in the back and pelvic region; that subsequently she obtained assistance of a neighbor and they moved him from the bed to a chair, where he could sit at a table for about a half hour, when he would become faint and dizzy and was compelled to return to his bed; that it was more than a month after he returned home before he could sit up all day; that his condition was such that he was unable to be clothed until January 1, and about that time the cast was taken off, and in the meantime he was taken to the hospital to have X-ray pictures taken; that when the cast was removed his leg was swollen from the top of the cast to his body; that when the cast was taken off she procured crutches for him and a splint was put on his leg for protection; that if his injured foot

touched the floor he almost fainted and he was compelled to return to his bed; that at night he was unable to change his position in bed and she had to turn him over every half hour, and that at the time of the trial she testified that she had to change his position two or three times in the night; and that up to the time of the trial he had never been able to turn on the fractured side and that she had never seen him put any weight on that side; that when he tried to do so or to put his left foot to the floor he became faint and it became necessary to put him back in his bed; that he complained greatly of soreness and suffered great pain.

[2] Defendant denies that it was negligent. It introduced testimony tending to prove that plaintiff negligently attempted to enter the elevator after it began to ascend, and that to gain an entrance he seized the doors, which prevented them from closing, and tried to jump in while the car was in motion; that he missed his footing and in falling seized the floor of the car with his hands and from thence he dropped into the bottom of the elevator shaft; that the speed of defendant's elevators in question is controlled by a device located in the building, and that the operator has only indirect control of the speed signaling to the man in charge of the controlling device, and that the doors of the elevator close automatically when the car begins to rise. There is also testimony going to show that the operator of the elevator made certain material statements in a deposition soon after the accident that were less favorable to plaintiff than those she made at the trial and that were in part contradictory of those statements. She frankly stated that her recollection of the facts was better at the trial than it was soon after the accident. Her testimony though, as one of plaintiff's witnesses, was a matter of credibility for the jurors. It may be said that, with respect to the scene of the accident and the occurrences immediately attending that catastrophe, the evidence of the witnesses who were called by the respective parties is in direct conflict. But that too was a question of credibility and the jury evidently accepted the version of plaintiff and rejected that of defendant, so that, under the rule, where there is sufficient evidence to support the verdict it will not be disturbed by us unless it is clearly wrong.

Plaintiff testified generally that the pain he suffered was intense and almost continuous; that his nights were sleepless and full of anguish; that his physical condition became so impaired and his vitality was so low that his life was despaired of; that, in the expectancy of impending death, a minister of the gospel was called to his bedside to administer the last rites while he was yet in the hospital; that he has never been able at any time since the accident to rest with any degree of comfort in one position for any

length of time; that it was only shortly before the trial that he was able to lie down even on one side, and that in no position, either night or day, could he remain more than a half or three-quarters of an hour without experiencing intense pain; that he could not move his injured foot without help, and at the time of the trial was able to move about only by the aid of crutches, and even at that time could not press his left foot to the floor.

[3] The defendant contends that, even if it was guilty of negligence, the verdict is greatly excessive. It points out that plaintiff, who was 45 years of age when the accident occurred, had an expectancy of about 24½ years, and that at the time he was earning \$23 a week. Plaintiff, however, testified that he had "a commission arrangement on outside business." From the facts so pleaded by defendant it argues that in no event should the judgment be in excess of \$13,000 or \$14,000. *Bower v. Chicago & N. W. R. Co.*, 96 Neb. 419, 148 N. W. 145, is a like case wherein we refused to fix "with exact nicety just how much compensation should be paid." We adhere to the rule there announced.

There is no fixed or exact rule known or recognized in our system of jurisprudence in which the same measure of damages for personal injury may be applied to all cases alike. As has often been said, much is left to the good sense and reason of the man in the jury box. *Fishleigh v. Detroit United Ry.*, 205 Mich. 145, 171 N. W. 549; *Southern Ry., Carolina Div., v. Bennett*, 233 U. S. 80, 34 Sup. Ct. 566, 58 L. Ed. 860. The law gives to the jury the right to determine the amount of recovery in cases of personal injury. That is, of course, one of its functions, and, if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed. It will be noted, however, that the present case was tried and the verdict rendered in a period, that has not yet passed, when the purchasing power of money for necessities generally was about half that which prevailed only a few years prior thereto, and the jury no doubt took this circumstance into consideration. But from the record before us and in view of verdicts that have been sustained in this and in other states, in cases involving injuries substantially like those in the present case, we conclude that the verdict is excessive in the sum of \$10,000.

[4] *Union P. R. Co. v. Connolly*, 77 Neb. 254, 109 N. W. 368, was decided by this court in 1906. We there held that a verdict of \$27,500 recovered as damages for an injury resulting in the amputation of both legs about five inches below the knee was not excessive. True, Connolly was only 31 and his expectancy was 33½ years. But in his

case, appalling and horrible even to contemplate, the pain and suffering could hardly have been greater than plaintiff's, whose injuries are in large part internal. Besides, it is obvious that Connolly's capacity to engage in useful and profitable employment would be even much greater than the plaintiff can hope to enjoy. The mental anguish and physical pain that plaintiff herein has suffered and that he continued to suffer, and the permanency of the injury, the humiliation, and the medical assistance and personal attention that his physical condition will require, and the decreased purchasing power of money, are all proper elements of damage for the jury to consider. Cases are cited in the Connolly Case showing that, even in the first decade of the present century and prior thereto, when from a financial viewpoint the times were normal, substantially like verdicts, in the light of the facts therein depicted, were held not to be excessive.

[8] The evidence seems clearly to support the allegation of plaintiff with respect to the negligence of defendant. In the elevator lobby, where three elevators are installed on each side, it was shown that defendant ordinarily employed a starter. At the time of the accident it appears that the starter was not in the lobby. The elevator that inflicted the damage was under the control of a young lady, as hereinbefore noted, who was unskilled, and who began her work as conductor that morning without having had previous experience. She testified that she signaled for power at the highest speed when she should have signaled for the lowest. She substantially corroborated the evidence of plaintiff's testimony with respect to the manner in which the injuries were inflicted. The evidence on this feature of the case, taken in its entirety, discloses negligence on defendant's part. In *Quimby v. Bee Building Co.*, 87 Neb. 193, 127 N. W. 118, 138 Am. St. Rep. 477, we held that the owner of a passenger elevator, installed in his building for the use of tenants and the public, is subject to the same degree of care with respect to those using the elevator that is imposed upon common carriers. In *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010, the court say:

"The owner and manager of an elevator for passengers is to be treated as a public carrier of passengers, and is subject to the same responsibilities as a railway passenger carrier. Therefore the law holds him to the utmost diligence and care of very cautious persons, and responsible for the slightest neglect."

In *Tonsey v. Roberts*, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655, it is said:

"An elevator in a building for the carriage of persons is not supposed to be a place of danger, to be approached with great caution; on the

contrary, it may be assumed, when the door is thrown open by an attendant, to be a place which may be safely entered without stopping to look, listen or make a special examination."

In *Blackwell v. O'Gorman Co.*, 22 R. I. 638, 49 Atl. 28, it is said:

"Starting an elevator while the door remains open, and while a passenger is entering the car, is negligence."

To substantially the same effect is *Mitchell v. Marker*, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33.

The judgment in the present case is one of the largest in amount that has ever been awarded for personal injuries in this jurisdiction, and it may be added that the record presents the most serious personal injuries that have at any time been presented to this court. In view of this fact a comparison of verdicts that have been heretofore rendered in personal injury cases is of little assistance. The rule is well settled that in this class of cases it properly comes within the province of the jury to take into account the purchasing power of money with respect to the commodities that are in use by the public generally and that may reasonably be said to constitute the necessities of life. *Lincoln Gas & Electric Light Co. v. City of Lincoln*, 250 U. S. 256, 39 Sup. Ct. 454, 63 L. Ed. 968; *Seaboard Air Line Ry. v. Miller*, 5 Ga. App. 402, 63 S. E. 299; *Louisville & N. A. Co. v. Williams*, 183 Ala. 138, 62 South. 679, Ann. Cas. 1915D, 483; *Noyes v. Des Moines Club*, 186 Iowa, 378, 170 N. W. 461, 3 A. L. R. 605; *Hays v. United R. Co.*, 183 Mo. App. 608, 167 S. W. 656; *Hurst v. Chicago, B. & Q. R. Co.*, 280 Mo. 566, 219 S. W. 566, 10 A. L. R. 174.

[6] Defendant finally argues that the jury having made an excessive award as compensation for medical and hospital expenses, proves that it was not guided by the evidence. A remittitur, of the excess in the sum of \$1,039 was filed by the plaintiff. In *Kriss v. Union P. R. Co.*, 100 Neb. 801, 161 N. W. 414, Ann. Cas. 1918A, 1122, we held that in such case where a remittitur is filed the error is cured. Defendant also makes complaint with respect to the giving of certain instructions. Upon examination we conclude that they do not present reversible error. The court did not err in overruling defendant's motion for a new trial.

[7] The Megeath Stationery Company, plaintiff's employer, was made a party plaintiff, and is interested in the suit from the fact that it has paid to plaintiff compensation under the provisions of the Workmen's Compensation Law (Laws 1913, c. 198). The company asks that it may be subrogated to the rights of plaintiff to the amount of such compensation as it may have paid him in accordance with the provisions of the act in

question. From the record it appears that the prayer of the company should be and it hereby is granted. It is therefore ordered that the Megeath Stationery Company be subrogated to plaintiff Dailey's rights in the judgment in the amount of the compensation that it has paid him under the act. For the purpose of arriving at the amount of money so paid, the parties, or any of them, may, if so advised, submit further testimony to the district court.

[8] The judgment is that, if plaintiff Dailey files a remittitur in the sum of \$10,000 within 20 days, the judgment will be affirmed for \$40,981. Upon his failure to do so, a reversal will be granted and a new trial ordered.

Affirmed on condition.

PRESTON v. STATE. (No. 21952.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Parent and child §17(6)—Evidence held insufficient to support verdict of guilty of neglecting and abandoning child.

Evidence examined, and held insufficient to support the verdict.

2. Parent and child §17(2)—Husband's failure to furnish wife money for maintenance of two months old child born after she had left the matrimonial domicile without cause held not "willful neglect."

The failure of the husband to furnish his wife money for the maintenance of a two months old infant born in the home of her parents, after she had left the matrimonial domicile without cause and contrary to his wishes, is not in itself willful neglect or refusal to provide for such child within the meaning of section 8614, Rev. St. 1913.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Neglect.]

3. Criminal law §108(1)—Venue of case for abandonment of child is in county of matrimonial domicile.

The county in which the matrimonial home or domicile of the husband and wife is located fixes the venue of a case prosecuted under section 8614, Rev. St. 1913, and such case cannot be instituted in another county.

4. Husband and wife §3(1)—Husband has right to establish matrimonial domicile.

The husband has the right to establish the matrimonial domicile, and it is the duty of the wife to recognize that fact.

5. Parent and child §17(2)—On prosecution for neglect and abandonment of a minor child each case must be decided on its merits.

No inflexible rule can be laid down for the application of section 8614, Rev. St. 1913;

each case must be decided on its own merits; the statute was enacted for a wise purpose, but is capable of abuse and of being made an instrument of intolerable oppression.

6. Statutes §241(1)—Penal statutes must be strictly construed and are never extended by implication.

It is elementary that penal statutes are inelastic and must be strictly construed; they are never extended by implication.

Error to District Court, Otoe County; Begley, Judge.

Elmont F. Preston was convicted of abandoning and refusing to provide for his minor child, and from the judgment and a sentence to a year's imprisonment, he brings error. Reversed.

D. W. Livingston, of Nebraska City, for plaintiff in error.

Clarence A. Davis, Atty. Gen., for the State.

Heard before MORRISSEY, C. J., ROSE and ALDRICH, JJ., and ALLEN and REDICK, District Judges.

ALLEN, District Judge. The plaintiff in error, Elmont F. Preston, was convicted of the crime of abandoning and willfully neglecting and refusing to provide for his minor child, Robert Elmont Preston, under section 8614, Rev. St. 1913, and from a judgment of guilty on the verdict and a sentence to one year's imprisonment in the penitentiary, he has brought the case to this court for review. For convenience, the parties will remain classified as they were in the district court.

January 28, 1921, the county attorney filed a complaint in the district court for Otoe county containing two counts, the first charging that the defendant, on or about May 26, 1920, in said county, willfully and feloniously refused and neglected to support, maintain, and provide for his wife, and the second reading as follows:

"And the said Geo. H. Heinke, county attorney within and for the county and state aforesaid, for further complaint and information makes upon his oath as aforesaid, and says that on or about May 26, 1920, that Elmont F. Preston, then and there being in said county as aforesaid, and then and there being the father of Robert E. Preston, aged two months, then and there being in said county, and being a minor, did then and there without good cause unlawfully, willfully and feloniously abandon the said Robert E. Preston, his minor child, and did then and there unlawfully, and feloniously neglect to support, maintain and provide for said Robert E. Preston, his said minor child, although of sufficient ability so to do, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state of Nebraska."

It does not appear when the prosecution was instituted. At the conclusion of the

state's case, the court directed a verdict for the defendant on the first count, and we have to deal only with the case stated in the second. The state introduced two witnesses, May Preston, wife of the defendant, and Margaret Gaskell, her mother; while the defendant testified in his own behalf, and introduced the testimony of W. R. Holly, Louise Schnittker, and his mother, Mrs. W. J. Preston.

The pivotal facts are not in dispute and are, in substance, these: The defendant and May Gaskell were married in Kansas City, Mo., March 10, 1915, and some time thereafter, probably in 1917, moved to Kearney, Neb., where the defendant purchased and furnished a comfortable five-room house for his family, and engaged in the occupation of garage-man as a means of supporting himself and wife and paying a mortgage debt upon his home. October 21, 1919, a quarrel arose between them, because, in his absence, she had purchased a rug which he insisted was unnecessary and inadvisable, inasmuch as the house was carpeted and his income limited; and, over the defendant's protest and contrary to his wishes, she left home in anger and reached her parents' home the next day. She left her work undone and the dishes unwashed on the table. She was enceinte at the time, and her child was born in Otoe county, March 6, 1920, and it was a little over two months old when, it is said, the defendant abandoned it. After the prosecuting witness left Kearney, the defendant kept the home open and continued to occupy it until some time in July, 1920. She returned in November, 1919, and remained a week or more and then went back to her parents. The defendant never lived or had a residence in Otoe county, nor was a home established there. He visited his wife and baby in March, April, and May, 1920, and on his last visit, May 19, 1920, he remained with his wife and child in the home of her parents for a few hours, at which time their differences were talked over, and it was agreed that, on account of the trouble they had had in Kearney, they could not return, and did not want to live in Nebraska City, and that the Kearney property and its contents should be sold and a residence established elsewhere; but no place was agreed upon. She testified that he said she should, in the meantime, live with her parents. "Well, we didn't expect to establish a residence here, but I was to stay here until he came after me, and this was to be my home until he came and got me. * * * Well, I was to live there with mother until he came and got me." The defendant gave his wife \$75 with which to pay expenses incident to her lying-in sickness. Pursuant to the understanding of May 19, 1920, the Kearney home and its contents were sold in July, after which the defendant went to Imperial, Neb., and for two months, probably, there

there was no correspondence between them. There is no testimony that any specific demand for money was made on the defendant for the support or maintenance of the child, but there is some testimony that the prosecuting witness wrote him for money, while he testified that he sent her some, but the amount is not stated. There is no testimony that the child needed additional shelter, clothing, a nurse, or anything else. It drew nourishment from its mother; presumptively it slept with her in the same bed and under the same roof. Its requirements must, of necessity, have been few and simple. There is no evidence tending to show that any request was made of the defendant for money, apart from that which the prosecuting witness was to use for herself. There was no excuse for Mrs. Preston leaving her Kearney home. The fact that her husband during their quarrel over the rug may have said that if she left it would be final and she could not return, and that he advertised her, did not seem to have any effect, as she returned and remained for many days. That she did not intend to establish a residence in Otoe county is manifest from her admitted statement to her mother-in-law:

"I told her I would go back. Q. Did you go back after that? A. Yes, sir; shortly after that I went up to Kearney; within a week or two. * * * Q. You did express a wish to that effect, didn't you, Mrs. Preston? A. I did."

But it does not appear that she communicated the wish to her husband, or that he knew of her desire. But, apart from this, the conduct of the husband, however unnecessary and uncalled for, furnished no excuse for her desertion of her home.

[1, 2] That part of section 8614, Rev. St. 1913, applicable to this case, is as follows:

"Whoever abandons his or her legitimate or illegitimate child or children under the age of sixteen years, and willfully neglects or refuses to provide for such child or children, shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six months."

[5, 6] The defendant's failure to send money to the prosecuting witness on her request seems to have been considered as an abandonment and willful neglect or refusal to provide for his minor child. This is a non sequitur and the interpretation is incorrect. The defendant left with his wife's consent and there is nothing to show that he was then or thereafter informed that the child needed anything. Of course, the defendant owed the child the duty "to provide for" it; but, to convict him, it was necessary to prove that it was in necessitous circumstances. He was not required to send the prosecuting witness money "to provide for such child," as he

might provide for it directly or by establishing a credit where articles suitable to its condition could be purchased. The failure or refusal of the husband to send the prosecuting witness money on her demand was not the commission of a crime. The phrase, "whoever abandons his * * * child * * * under the age of sixteen years, and willfully neglects or refuses to provide for such child," shall be guilty of the crime of desertion, is elliptical. "Willfully neglects or refuses to provide" what? Not, money, but those things that were necessary to the comfort, health and protection of an infant slightly over two months of age. The state made no attempt to show that the defendant had neglected or failed in this respect. No inflexible rule can be laid down in cases of this kind; each must be decided on its own merits. The statute was enacted for a wise purpose, but is capable of abuse and being made an instrument of intolerable oppression. It is elementary that penal statutes are inelastic and must be strictly construed; they are never extended by implication. *Andrews v. United States*, 2 Story, 202, Fed. Cas. No. 381. The testimony is, in our judgment, insufficient to support the verdict.

[3, 4] The defendant urges that the venue was laid in the wrong county and that the district court for Otoe county had no jurisdiction of the case. It is elementary that, notwithstanding modern statutes have greatly changed the status of married women, the husband is the head of the family and has the right to choose the matrimonial domicile, and this right must be recognized by the wife. The matrimonial domicile of the defendant and his wife May 26, 1920, when it is claimed he committed the offense, was in Buffalo county. In *Cuthbertson v. State*, 72 Neb. 727, 101 N. W. 1031, it is said: "The county in which the home is fixes the venue of the offense." That case was well considered and has stood the test for nearly 17 years, and is vindicated by the ruling in *State v. Smith*, 145 La. 913, 83 South. 189; *State v. Justus*, 85 Minn. 114, 88 N. W. 415; *State v. Baurens*, 117 La. 136, 41 South. 442; *State v. Fick*, 140 La. 1063, 74 South. 534; *In re Roberson*, 38 Nev. 326, 149 Pac. 182, L. R. A. 1915E, 691; *State v. Dangler*, 74 Ohio St. 49, 77 N. E. 271; *State v. Dvoracek*, 140 Iowa, 266, 118 N. W. 399; *In re Price*, 168 Mich. 527, 134 N. W. 721, Ann. Cas. 1913C, 594. Section 9024, Rev. St. 1913, provides, "All criminal cases shall be tried in the county where the offense was committed," and if the county in which the home was fixes the venue of the offense, if any, it is clear that the district court for Otoe county was without jurisdiction.

The judgment is reversed and the cause remanded.

Reversed.

SWEAT v. HINES, Director General of Railroads. (No. 21677.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Master and servant §111(1½)—Hauling car with broken coupler held negligence under federal statute.

Where, in an action for damages for the death of plaintiff's decedent against the director general of railroads, instituted under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), arising out of an alleged violation of the federal Safety Appliance Act (U. S. Comp. St. § 8605 et seq.) it appears from the undisputed testimony that, while in transit, the automatic coupler to one of the defendant's cars became broken and discarded as unfit for further use, and instead of conveying said "bad-order" car to the nearest point for repair, as required under the statute, the defendant caused said car to be fastened to the car behind it by means of a chain, and, thus fastened, mingled said "bad-order" car with other commercial cars and proceeded to haul it toward its destination at a distant point in a neighboring state, *held*, said act on the part of the defendant was negligence per se.

2. Master and servant §204(2), 276(10), 284(3)—Evidence as to scope of employment held to present question for jury and to sustain verdict; risk of chain coupler held not assumed.

On the claim by defendant that decedent, in being where he was and in doing what he did at the time of the happening of the accident, resulting in his death, was a mere volunteer, and not engaged in the master's service, and that it was the duty of the court to so declare as a matter of law and direct a verdict for the defendant accordingly, *held*, that under the evidence the question was one of fact properly to be submitted to the jury. This having been done, under a proper instruction, and a verdict favorable to the plaintiff returned, *held*, further, that the evidence is ample to support a finding for plaintiff in this respect; *held*, further, that, if decedent was properly engaged in the master's service at the time and place of the accident, he did not assume the risk of danger incurred thereby, even though he had full prior knowledge of the same.

3. Courts §97(5)—Death §95(3), 104(6)—Federal rule of damages under federal Employers' Liability Act controlling in state court charging on issue.

In an action for damages against the Director General of Railroads for the death of plaintiff's decedent, instituted in a state court under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), upon a finding for plaintiff the measure of damages must be settled according to the principles of law as administered by the federal courts requiring the ascertained proceeds of the probable future earnings of decedent to be reduced to their

present worth and to include in the verdict to be returned by the jury such sum only, and it is the duty of the state court to so instruct the jury. The defendant having tendered such instruction to the trial court and the same refused, and the court giving no other instruction upon the subject, *held* error.

4. Death $\Leftrightarrow$ 99(4)—Damages to widow under federal Employers' Liability Act held excessive.

In view of the foregoing and in connection therewith, *held*, further, that the verdict and the judgment rendered thereon is grossly excessive, because of which a new trial must be granted.

Appeal from District Court, Dawes County; Westover, Judge.

Action by Anna Mabel Sweat, as administratrix of the estate of Norman Edward Sweat, deceased, against Walker D. Hines, Director General of Railroads under the United States Railroad Administration, for the death of plaintiff's intestate. Judgment for the plaintiff, and the defendant appeals. Reversed, and new trial ordered.

Wymer Dressler and Robert D. Neely, both of Omaha, and Paul S. Topping, of Nebraska City, for appellant.

M. F. Harrington and Gerald F. Harrington, both of Omaha, for appellee.

Heard before MORRISSEY, C. J., ROSE, ALDRICH, and FLANSBURG, JJ., and DIXON and TROUP, District Judges.

TROUP, District Judge. This is an action for damages against Walker D. Hines, as Director General of Railroads, brought by Anna Mabel Sweat, the administratrix of the estate of her deceased husband, who at the time of the accident, resulting in his death, was a freight conductor in the employ of the defendant. The action is brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) and involves the alleged violation of the federal Safety Appliance Act (U. S. Comp. St. § 8605 et seq.).

The plaintiff's petition contains the usual allegations necessary to maintain the action and prays for a judgment in the sum of \$100,000. The defendant admits the death of deceased at the time and place alleged, and that at the time of the accident resulting in his death he was a conductor in the general employment of the defendant, but alleges that at the time and place of the accident the deceased was a mere licensee and volunteer, that any defects which may have existed in the equipment of defendant's car were open and obvious and well known to deceased at the time, and that by reason thereof he assumed the risk of any injury arising therefrom, and denies all other allegations of plaintiff's petition, and all liability for the death of decedent, and prays

a dismissal of the action. The reply denies all new matter in defendant's answer.

A trial of the case to a court and jury resulted in a verdict of \$55,000. Upon motion by defendant for a new trial the court required as a condition precedent to the denial thereof a remittitur by plaintiff of \$15,000 from the verdict, to which plaintiff agreed, and thereupon motion for new trial was overruled, and a judgment rendered for the plaintiff in the sum of \$40,000 and costs. The defendant appeals.

The following facts may be regarded as either admitted in the record or established by the undisputed evidence:

On the 27th of September, 1919, one Sprague, in the employ of the defendant, was conducting a freight train from Lusk, in the state of Wyoming, to Chadron, in the state of Nebraska. When this train reached a point near Dakota Junction, Neb., about four miles west of Chadron, the drawbar at the west end of a car loaded with coal pulled out; the same was taken and thrown to one side on the right of way, and the coal car, thenceforth known as the "bad-order" car, was coupled to the car next in the rear, the same being a flat car loaded with lumber, by means of a chain. Apparently these two cars, the coal or "bad-order" car, and the lumber car to which it was attached, were not to go to Chadron, but were destined to some point north from Dakota Junction on the Black Mills' line in South Dakota. Conductor Sprague left the coal and lumber cars at Dakota Junction and came into Chadron and reported to the train dispatcher at Chadron the existence and condition of the "bad-order" car at Dakota Junction. Chadron was the nearest repair shop to Dakota Junction where the defective coupler could be repaired. On the next morning, September 28, one Gale, a freight conductor in the employ of defendant, was ordered from Chadron with a caboose and two engines to proceed to Dakota Junction, there "pick up his train" and proceed northward. In the course of making up this train and in moving or switching the "bad-order" car, the chain coupler thereon broke and was again repaired by another chain. It appears that Conductor Gale received no express orders respecting the "bad-order" car, nevertheless he included the same in his train, assigning it a place just next forward from the lumber car, and being the second car forward from the caboose, and, thus situated, fastened by a chain to the lumber car in its rear, the train proceeded northward as far as Smithwick, S. D., arriving there about 10:20 in the forenoon.

In the meantime the decedent, as freight conductor, was engaged in conducting a south-bound freight train from Deadwood, S. D., destined to Chadron, Neb., and arrived at Smithwick, S. D., at 10:10 in the forenoon

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of the 28th, where he had an order to await the coming of the north-bound train, which arrived ten minutes later; so that at all the times herein mentioned the defendant and the two conductors of both the north and south bound trains were engaged in the traffic of interstate commerce. As the north-bound train pulled in on its track, the decedent and one of his brakemen stood by on the east side of the moving train, and as the "bad-order" car passed them their attention was attracted to the chain coupling between the coal and lumber cars, and they both immediately proceeded to walk northward the short distance to where the "bad-order" car had stopped. At or about the same time the conductor of the north-bound train appeared on the opposite or west side of the chain coupling of the "bad-order" car, and, for the purpose of inspecting the chain coupling or to readjust the same, or both, both conductors about simultaneously stepped in between the cars from their respective sides, and were there but about a half minute when the engineer of the north-bound train, for the purpose of placing his engine opposite the water tank, a few feet in the rear, to take water, without an order to do so, but, of course, without knowledge that the conductors were between the cars, suddenly backed up the train, and, there being nothing to prevent the "bad-order" car from coming into immediate contact with the lumber car in the rear, it did so, and both conductors were instantly crushed to death.

[1, 2] In addition to these undisputed facts it must be conceded that the defendant had no lawful right to haul this "bad-order" car as it did, commingled as it was with other commercial cars. It was its duty under the statute after discovering its defective condition, to take it at once to the nearest repair shop, which was Chadron, four miles east of Dakota Junction, where the defect occurred; but, in the event of hauling it at all, it was the duty of the defendant under the rule governing such a situation to have placed the "bad-order" car at the rear of the caboose. And, had the defendant done either, this accident could not have occurred. So that the defendant, in dealing with this "bad-order" car as it did, was guilty of negligence per se. And, further, if the two conductors were rightfully between the cars in pursuance of a duty to the defendant under their employment, they did not assume the risk of the danger incurred in so doing, even though they had full prior knowledge (which, of course, they had) of the defective coupling. So that the liability or nonliability of the defendant in this case depends upon the one question: Was Conductor Sweat, the deceased, justified in going between the cars at the time and under the circumstances he did, and in pursuance of a duty or obligation devolving upon him, arising out of his general course of employment with the defendant?

The defendant urgently insists that he was not, that he had his own train to look after, and that he was not called upon nor had he any business to meddle with the operation of another man's train, and that in so doing he was a pure volunteer, by reason of which no recovery can be had for the injury incurred.

The defendant itself promulgated a book of rules prescribing the duties and obligations of its various employees in the course of their employment, and distributed the same generally among its employees, one of which was furnished the deceased and was in his possession when he met his death, and from which the following was introduced in evidence:

"1152. In cases of accident to trains, storms, or other causes which may prevent the movement of trains, they will render all possible assistance in restoring normal conditions, whether coming under their particular duties or otherwise, and co-operate with other departments in the protection of the company's property."

A number of the employees of defendant, in giving evidence in behalf of the plaintiff, were permitted to testify, over the objection of defendant, that it was likewise the custom and practice of defendant's employees generally, when present, to assist each other in every way possible, particularly in the way of promoting traffic in the movement of trains, irrespective of whether they were of the same crew, or in the same department of service. The defendant objected to the admission of such testimony without first requiring the plaintiff to show, if she could, that the defendant had knowledge of such custom. If the rule itself did not furnish a sufficient basis for a finding of defendant's liability, providing the deceased was rightfully within its provisions, then it might have been held error for the court to have received evidence of a custom of employees without first showing that the defendant had knowledge of the same, and in some manner expressly or impliedly sanctioned it. But if the rule itself, with the record stripped of all evidence of custom, is sufficient for the purpose stated, which we think it is, then the receipt of evidence that it was the custom or practice of employees to observe the rule by complying with its provisions, which is manifestly all the evidence to, would at most be error without prejudice. So that the only question still is: Was the deceased justified in such a measure in doing what he did and being where he was, when the accident occurred, as to render the defendant liable for his death?

Donald Snyder, one of Conductor Sweat's brakemen, was the only eyewitness to the accident, present at the trial and testifying. Snyder and Conductor Sweat were together on the east side of the track as the north-bound train containing the "bad-order" car pulled in on its track, and both, attracted

by the chain coupling, walked up to where the car had come to a stop, and Snyder, being present, saw all that transpired respecting the accident. He testified in substance:

Gale (the conductor hauling the "bad-order" car), stepped between the cars first, and Sweat immediately afterward; the drawbar was out on the south end; the coal car was fastened to the lumber car with a chain; was not very tight; the pin lifter had been broken off and was hanging down almost to the ground; saw Gale take hold of pin lifter and give it a jerk, but didn't budge it, then Sweat took hold on east side and tore it off and handed it to Gale, who threw it on the car; first thing I heard Gale say was about taking up a link in the chain, he said he figured on taking up a link in the chain; from place Gale stood he could not pick up pin lifter; Sweat was the only man from where he was standing; I was going in there to help, but Sweat beat me to it; at time of crash Sweat did not have his hands on anything, he was just turning his body a little; it was about one minute and a half from the time the train stopped until it backed up and the accident happened, and Sweat had not been between the cars but about half a minute before he was killed.

Owen E. Dugan in the service of the railroad company for 25 years, part of the time as yardman, testified that there is danger in having a loose pin lifter in a train; it is barely possible that the pin lifter would have got under the wheels of the hind car and put it off the track.

One Koske, a brakeman on Conductor Gale's train, being unable to attend the trial, an affidavit of the defendant's counsel declaring what Koske would testify to, were he present in court, was admitted in evidence. It was admitted that Koske would testify that, upon the arrival of their train, he and Conductor Gale got off their way car with the necessary tools for the purpose of packing a hot box on the car forward from the "bad-order" car; that he, Koske, was just opposite the opening between the cars where Gale and Sweat were killed when the engineer gave three short whistles of the engine, signifying the intention to back the train, which Koske distinctly heard; that neither Gale nor Sweat were between said cars for any purpose in connection with repairs to said coupling, but only happened to see each other on opposite sides and came into the opening for the sole purpose of holding friendly conversation; that the "bad-order" car was properly chained up and required no repairs; that Koske was in position to hear the conversation between Gale and Sweat as they stood between the cars; that same did not pertain to any repairs to drawbars or other parts of the train; and that Gale did not say to Koske that they would take up a link in the chain coupling, or make any other remark to indicate intentions to make any repairs to said "bad-order" car.

Witness Snyder, whose testimony respecting the accident is above related, testified in rebuttal that, when the collision occurred, Koske was not at the opening between said cars, but was half a car length forward of the chained car, and that, when collision occurred, "I hollered to him to pull the air, and he pulled the air on the car ahead of this car of coal," and that he promptly did so, which, if true, indicated that he must have been at or near the forward car brake when the order was given.

The above comprises the substance of all the testimony relating to the immediate scene of the accident. At the close of the trial the court, after stating certain uncontroverted facts, instructed the jury as follows:

"On this state of facts only two questions arise in this case: First, was the deceased, Norman Edward Sweat, injured and did he die as the result of said injuries, while he was an employee of the defendant and while discharging a duty which he owed to the defendant? If the plaintiff has established by a preponderance of the evidence that he was injured and died, as the result of the injuries by reason and on account of the violation of the Safety Appliance Act, and that at the time he was injured he was engaged in a duty which he owed to the defendant as an employee of defendant, then the only question remaining is the amount of damages. Now, if you shall find from the evidence that the deceased was a mere volunteer or licensee, as claimed by defendant, and that it was not his duty to be between the defective car and the lumber car, then there could be no recovery in this case. Whether he was actually engaged in the discharge of his duty as an employee of defendant at the time he was injured is a question for this jury to determine upon the evidence, and on this question the plaintiff must establish by a preponderance, which means the greater weight, of the evidence, that at the time Norman Edward Sweat was injured he was an employee of the defendant and as such employee was engaged in the proper discharge of his duties to defendant. If that has been proved by a preponderance of the evidence and to your satisfaction, then the only question left for you to consider is the amount of damage. If, however, the plaintiff has failed to establish by a preponderance of the evidence that the deceased, Norman Edward Sweat, was an employee of defendant, engaged in the proper discharge of his duties toward defendant, but was a mere volunteer or licensee, then your verdict should be for the defendant. If the evidence be evenly balanced on that question, it will be your duty to find for the defendant. But if it be shown by a preponderance of the evidence that deceased was such employee, and that in the discharge of his duty as such employee he was injured and killed on account of the defective condition of this 'bad-order' car, then you should find for the plaintiff and award such damages as will compensate his widow and children for the loss sustained."

As before stated, the jury returned a verdict for the plaintiff. Was the instruction given by the court and above quoted a correct statement of the issue to be determined, and was a verdict for the plaintiff sustained by the evidence? We think the issue submitted to the jury by the above instruction is a correct statement of the law and the facts, and that a verdict for the plaintiff is sustained by the evidence.

The defendant insists that Sweat in going between the cars, whether for the purpose of inspecting or readjusting the coupling, or otherwise, was a mere volunteer, and for that reason no recovery can be had. We do not see how it is possible to so hold in face of the rule promulgated by the defendant hereinbefore referred to, prescribing the duties of employees in such cases. It is no answer to the apparent willingness of the deceased to assist, if assistance was needed, that he had not been invited to do so or that the crew of the train containing the "bad-order" car was able to take care of their own troubles. The rule does not require an employee before he shall assist or offer to assist, where apparently assistance may be needed, to decline such service until he shall be specially invited, or unless he shall have first determined that no one who perhaps stands in a closer relationship to the service to be performed is available. Such an attitude on the part of an employee would be a violation of both the letter and the spirit of the rule, and would result in an utter demoralization of the object and purpose intended to be attained thereby. The deceased, in the discharge of his duty to the defendant under the rule, was justified in offering to assist, as he did, in the inspection and readjustment of the defective coupler, and we are bound to presume, in the absence of evidence to the contrary, that what he did in that regard he did in good faith and in observance of a duty required of him by his master; and to penalize him because of his faithfulness in this respect would be both unwarranted and unjust.

In this connection what the Supreme Court of the United States said in the case of *Spokane & I. E. Co. v. Campbell*, 241 U. S. 497-508, 36 Sup. Ct. 683, 60 L. Ed. 1125, is applicable here:

"It is most earnestly insisted that the findings establish that Campbell was not in the course of his employment when he was injured, and consequently that judgment could not properly be entered in his favor upon the cause of action established by the general verdict. This invokes the doctrine that where an employee voluntarily and without necessity growing out of his work abandons the employment and steps entirely aside from the line of his duty, he suspends the relation of employer and employee and puts himself in the attitude of a stranger or a licensee. The cases cited are those where an employee intentionally has gone outside of the scope of

his employment or departed from the place of duty. The present case is not of that character; for Campbell, as the jury might and presumably did find, had no thought of stepping aside from the line of his duty. From the fact that he disregarded and in effect violated the order as actually communicated to him, it of course does not necessarily follow that he did this willfully. The jury was not bound to presume—it would hardly be reasonable to presume—that he deliberately and intentionally ran his train out upon a single track on which he knew an incoming train with superior rights was then due. However plain his mistake, the jury reasonably might find it to be no more than a mistake attributable to mental aberration, or inattention, or failure for some other reason to apprehend or comprehend the order communicated to him. In its legal effect this was nothing more than negligence on his part, and not a departure from the course of his employment."

The court then speaks of some of the startling consequences that would ensue if held otherwise, and closes by saying:

"The unsoundness of the contention is so apparent that further discussion is unnecessary."

We have examined the several cases cited by the defendant in support of its view of the present case, but, excepting three to be referred to presently, none of them, in so far as we have been able to discover, involves in any way the federal Safety Appliance Act, nor were the courts deciding them confronted with a rule of the defendant company prescribing the duties and obligations of employees as in the case at bar, and are otherwise so dissimilar to the instant case as to be regarded without application. Nor do we believe that the application of any of the three cases referred to is sufficient to justify an extended review of the same, particularly in view of the disposition we feel compelled to make of this case on another point.

The case of *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 35 Sup. Ct. 785, 59 L. Ed. 1290, the one perhaps most relied upon by defendant, involved a consideration of the Safety Appliance Act, but was not affected by a rule of the defendant prescribing the duties of employees, etc., as in the case at bar. We think but a casual examination of this case will readily show that it can in no way affect the ruling required to be made in the instant case, particularly when read in connection with the later case of *Louisville & N. R. Co. v. Layton*, 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931. The same may be said of the case of *Dodge v. Great W. R. Co.*, 164 Iowa, 627, 146 N. W. 14, wherein the plaintiff sought to invoke the provisions of the Safety Appliance Act, but without success. The case of *Byram v. Illinois C. R. Co.*, 172 Iowa, 631, 154 N. W. 1006, Ann. Cas. 1918A, 1067, did not involve the Safety Appliance Act, but in the effort to save him-

self from the charge of being a mere volunteer plaintiff sought to invoke a rule of the defendant company which, however, plainly appeared to have no application to the act plaintiff was engaged in performing when the accident happened. We are convinced that the ruling in the case at bar conflicts in no way with any principle of law decided in any of the cases above cited.

We are likewise of the opinion that upon the facts disclosed by the evidence in the present case the defendant is liable for the death of deceased. This disposes of the various other assignments of error relating to instructions given and instructions refused pertaining to this phase of the case.

[3, 4] The remaining principal assignments of error are: (1) That defendant did not have a fair trial in the lower court; that the whole trial was one of emotion and not a fair and just consideration of the rights of the parties; that there was a stage setting cunningly indulged in by the friends of the plaintiff and her deceased husband in the interests of plaintiff and to the disadvantage and prejudice of the defendant, which the defendant was powerless to overcome, all of which culminated in the excessive verdict of \$55,000, reduced by the court to \$40,000; (2) that the verdict, even as reduced, is grossly excessive; (3) that the court erred in not instructing the jury that if they found for the plaintiff they should reduce to its present worth the financial loss which the evidence showed the plaintiff, suing for herself and next of kin, had sustained, and return a verdict for that sum only.

We think the defendant is entirely right on the last two assignments and has much just reason for complaint under the first one, and for all of which we think a new trial must be granted. The aforesaid assignments, being so related to each other as they are, may be considered together. We have carefully examined the record, which discloses an account of things complained of occurring at the trial, of an unusual nature, for the most of which the trial court can scarcely be held responsible, but which must be well known to counsel, as the same are specified in defendant's brief and we feel compelled to say that there is in it much that merits disapproval—things which ought to have been avoided in common fairness to the defendant, but which indulged in could have but one effect, that of unjustly prejudicing the defendant and precluding it from a fair and even chance with plaintiff before the jury. In the belief, however, that they, or similar incidents, will not occur upon a retrial of the case, we do not stop to particularize further in this respect.

As before stated, we think the verdict, even as rendered, is grossly excessive, and its excess is to be accounted for largely, if not entirely, in what we believe was the

court's error in refusing to instruct the jury that it was their duty to reduce the ascertained proceeds of the probable future earnings of deceased to their present worth and include in their verdict that sum only. The defendant tendered an instruction of that import, but the same was refused by the court, and it gave no instruction on the subject. That the defendant was entitled to such an instruction, and that, if tendered, it was the duty of the court to give it, is, we think borne out by all of the federal authorities on the subject, authorities which are controlling upon the state courts on the measure of damages in actions based upon the federal Employers' Liability Act and federal Safety Appliance Act, as was the action in the case at bar. See *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F. 367; *Chesapeake & O. R. Co. v. Gainey*, 241 U. S. 494, 36 Sup. Ct. 633, 60 L. Ed. 1124. In both of these cases the Kentucky Court of Appeals was reversed, and for the sole reason that the state court rejected the present worth theory and approved the verdict of the jury on which a judgment was entered representing the whole bulk sum of future earnings as payable at once. See, also, *Louisville & N. R. Co. v. Holloway*, 246 U. S. 525, 38 Sup. Ct. 379; 62 L. Ed. 867; *Vicksburg & M. R. Co. v. Putman*, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257; *Pierce v. Tennessee Coal, Iron & R. Co.* 178 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591.

The plaintiff insists that when the court instructed the jury that they can award such damages only as will "compensate" the plaintiff for the loss sustained, as the court did in the case at bar, the jury's verdict must be presumed to be their estimate of what the actual and true compensation is, valued at its present worth. That is virtually what the Kentucky Court of Appeals said in justification of its approval of a bulk verdict. But the Supreme Court of the United States said, "The theory is erroneous," and reversed the state court. The instructions of courts in such cases almost invariably contain the direction to the jury, in one form or another, as did the courts in the Kentucky cases above referred to, that it is their duty to award such a sum only as will fully and fairly "compensate" the dependents. But we think neither court nor lawyers, much less a jury, understand from such instruction that only a sum equivalent to the present value of the aggregate of future earnings is to be awarded. That this is the correct rule, and that any other would be unwarranted, may be illustrated by the verdict in the present case as demonstrated in defendant's brief, namely: If the \$40,000, the amount of the judgment rendered in this case, were turned over in bulk to the dependents herein, by placing the same at 6 per cent. simple in-

terest, it would yield to the dependents annually a sum equal to \$360 more than they ever received from the deceased in his lifetime, and yet at the end of all their lives they would still have the \$40,000 intact. This is more than the law affords. As we said before, the law in such cases pretty definitely defines and limits the elements of damage to be considered, and, except in rare cases, those damages are capable of being computed with almost mathematical certainty. This is not a case where the bars may be let down and the jury allowed to scamper into the field of wild speculation and return a verdict in any sum that may suit their fancy. The plaintiff sued for \$100,000, and her counsel told the jury he "wanted the largest verdict ever returned in Dawes county." The jury not only granted his request, but went several better, and, apparently believing there was no limit, returned a verdict for a sum greater by \$15,000 than the court, and even counsel himself, believed plaintiff was entitled to receive.

Except for the somewhat unusual element of damages injected in the case, alleged to result from being deprived of a few simple ordinary domestic services the deceased may have been accustomed to perform in and about the home, an element which when measured in money value, as it must needs be, is always of a most doubtful and uncertain nature at best, except, we say, for this element alone, the evidence furnishes a basis from which the damages to be awarded can be ascertained to almost a mathematical certainty. Applying the formula for obtaining the present worth on the basis of the annuity tables prescribed in the Nebraska statute, which has been the method followed in this state for a great many years, and assuming, as the evidence shows, that deceased earned \$200 a month, which is probably the apex of wartime wages, and that his personal expenses did not exceed \$30 a month, so that he contributed to his family \$170 a month, or \$2,040 a year, and assuming, further, that he would have continued doing so throughout his whole 30 years' expectancy of life, the present worth of the entire proceeds on the ordinary 6 per cent. basis would be exactly a fraction less than \$21,857.15.

We do not wish to be understood as saying that this is the exact sum, no more nor no less, which should be awarded for future earnings. It depends on the rate of interest

at which the proceeds should be computed, and perhaps whether or not the interest should be computed on the system of annual rests, but what we do mean to say is that this is the principle on which the award for future earnings should be made, and, approximately speaking, the above sum cannot be far from the just amount to be awarded in this case.

If, perchance, plaintiff should claim that we have a right to assume that the jury found that the deceased would have outlived his expectancy and thereby increase the aggregate earnings proportionately, the answer is that there is no justification for such claim. For the jury to have done so, with 30 years intervening between decedent's death and the end of his expectancy, would be the purest speculation. Too many things are likely to intervene to shorten life, and few, if any, to lengthen it during so long a time. If it were a case where the deceased had already approached the end of his expectancy, and immediately before his death he was shown to be a person of sound and vigorous physical and mental health, there might be some justification for one to conclude that such person would outlive his expectancy a few years, but in our opinion no such theory can be indulged in where the time intervening between the death of one and the end of his life expectancy is so great as that existing in the present case.

Aside, then, from that which might properly be allowed for the loss of simple, domestic services before referred to, of the money value of which no evidence was offered, it is difficult to see how the judgment could be greater than the amount above indicated. While the domestic services referred to may be invaluable, estimated from a standpoint of sentiment and parental association, measured by a money value, as they must be, they cannot be more than inconsiderable under the evidence in the case. So that even allowing a most liberal sum for this item would still leave the judgment rendered grossly excessive.

We regret that it seems necessary to order a new trial of the case, and were it not for this item of domestic services above mentioned, the court could readily adjust the amount to be awarded with exact justice to both parties, but, because of this and the errors pointed out in the record, the judgment must be reversed and a new trial ordered.

Reversed.

SHEEAN v. HINES, Director General of Railroads. (No. 21734.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Master and servant §285(8), 286(14)—Conflicting evidence of negligence in maintenance of railroad track and proximate cause of injury, for jury.

Where, in an action for damages against the Director General of Railroads, for the death of plaintiff's decedent, caused by the alleged negligent maintenance of defendant's roadbed and track, the evidence as to negligence and the proximate cause of the accident is sharply conflicting, although the defendant's testimony may strongly tend to overcome that of the plaintiff, yet if the evidence upon these issues, taken as a whole, is such as from which different minds may honestly draw different inferences and conclusions, and the testimony is sufficient to sustain a verdict for the plaintiff, if one be found in her favor, the situation presents one proper to be submitted to a jury.

2. Master and servant §276(6), 278(7), 285(8), 286(14)—Negligence in maintaining railroad track and proximate cause of injury held for jury on evidence which sustains verdict.

Evidence upon the issues referred to examined, and held proper to submit the same to the jury; held, further, the evidence upon the same sufficient to sustain a verdict for the plaintiff if submitted to the jury on proper instructions.

3. Appeal and error §843(2)—Whether instruction permitting consideration of what occurred was error not decided.

Where, in an action for damages against the Director General of railroads for the death of plaintiff's decedent, caused by the alleged negligent maintenance of defendant's roadbed and track, wherein it appeared that the engine which the decedent was operating became derailed, the train wrecked, and the decedent killed, the court submitted the question of negligence to the jury by an instruction, perhaps otherwise proper, but containing the statement, "You are not confined to the statements of witnesses alone, *but you are at liberty to consider what occurred* [italics ours]," held probable error, but not definitely decided for reasons stated in the opinion.

4. Master and servant §288(2)—Locomotive engineer's assumption of risk held question for jury.

The defendant, interposing the defense of assumption of risk, introduced evidence strongly tending to establish the same. Held, nevertheless, it was one of the questions, among other things, proper to be submitted to the jury, which was done by a proper instruction on the subject.

5. Courts §97(5)—Death §95(3), 104(6)—Federal rule of damages under federal Employers' Liability Act controlling in state court charging on issue.

In an action for damages against the Director General of Railroads for the death of plaintiff's decedent, instituted in a state court under the federal Employers' Liability Act, upon a finding for plaintiff, the measure of damages must be settled according to the principles of law as administered by the federal courts requiring the ascertained proceeds of the probable future earnings of decedent to be reduced to their present worth and to include in the verdict to be rendered by the jury such sum only, and it is the duty of the state court to so instruct the jury. The defendant having tendered such instruction to the trial court, and the court having refused the same, and giving no instruction upon the subject, held, error. *Sweat v. Hines*, 184 N. W. 927.

6. Death §98(4)—Damages held excessive.

In view of the foregoing and in connection therewith, held, further, that the verdict and the judgment rendered thereon is grossly excessive, because of which a new trial must be granted.

Appeal from District Court, Dawes County; Westover, Judge.

Action by Nellie E. Sheean, as administratrix of the estate of Thomas S. Sheean, deceased, against Walker D. Hines, Director General of Railroads of the United States under the Railroad Administration, for damages for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Reversed, and new trial granted.

Wymer Dressler and Robert D. Neely, both of Omaha, and Paul S. Topping, of Nebraska City, for appellant.

Earl McDowell, of Crawford, and M. F. Harrington, of O'Neill, for appellee.

Heard before MORRISSEY, C. J., ROSE, ALDRICH, and FLANSBURG, JJ., and DICKSON and TROUP, District Judges.

TROUP, District Judge. This is an action for damages against the Director General of Railroads, brought by Nellie E. Sheean, administratrix of the estate of her deceased husband, who, at the time of the accident resulting in his death, was a locomotive engineer in the employ of defendant. The action is brought under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and charges the accident to have occurred while both the defendant and the deceased were engaged in the traffic of interstate commerce. The particular provision of the federal Employers' Liability Act involved in the present suit is that contained in section 1 of the act (U. S. Comp. St. § 8657), which provides that every common carrier by railroad engaged in interstate commerce shall be liable in damages to any person suffering injury

while he is employed by such carrier, or, in case of the death of such employee, to his or her personal representative, "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

That part of plaintiff's petition relied upon to maintain her action under said provision is in substance as follows:

That at said time (June 7, 1919) the defendant unlawfully and negligently kept and maintained the said railroad track, including the roadbed, rails, ties, spikes and all parts thereof, a short distance to the west of the station of Stroud, in the state of Wyoming, in a loose, dangerous and negligent condition, and in a condition where it was dangerous for said Sheean, or any other employee of defendant, to operate a locomotive engine over said track, and that, on said day and while so employed, said Sheean, while operating a locomotive for and in behalf of defendant and aiding and assisting in carrying on said business of interstate commerce by him as an employee, ran said locomotive over said track and by reason of the aforesaid unlawful, negligent and unsafe condition of said track, roadbed, ties, rails, and spikes, the said locomotive was derailed and overturned, and said Sheean was crushed and scalded in all parts of his body, whereof he suffered great torture and anguish and as the result thereof died on the 12th of June, 1919.

The defendant's answer admits that, at the time and place alleged in plaintiff's petition, the deceased received injuries by the derailment of the engine which he was operating, while in the employ of the defendant and while both were engaged in interstate commerce, and from which injuries the deceased died on the date alleged, but denies each and every other allegation in plaintiff's petition.

"Further answering, the defendant alleges that the said Thomas S. Sheean had been an engineer in the defendant's employ for a long time prior to said date; that he had operated an engine as engineer over said railroad track on which said accident occurred for a long time and was familiar with the condition of said track and all parts thereof; that said Thomas S. Sheean had complete control of the engine he was operating and with full power to regulate the speed thereof, and defendant alleges that the said Thomas S. Sheean assumed the risk of said engine becoming derailed by reason of the speed at which he was operating same over said track."

The reply of the plaintiff is a general denial.

The two questions in dispute under the issues thus raised are, therefore: (1) Did the defendant negligently maintain its track or roadbed at the time and place alleged in a

condition substantially as charged in plaintiff's petition? and (2) in any event, did the deceased assume the risk in operating his engine over the same?

The plaintiff introduced the testimony of a number of witnesses tending to support the allegations of her petition in respect to the condition of defendant's track and roadbed, and, on the other hand, defendant introduced the testimony of a number of witnesses tending to show that defendant's track and roadbed at the time and place in question was in a sound and normal condition, that defendant was free from negligence, and that the accident was one of those happening from an unknown cause, for which the defendant is not liable, and further that the deceased assumed the risk of whatever danger there was incurred, and that for either one or both reasons the defendant was entitled to a directed verdict in its favor. The court denied the request for a directed verdict and submitted the issues to the jury under certain instructions. We think there was no error in submitting the case to the jury. The train (passenger) which met with the accident was traveling westward at the rate of about 35 or 40 miles an hour, when the undisputed evidence shows that something caused the south or left-hand side of the engine to be tilted up so that the flanges of the drive wheels got upon the top or ball of the south rail, and thus rode for a distance of about 26 feet, when the south drive wheels of the engine dropped off the rail entirely on the south side of the rail, tearing up the track for a distance of 50 or 60 feet, when the engine finally plunged into the ditch on the south side of the track and the disaster followed. The engineer was pinioned under some parts of the engine and the escaping steam so scalded him that he died five days thereafter. The tender and at least one car were entirely upset, and two or three other cars partially derailed. There was no evidence that the wheels, flanges, or any other parts of the engine or the running gear of any of the cars comprising the train or the rails were defective in any way.

The plaintiff called four witnesses to testify as to the condition of the track and roadbed at the point in question, and to circumstances surrounding the accident, one a lawyer and passenger, another in the railway mail service, upon the wrecked train, another a contractor, but in what business is not disclosed, and the fourth a locomotive engineer in the employ of the defendant company, and brother-in-law of deceased. The last two were not present at the happening of the accident, but arrived soon thereafter. All of these witnesses testified that they had examined the track and roadbed immediately after and in the immediate vicinity of the accident, and east of where the track had been torn up by the wreck, and testified generally that some of the ties were rotten, some split,

some spikes gone, others loose, one of four bolts to a certain fish plate missing, another loose, earth balast only composed the roadbed, some ties were "hollow," that is, holes underneath them so that the track and ties were low in spots on both sides, and that there was a slight curve in the track at point of accident. In addition to the foregoing, the locomotive engineer, witness, testified that the surface of the rails was not level, that it was low in spots for three or four rails on each side, an estimate of two inches of depression; that the low places were not directly opposite each other; that he had been running an engine for 23 years and knew the effect of the action of a locomotive running over a roadbed in that condition, and stated that:

"When you hit a low spot in the rail the engine will swing over that way. * * * It has a tendency to raise the other side of the engine up off the rail, and then when it goes back, if it runs into a hole on the other side, it will go over that much farther. * * * It will spread the track where the ties are bad and the spikes are poor, and it has a tendency to raise the flange up higher than the rail, and leave the track."

On the other hand, eight witnesses called by the defendant testified to the condition of the track at the point in question, all of them in the employ of the defendant—one roadmaster and trackman for 44 years; another division superintendent of 39 years' experience; another roadmaster over that part of the road where the wreck occurred; another a civil engineer; and the others as follows: A machinist, boiler foreman, round-house foreman and baggageman on the wrecked train. The majority, if not all of these witnesses, testified that they had examined the track and roadbed in the vicinity of the accident, particularly east of that part torn up by the wreck, with considerable care, and state generally that there is no curve in the track at the point of accident, but, on the contrary, it is perfectly straight, and is so for more than 2,000 feet either way from said point; that there were no rotten ties or displaced spikes or bolts; that the roadbed was dry, sound, and in good usable order as other parts of the road. In addition to the above testimony, two of the witnesses, the division superintendent and the assistant civil engineer, testified that they tested the level of said track with a spirit level and gauged the width thereof for a distance of eight rails east of the point of accident; that the track was in perfect gauge except one spot where it was one-half inch wide, which was insignificant in practical railroad-ing; that the spirit level showed the north rail uniformly low, varying from one-fourth to seven-eighths of an inch, and two low points on opposite sides of three-eighths inch each. Asked as to whether a spot out of level seven-eighths of an inch would affect

the safety of the track, the witness answered:

"No, sir—well, that would depend on circumstances. If you had just one spot that was seven-eighths, one short spot, an engine running at high speed would drop into that and out quick, of course that might throw the engine all right, but it wouldn't be dangerous at reasonable speed."

The witness also testified, however, that seven-eighths of an inch out of level is not an unusual thing in practical railroad-ing. They also testified that, if an engine passing over a rail was to spring down two or three inches and then spring back again, it would leave evidence of such action on the roadbed, which could be detected upon examination, and that no such evidence was detected. The division superintendent also testified that after careful examination he was unable to ascertain what caused the wreck, and that it was his opinion that no man could tell the cause. It was also in evidence that on the same day, prior to the wreck, seven trains—two passengers and five freight trains—passed over the same piece of road in perfect safety, one passenger train running at the rate of 43 miles an hour.

[1,2] The defendant urgently contends that upon the whole evidence on this branch of the case, the substance of which is given above, the plaintiff has failed to establish any negligence on the part of defendant, or that the negligence attempted to be established was the cause of the accident; and, unable itself to account for the derailment or to offer any explanation of how the accident occurred, it insists that it is merely one of such accidents as are constantly occurring in railroad history, notwithstanding the exercise of great care.

It may be admitted that the defendant's evidence tends stronger to support the reasonably sound condition of its road, and yet we are of the opinion that the evidence of the plaintiff tending to show the contrary, together with some evidence given on the part of defendant, as to some impairment of defendant's track at the point in question, and the admission by the witness that such impairment might be instrumental in causing a wreck, affords a sufficient justification to submit this disputed question to the jury for its determination, and, that having been done, that there is sufficient evidence to sustain the finding of the jury that defendant's track at the point in question was negligently maintained.

The plaintiff was not bound to establish negligence to an absolute certainty; it is sufficient if the evidence furnishes a reasonable basis for satisfying the jury that the defendant was guilty of negligence as alleged. Neither is it necessary, nor always possible, to establish with absolute certainty the connection of cause and effect between

the negligent act or condition, and the accident and injury that follows. It is likewise sufficient in this particular if the evidence furnishes a reasonable basis for satisfying the minds of the jury that the negligent condition complained of was the proximate and operating cause of the accident. *Orth v. St. Paul, M. & M. Ry. Co.*, 47 Minn. 384, 50 N. W. 383; *Olson v. Great Northern R. Co.*, 68 Minn. 155, 71 N. W. 5. And when it is admitted by the defendant that the north rail was low in spots from one-fourth to seven-eighths of an inch, and plaintiff's witnesses testify it was low about 2 inches, and that the effect of such condition would be to cause the engine to tilt down on the north side and up on the south side, and the south drive wheels were elevated, by some means, so that the flanges rode the top or ball of the rail for a distance of 26 feet, then dropped off entirely and the disaster followed, it is not an unwarranted deduction to account for the accident in the way suggested, particularly so when no other explanation is afforded. The condition of defendant's road, the alleged negligence of defendant in respect thereto, and the cause of the accident in connection therewith were all matters in dispute, and the evidence in relation to them is such from which fair-minded men may draw different inferences and conclusions. It was therefore proper to submit these questions to a jury under proper instructions.

[3] The defendant further complains, however, that the court erred in its instruction to the jury in this respect. The court's instruction upon this branch of the case is as follows:

"Under the act of Congress under which this suit is being prosecuted, it was the duty of the defendant to exercise due care and caution to have the railroad at and about the place where the engine operated by Sheehan was derailed in a condition that was reasonably safe. And you are to determine from all of the evidence whether that was the condition of this railroad. As to whether this track was maintained in proper condition, or negligently maintained and used, is a question for you to determine under the entire evidence in the case. Negligence is the doing of something which a railroad corporation of ordinary prudence would not do under the conditions, or the failure to do that which a railway corporation of ordinary prudence would do under the circumstances. And it is for you to determine from all the evidence whether this railroad was kept and maintained negligently or not. The plaintiff is required to prove by a preponderance of the evidence that it was negligently maintained. This you will determine upon all the evidence. You will determine it from all the facts and circumstances in the case. You are not confined to the statements of witnesses alone, but you are at liberty to consider what occurred [italics ours], and all the facts and circumstances that will aid you in arriving at the truth, and which will enable you to say whether the injuries sustained by Sheehan were due to the negligence of the de-

fendant in the matter of the roadbed in question."

That part of the instruction in italics forms the ground of defendant's complaint. The defendant claims that this is equivalent to instructing the jury that it may consider the mere happening of an accident as evidence of defendant's negligence, and after due consideration we confess we are unable to distinguish any material difference between the two propositions. We think it must be conceded that it would have been error for the court to have instructed the jury that it was at liberty to consider the mere happening of the accident itself as evidence of defendant's negligence, and yet we think that is what the court's instruction amounts to. In addition to the statements of the witnesses as to the facts and circumstances surrounding the accident we are unable to perceive what there is left to consider as having "occurred," except the mere happening of the accident or wreck itself, and that plaintiff's decedent was killed. The court, of course, might properly enough have told the jury that, in addition to the positive facts established by the evidence, it would be at liberty to consider all reasonable inferences naturally and logically deducible therefrom, but that is not what the court said, nor do we think that what the court did say is equivalent thereto. There are two reasons why that part of the court's instruction referred to may be specially objectionable in the present case: First, because the evidence between plaintiff and defendant on the question of negligence was close and near evenly divided, and a finding for the defendant on that point would have ample evidence in the record to sustain it; and, second, because, generally speaking, under the rule obtaining in the federal courts, which is controlling in this case, the doctrine of *res ipsa loquitur* does not apply in actions between employer and employee.

We are strongly inclined to the opinion that the error complained of is sufficiently grave of itself to require a reversal of the case; but, inasmuch as there must be a new trial ordered for another reason, we pass the point at this time without further consideration, except to suggest that upon a retrial that part of the court's instruction referred to be eliminated.

[4] One of the chief defenses in the case was that plaintiff's decedent assumed the risk of whatever danger there was incurred in running his engine over defendant's road, and defendant claims that the evidence conclusively shows that decedent was familiar with all the conditions of the road generally, including the point in question, and fully understood and appreciated the whole situation and conditions as they actually were, so that it was the duty of the court to have instructed the jury to that effect, and that

therefore, as a matter of law, plaintiff could not recover. While there is a strong tendency to the belief, from the evidence, that defendant may be right on this point, yet we feel constrained to hold, nevertheless, that this is one of the questions, among others, that was proper to submit to the jury for its determination. The court recognized that the assumption of risk was a proper defense and submitted the question fully by a separate instruction which we think stated the law correctly as applicable to the facts in the case, and to which the defendant made no specific objection, except that the verdict is contrary thereto.

[5, 6] The next and last assignments of error are that the verdict as returned by the jury, and on which judgment was entered by the court, is greatly excessive, and for the failure of the court to instruct the jury that, if it found for the plaintiff, it should reduce the aggregate of the anticipated earnings of decedent, as shown by the evidence, to their present worth, and as to that element of damages include in the verdict that sum only. The defendant tendered an instruction of that import, which was refused by the court, and the court gave no other instruction on the subject. We think the defendant is right on both propositions, and, considering them together, we must hold that the court erred in refusing to instruct as suggested, and because of which a new trial must be granted.

This point in the present case is identical with a corresponding point in the case of *Sweat v. Hines*, 184 N. W. 927, and must be subject to the same ruling, and to which case we refer for a more extended discussion of the subject. As was held in the *Sweat Case*, this is one of the class of cases (actions brought under the federal Employers' Liability Act) in which, among other things, the proper measure of damages to be awarded for ascertained future earnings must be settled according to general principles of law administered by the federal courts. The Supreme Court of the United States seems to have definitely decided that in such cases the sum to be awarded for the anticipated earnings of a decedent must be the present worth only of such earnings; that it is the duty of state courts to so direct the jury; and the court first mentioned twice reversed the Kentucky Court of Appeals for no other reason than that the state court failed to comply with the rule of the federal courts in that respect. See *Chesapeake & O. R. Co. v. Kelly*, 241 U. S. 485, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 867; *Chesapeake & O. R. Co. v. Gainey*, 241 U. S. 494, 36 Sup. Ct. 633, 60 L. Ed. 1124.

We do not assume to prescribe definitely

just how the present worth in such cases shall be ascertained. That depends somewhat upon at what rate of interest the proceeds should be computed, and possibly whether or not the interest shall be computed on the system of annual rests. The formula, however, suggested in the *Sweat Case* is one that has long been in vogue in this state, and we are of the belief that a result thus obtained cannot be far from the just amount to be awarded. In the present case the evidence shows that the earnings of decedent, at the apex of war-time wages, and without any deduction for loss of time, was \$2,604 a year, less personal expenses of \$834; leaving a net balance for distribution to dependents of \$1,770 a year. For 16 years, the life expectancy of decedent, the total amount of earnings available to dependents would be \$28,320. Applying the formula suggested in the *Sweat Case*, the present worth of the above sum would be a fraction less than \$14,449, or computed on the basis of 15 years, the life expectancy of the plaintiff, the present worth would be a fraction less than \$13,973.68. The verdict and judgment in the case is for \$28,500. In addition to the sum claimed for future earnings the plaintiff asked damages for pain and suffering of decedent in the sum of \$10,000. The deceased died on the fifth day after the accident, a part of which time, the evidence shows, he was not conscious. This would give plaintiff the sum of \$14,051 on the basis of decedent's expectancy, or \$14,526.32 on the basis of plaintiff's expectancy for pain and suffering alone, or, allowing the full five days of consciousness, a fraction over \$2,810 a day on the first basis, and a fraction over \$2,905 a day on the latter basis, either one of which we think must be conceded is excessive.

We have not overlooked the fact that plaintiff also injected into this case a claim for damages for loss of a few simple domestic services, which it is claimed decedent was accustomed to perform in and about the home, such as a mowing the lawn, or watering the trees occasionally, but as to the money value of which no evidence was offered. As we said in the *Sweat Case*, while these little domestic services might be invaluable estimated from a standpoint of sentiment and personal association, measured by a money value, as they must be, they cannot be more than inconsiderable. So that this item could not materially change the result above stated.

We regret that a new trial is necessary, but we see no way to avoid it. The judgment of the lower court is therefore reversed and a new trial granted.

Reversed.

BAILEY et al. v. CHILTON et al. (No. 21594.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Pleading $\S$ 72—In action to cancel deeds and recover land title, it is proper to pray for alternative relief.

In an action to cancel deeds and recover title to real property, which is alleged to have been wrongfully and fraudulently procured from the owner, a prayer for alternative relief, asking that damages may be awarded in case the property cannot be reconveyed, is proper, since equity, having once obtained jurisdiction of the controversy, will retain the case to assess damages in favor of the injured party, or to decree such other relief as may be just in the premises.

2. Cancellation of instruments $\S$ 35(3)—In action to cancel deeds it is proper to join party fraudulently obtaining it with the party purchasing with notice.

In such an action, it is proper to join, as one defendant, the person who fraudulently deprived the owner of his property, as well as the person to whom the property has been conveyed by him and who, it is alleged, took the property with notice of the fraud.

3. Venue $\S$ 22(3)—Plaintiff failing to present issuable controversy against defendant in county of suit cannot rightfully serve other defendants outside such county.

Where an action is brought and service had upon one defendant in the county where the petition is filed, the action cannot be said to be rightfully brought in the county so as to authorize issuance of summons to a second defendant in another county, where it develops that the plaintiff is unable to present an issuable controversy as to the first defendant, and has no reasonable basis for a cause of action against him, and where no issue of fact is presented to establish that such defendant has any substantial interest in the suit adverse to the plaintiff.

Appeal from District Court, Lincoln County; Grimes, Judge.

Action by Martin L. Bailey with Mary L. Bailey intervening against James W. Chilton and others, in which judgment was entered for plaintiff for damages against the defendant Chilton. The action was dismissed as to the defendant Guy A. Silvis, and the defendant Chilton appeals, and the other parties, both plaintiff and defendant, filed cross-appeals. Judgment against defendant Chilton reversed.

C. L. Baskins, of North Platte, for appellant James W. Chilton.

Geo. N. Gibbs, of North Platte, for appellee Martin L. Bailey.

Evans & Evans, of North Platte, for appellee Mary L. Bailey.

Hoagland & Carr, of North Platte, for appellee Silvis.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, LETTON, and ROSE, JJ.

FLANSBURG, J. This was an action based upon fraud brought against the defendants Chilton and Silvis to cancel certain deeds made by the plaintiff, and to recover title to the real estate thereby conveyed, and, in the event that such real estate could not be recovered, plaintiff sought an award of damages for the wrongful deprivation of his property. The lower court held that the property had been conveyed by defendant Chilton, plaintiff's immediate grantee; to defendant Silvis, an innocent purchaser, entered judgment for the plaintiff for damages against the defendant Chilton, and the action as to Silvis was dismissed. Defendant Chilton appeals.

The sole question is one of the jurisdiction of the court over the person of the defendant Chilton, who was served by a summons sent to him in a county other than the county in which the action was instituted.

Plaintiff in his petition, for cause of action, stated that the defendant Chilton had, by fraudulent representations, procured a deed from plaintiff to Chilton, covering the real estate in controversy, and that defendant Chilton, having procured title to such real estate, had conveyed the same by deed to the defendant Silvis, and that the defendant Silvis took with knowledge of the fraud perpetrated upon the plaintiff and was not an innocent purchaser, for value. The plaintiff prayed that his deed to the defendant Chilton and the deed from Chilton to defendant Silvis be canceled, and that the title to the real estate be quieted in him; but, in the event that the court should find that Silvis was an innocent purchaser and had acquired a good title as against the plaintiff, that the plaintiff be allowed to recover a money judgment against Chilton for damages.

The suit was instituted in Lincoln county, and service was had upon defendant Silvis in that county and upon defendant Chilton by service of summons upon him in Arthur county.

[1,2] Defendant Chilton contends that he was improperly made defendant in the action, since the plaintiff's cause of action, if any, against him and against defendant Silvis could not be joined in the same proceedings. It is his contention that plaintiff's cause of action against him was one for damages and the cause of action against Silvis was one in equity to cancel deeds and quiet title. The gist, however, of the plaintiff's action is to recover property, or its value, of which plaintiff has been wrongfully de-

prived, and his claims against the two defendants, as set out in his petition, grow out of the same transaction, or series of transactions, between the parties, all tending to one end. It would seem that the relief asked for was properly sought in one proceeding. 23 Cyc. 430. By the allegations of the plaintiff's petition, both defendants, Chilton and Silvis, acted together in fraud of the plaintiff's rights and to the end of depriving him of his property, and, where an action is brought for the purpose of canceling deeds fraudulently procured, and it is found that the property for some reason cannot be reconveyed to the party wronged, a court of equity having attained jurisdiction, will hold the case for the purpose of giving complete relief, and may award damages in lieu of the return of the property. 9 C. J. 1263, § 211. As said in *Johnson v. Carter*, 143 Iowa, 95, 100, 120 N. W. 320, 322:

"It is a well-settled proposition that, equity having once obtained jurisdiction of a controversy, if it be found that some act of the party charged has made the application of the specific remedy sought impossible or impracticable, the court will retain jurisdiction to assess damages in favor of the injured party, or to decree such other relief as may be just in the premises. * * * It would be a strange perversion of the spirit which pervades all rules of equity if, when a party, who has been defrauded of his title to land, brings the person who defrauded him into a court of equity, upon a demand for rescission of the conveyance, he can divest the court of jurisdiction by showing that he has conveyed the title to an innocent purchaser, and thus compel the injured party to resort to another forum for the recovery of damages."

See, also, *Rakow v. Tate*, 93 Neb. 198, 140 N. W. 162.

Under the allegations of the plaintiff's petition, then, it was proper to join the defendants in the one action and to seek the relief prayed.

It is, however, further contended by the defendant Chilton that at the time of the institution of the proceeding it was fully known to the plaintiff that the defendant Silvis had not participated in the fraud, and that Silvis was, in fact, an innocent purchaser from Chilton; that it was, therefore, fully known to plaintiff that he had no cause of action against the defendant Silvis, and that the allegations of the plaintiff's petition, so far as they relate to any cause of action against Silvis, were made without any foundation whatsoever in fact, and only for the purpose of a joinder of Silvis in the action, so as to procure service upon Silvis in the county, and by that means furnish a basis for the issuance of process against Chilton, as a co-defendant, outside of the county where the action was brought,

[3] The statute provides that, where the action is rightfully brought in any county, a summons may be issued to any other county against one or more of the defendants at the plaintiff's request. Rev. St. 1913, § 7627.

An action to quiet title must be brought in the county where the property is situated, and in such an action Chilton would have been a proper party defendant to the proceeding, though he had parted with his interest in the property by his deed to Silvis. 32 Cyc. 1347, 1348.

Before, however, the action for fraud or to quiet title can be said to have been rightfully brought against Silvis, it must appear that the plaintiff had some substantial basis for the action. We have made a careful examination of the entire record in this case, and find no attempt in the testimony at any place to show that Silvis was a party to the fraud with Chilton, nor to deny the fact that he was an innocent purchaser of the property. In fact, it does appear that the plaintiff, by his actions, has at no time controverted the rights of Silvis. He promptly moved out of the property at the request of Silvis, and has, until this suit, recognized his title. Upon an examination of all the evidence in the case, it appears clear to us that, as to the defendant Silvis, the action is purely nominal.

Had the plaintiff shown any reasonable ground to believe that Silvis was not an innocent purchaser, and had he introduced sufficient evidence to show that his action against Silvis was based upon probable cause, the case would have been different, for his action might have been rightfully brought and the court have acquired jurisdiction for the trial of the issuable controversy as against Silvis, though it should prove, upon trial, that the plaintiff's evidence was insufficient to allow him to prevail. But in this case the plaintiff, by his testimony, presented no issue in support of a cause of action against Silvis. The testimony in the case bears upon the one issue of alleged fraud perpetrated by defendant Chilton and upon the question of the amount of damages. That Silvis was not a party to the fraud, but was an innocent purchaser of the property for value, is shown beyond any dispute, as to fact or inference, in the record.

Where an action is brought and service had upon one defendant in the county where the petition is filed, the action cannot be said to be rightfully brought in the county so as to authorize issuance of summons to a second defendant in another county, where it develops that the plaintiff is unable to present an issuable controversy as to the first defendant, and has no reasonable basis for a cause of action against him, and where no issue of fact is presented to establish that such defendant has any substantial interest in the suit adverse to the plaintiff.

Cobby v. Wright, 29 Neb. 274, 45 N. W. 460; Dunn v. Haines, 17 Neb. 560, 23 N. W. 501; Allen v. Miller, 11 Ohio St. 374; Miller v. Meeker, 54 Neb. 452, 74 N. W. 962; Ayres v. West, 86 Neb. 297, 125 N. W. 583.

For the reasons given, it is our opinion that the district court acquired no jurisdiction over the person of the defendant Chilton, and his objections to the court's jurisdiction should have been sustained. The judgment entered against defendant Chilton is reversed.

CARPENTER v. STATE. (No. 21931.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Indictment and Information ¶11(3)—Indictment for practicing without authority need not negative exceptions in practice act.

The exceptions set forth in section 2724, Rev. St. 1913, as amended by Laws 1919, c. 190, tit. 6, art. 2, § 8, form no part of the descriptions of the offense, and it is unnecessary that they be negated in an indictment charging in violation of the Medical Practice Act.

2. Physicians and surgeons ¶2—Act not discriminatory because failing to provide for practice of "napropathy."

The statute regulating the practice of medicine is not void as discriminatory because it fails to provide that persons desiring to practice "napropathy" may treat diseases without examination.

3. Physicians and surgeons ¶2—State board need not prepare for examining persons desiring to treat patients by extraordinary methods.

Unless so provided by the Legislature, it is not incumbent upon the state board of health to furnish means for examining the qualifications of all persons desiring to treat patients by drugless or other methods of healing for fee or reward, and to fail to do so is not a denial of any constitutional right.

4. Physicians and surgeons ¶6(8) — Neither Legislature nor state board of health can be expected to anticipate new health methods.

Neither the Legislature nor the state board of health can be expected to anticipate the inception of new methods of healing.

(Additional Syllabus by Editorial Staff.)

5. Physicians and surgeons ¶6(10) — In a prosecution for illegal practice evidence held properly excluded as not showing system to be a household remedy here.

In a prosecution for illegal practice of medicine excluding evidence that treating disease by manipulation of spinal column had been used in Bohemia for more than 100 years held not

error as such evidence would not establish that the practice of "napropathy" as described by defendant is an ordinary "household remedy" in this country within the exception of the Medical Practice Act, Rev. St. 1913, § 2724, as amended by Laws 1919, c. 190, tit. 6, art. 2, § 8.

6. Physicians and surgeons ¶6(11)—In prosecution for illegal practice evidence held insufficient to warrant instruction on napropathy being a household remedy.

In a prosecution for illegal practice of medicine by system called "napropathy," refusal of an instruction that the law permits treatment of physical ailments through household remedies such as massage and external manipulations held not error, where neither the evidence offered and excluded nor received would establish that defendant administered ordinary household remedies within the statutory exception.

Error to District Court, Brown County; Dickson, Judge.

P. R. Carpenter was convicted of the illegal practice of medicine for a stated fee, and he brings error. Affirmed.

Wm. M. Ely, of Ainsworth, and Clarence S. Darrow, of Chicago, Ill., for plaintiff in error.

Clarence A. Davis, Atty. Gen., for the State.

Heard before MORRISSEY, C. J., and LETTON, ROSE, DEAN, ALDRICH, DAY, and FLANSBURG, JJ.

LETTON, J. Plaintiff in error (hereinafter termed defendant) was convicted upon four counts of an information charging him with the illegal practice of medicine, for a stated fee. The evidence shows that defendant, who did not possess the qualifications as to professional education required by the statute for the practice of medicine, or the treatment of diseases, had treated the persons named in the information for physical ailments, for a fee, by a manipulation of the spine or its ligaments.

Defendant relied for a reversal of the judgment upon a number of assignments of error, which may be grouped as follows: (1) No count of the information charges an offense; (2) the court erred in excluding evidence offered in his behalf; (3) the court erred in giving and refusing certain instructions; (4) the statute is in violation of the Constitution of the state and of the United States.

[1] Section 2724, Rev. St. 1913, as amended in 1919, Laws 1919, p. 754, is as follows:

"Any person shall be regarded as practicing medicine, within the meaning of this article, who shall operate on, profess to heal or prescribe for, or otherwise treat any physical or mental ailment of another. Nothing in this

article shall be construed to prohibit gratuitous services in case of emergency, and this article shall not apply to commissioned surgeons in the United States army and navy, nor to nurses in their legitimate occupations, nor to the administration of ordinary household remedies."

It is argued that the latter sentence is not negated in the indictment; that, if the indictment may be true and still the accused may not be guilty of the offense described in the statute, it is insufficient; that the section quoted has an arbitrary definition of practice of medicine, and that the exceptions made in the second sentence form as much a part of the definition as any other part of the section.

The same complaint was made to the information in the case of *Sofield v. State*, 61 Neb. 600, 85 N. W. 840. The court said:

"The information is assailed on the ground that it failed to contain any negative averment relative to the exceptions contained in section 17, c. 55, Compiled Statutes. Such a negative averment was wholly unnecessary. *O'Conner v. State*, 46 Neb. 157."

In *Holt v. State*, 62 Neb. 184, 86 N. W. 1073, which was a prosecution for keeping intoxicating liquor for sale without a license, under a section of the statute which provides:

"That this [section] shall not apply to physicians or druggists holding permits for the sale of liquors for medicinal, mechanical, chemical, or sacramental purposes, or persons having liquors for home consumption"

—it was argued that the information was fatally defective because it did not specifically allege that the defendant was not one of the persons designated in the proviso. But the court said:

"The information sufficiently negatives the exceptions of the statute. It alleges that the accused had no liquor license or druggist's permit, and that the defendant kept the intoxicating liquors for sale and did sell the same. * * * The information negatives all exceptions of the statutes which are a necessary description of the crime attempted to be charged. Moreover, the general rule is that only such exceptions and provisions of the statute as are part of the description of the offense need be negated in the information."

This principle applies and the information is sufficient.

[3] It is assigned as error that the court refused to permit defendant to testify as to the condition of several of his patients before and after the treatments administered by him, and that in such treatments no drugs, medicines or surgical operations were used. It is said that the fact that defendant belongs to a class that has been unjustly dis-

criminated against, and that his constitutional right to life, liberty and the pursuit of happiness has been, or is sought to be, violated by the statute, can only be established by evidence showing the real nature of the acts performed. While a portion of the offered testimony was excluded, defendant was allowed to testify that "naproathy" is a drugless method of treatment of diseases or disorders of the human body discovered or founded about 15 years ago, and that he did not treat cases of obstetrics or of broken bones. He stated the theory of treatment as follows:

"We believe that the innate property of ligamentous tissue to shrink up from injury results very frequently in damage to the nerves which go out through the spinal column to the different parts of the body, and thus the impairment to nerves due to this contracting property of the ligamentous tissue results in shutting off the nerves in there, or possibly an irritation of the nerves, so that the organs or parts thus supplied do not act in a normally functioning way."

He defined at length the term "ligamentous tissue," and further testified that he treated the ligaments by using manual force upon the bones to which the ligaments were attached, using the prominences of the bones as a lever to stretch the shrunken ligaments, which are for the most part attached to the vertebrae. The witness was also permitted to testify in detail as to the actual condition of several of his patients before treatment and their general appearance and physical condition after the treatment. The undisputed testimony, therefore, is that their later condition was better than the first, and no prejudice or error occurred by the exclusion of merely cumulative evidence on this point.

Dr. Oakley Smith was called in behalf of the defendant and testified that he had charge of a school teaching "naproathy" in Chicago, which was the only school of the kind in the United States; that the system was founded by him about 15 years ago; and that he had formerly been a chiropractor. When asked to state the difference between chiropractic and osteopathy, on the one hand, and naproathy, on the other, the witness testified:

"I will do the best I can. As far as I can see, they are opposite in this regard: The chiropractor works on the basis of bones out of place, works on the basis of putting them back in place, makes up his treatment as he goes along; in other words, without chart or book-keeping. The naproath says we should do all work with a chart, work on the basis it's a ligatight, not bone out of place; a ligatight is a shrunken ligament, and on the basis we should stretch those shrunken ligaments. That is all. Q. And you might state the osteopath

theory? A. Without any accusations against the chiropractor, the chiropractor is the same as the osteopath, as far as I can see in theory and action. That is all."

[5] The court sustained an objection to the question as to how long the system of treating disease by manipulating the spinal column has been used. Defendant offered to show by the witness "that the practice of manipulating the spine has been in use in the world as far back as the history of medicine can be traced, that it has been specially in use in Bohemia, where he has studied and observed, and that it is used in families and has been for more than 100 years, and that it is in frequent use in the United States in families, especially in families of those who have recently come from Europe, as a household remedy," which permission was refused as not tending to prove or disprove any issue in the case. This is assigned as error. The evident object of the tendered evidence was to bring the practice of the treatment within the exception of the statute which permits "the administration of ordinary household remedies." Even if received, the testimony would not, in our opinion, have brought the case within the exception. Use in Bohemia or in the families of immigrants from Europe of rubbing or manipulation of the spine would not establish that the practice of "naprothy" as described by the witness is an "ordinary household remedy" in this country. The ruling on this point was not erroneous.

[6] Defendant requested instructions, in substance, to the effect that the law permits any person to treat diseases or physical ailments of others through the administration of household remedies, and that by such administration is meant the use of any agency, "such as massage or the exercise of the muscles or nerves by external physical manipulation, when such use of either or any of such agencies is frequently applied by members of a family or household in which one may be suffering some physical or mental ailment, or by neighbors, or by any other person called in for advice for such ailments," etc. The refusal of the court to so instruct the jury is assigned as error. We think these instructions were properly refused. It has been pointed out that neither the evidence offered and excluded, nor that received, would establish that the defendant administered ordinary household remedies, within the meaning of the statute.

[3] It is also assigned that it was error for the court to refuse to instruct the jury that it was the duty of the state board of health to provide means whereby persons desiring to practice drugless healing by the system of "naprothy" could take an examination as to their fitness to engage in

such a system of healing. It is said that to refuse or neglect to afford such an examination is a denial of defendant's constitutional rights and a discrimination against him in favor of practitioners of other schools of medicine. In recent years a number of schools of thought concerning the treatment of diseases have sprung up, mostly concerned with what is known as drugless healing, such as Christian Science, osteopathy and chiropractic.

The constitutionality of an act forbidding the practice of medicine except by persons licensed by the state board of health was first passed upon in this state in the case of *Gee Wo v. State*, 36 Neb. 241, 54 N. W. 513. The statute was again upheld in *State v. Buswell*, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68. The quoted section defining the practice of medicine was especially considered and was held to be valid.

In *Little v. State*, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. 717, which was a prosecution for the practice of osteopathy before the enactment of the statute providing for the issuance of licenses to that class of practitioners, the constitutionality of the act was again attacked on the ground of being prohibitive in its nature.

The law was again sustained in *Harvey v. State*, 96 Neb. 786, 148 N. W. 924, where it was said by Sedgwick, J.:

"Some of the questions presented appeal strongly to one's sense of justice, and would be difficult of solution if they were not foreclosed by the statute and the early decisions of this court. * * * This court cannot amend the statutes, nor disregard the early decisions upholding and construing those statutes. The Legislature has had ample opportunity to modify the laws, if they are considered harsh, unjust or impolitic, and, not having done so, they must be enforced as the will of the public expressed through its lawmaking powers."

After the law in this state had been so construed, believing that the regular schools of medicine did not possess a monopoly of the skill and knowledge available or necessary to alleviate human suffering, the votaries of these new methods applied to the fountainhead, and convinced the lawmaking powers of the state that their respective systems were of value and effect in the treatment of disease. The Legislature thereupon supplemented the statute by providing that the practice of osteopathy and chiropractic could lawfully be carried on under certain prescribed regulations. This was the proper and orderly method of proceeding.

There are but few relations in life in which there is a greater feeling of dependence, trust and confidence than in the relation between a patient and his physician. The very use of the title "Doctor" to the average

mind implies peculiar skill and knowledge, and invites faith and confidence, and it is entirely proper to protect the public from ignorant or incompetent men or women professing to be competent physicians. Such laws, no doubt, in some cases, and perhaps in this case, prevent a man of greater ability, or better education, than some of those having the legal qualifications, from practicing, and seem unjust in isolated cases; but it is impossible to legislate to meet every individual case, and some latitude must be allowed in order to attain the necessary and proper object to be attained—the protection of the public from quacks. There may be but a slight difference between the treatment given by osteopathic, chiropractic, or other healers by manipulation but the state has recognized a distinction between them and has declared the practice of such arts by specially educated practitioners legal and valid. The requirements for the right to practice either of these schools of drugless healing are not exacting, rigorous or unreasonable, but they are sufficient to exclude the ignorant. Neither does the

knowledge or study required, at least in osteopathy, seem to be inconsistent or incompatible with the study of napropathy as described by its founder or discoverer. We know of no law which would prevent the exercise of the system of napropathy by one who has been licensed to practice osteopathy.

[4] The Legislature cannot be expected to anticipate the founding of new systems of thought or methods of healing, and neither can the state board of health be required to anticipate every new idea in the drugless treatment of diseases. The cases cited on behalf of the defendant mainly are distinguishable, either as not involving the point considered here, or as construing statutes different in their terms. A large number of cases bearing on the questions involved may be found in the annotation to *People v. Cole*, 219 N. Y. 98, 113 N. E. 790, L. R. A. 1917C. 822, and in notes in former volumes of the series to which this note is supplementary.

We fail to see that any constitutional right of the defendant has been infringed. The judgment of the district court is affirmed.

DENKER v. STATE. (No. 21899.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

*(Syllabus by the Court.)*1. Witnesses $\S$ 337(5) — Defendant witness may be asked if ever convicted of felony.

"If the defendant testifies in his own behalf, the county attorney may, on cross-examination, ask him whether he has been convicted of a felony, and, if the witness equivocates in his answer, the prosecutor may ask such additional questions as may be reasonably necessary to bring out the fact of that conviction." *Johns v. State*, 88 Neb. 145, 129 N. W. 992.

2. Criminal law $\S$ 1159(3) — Conviction on conflicting evidence not set aside where state's evidence sustains verdict.

"A judgment of conviction in a criminal case will not be set aside because of conflicting evidence, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict." *Wheeler v. State*, 79 Neb. 491, 113 N. W. 253.

3. Forgery $\S$ 44½—Evidence held to sustain conviction.

Evidence examined, and found sufficient to sustain the verdict.

Error to District Court, Douglas County; Troup, Judge.

Fred Denker was convicted of forgery, and he brings error. Affirmed.

Richard S. Horton, of Omaha, for plaintiff in error.

Clarence A. Davis, Atty. Gen., and Mason Wheeler, Asst. Atty. Gen., for the State.

Heard before MORRISSEY, C. J., and LETTON, ROSE, DEAN, ALDRICH, DAY, and FLANSBURG, JJ.

ALDRICH, J. The defendant, Fred H. Denker, was convicted of the crime of forgery in Douglas county in January, 1921, and sentenced to confinement in the penitentiary from one to twenty years. Defendant prosecutes error.

The main contentions of the plaintiff in error are: First, that the county attorney improperly examined him as to his former conviction of forgery; and, second, that the evidence was insufficient to sustain the verdict of the jury and the sentence of the court.

[1] We note first that defendant appeared as a witness for himself. That being true, he is subjected to the same rules of cross-examination as any other witness to test or attack his credibility. The examination was irregular and may be criticized, but was brought on by equivocation of defendant. It is manifest that defendant knew what the prosecuting attorney was seeking. This question was asked:

"Mr. Denker, have you ever been convicted of a felony? A. No, sir. Q. Never been convicted of a felony? A. No, sir."

This was a plain equivocation. Section 7906, Rev. St. 1913, provides:

"A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof."

The county attorney by further cross-examination brought out the admission of defendant that he had pleaded guilty to a felony and was sentenced to the penitentiary. What the county attorney did in the instant case he has authority for in the case of *Johns v. State*, 88 Neb. 145, 129 N. W. 992. This phase of the case, with this brief discussion, may be dismissed.

[2, 3] The next question raised is that the evidence is insufficient to support a verdict of guilty. The evidence proves the fact that the defendant had established certain business relations with the Nebraska Clothing Company. In October, 1919, he cashed a check. After passing this valid check it is claimed he cashed the forged check in question. Counsel for plaintiff in error has much to say in criticism of Miss Waxman concerning her general conduct and the reliability of her testimony. We are of the opinion that she was willing to tell the truth and all the facts. The forged check was presented to Miss Waxman, then the head cashier of the Nebraska Clothing Company, and she cashed it. She testified that as a rule she did not see the party having the check to be cashed, but that the defendant came to her desk himself and asked if she would cash the check. It was unusual for her to see the party, as the custom was to send the check up through the carrier. Thus it appears that she was advantageously situated to be able to later identify Denker as the man who cashed the forged check. The fact that Miss Waxman in her cross-examination hesitated in recognizing the defendant does not reflect upon her testimony, for she positively identified the defendant at the trial as the man who cashed the check. There is no material difference between the testimony as she gave it on the last trial and the former trial. The jury were satisfied with her statement of fact.

Upon the question of whether the handwriting on Exhibits 1 and 2, and the writing on Exhibit 4, is the handwriting of defendant, we have the testimony of Mr. Wallace O. Shayne and Mr. Roy E. Karls. The record shows that Mr. Shayne was a man of much experience and had been in the employ of the government and other banks as a handwriting expert. The defendant in opposition called Mr. Roy E. Karls, who has been a bank cashier. The testimony of these two witnesses was placed in juxtaposition and the jury believed Mr. Shayne. It is not the province of this court to find fault with the verdict of the jury. "A judgment

of conviction in a criminal case will not be set aside because of conflicting evidence, where the evidence of the state, if believed by the jury, is sufficient to sustain the verdict." *Wheeler v. State*, 79 Neb. 491, 113 N. W. 253. This proposition has long been settled in this state, and may be said to be a rule of law. That being the case, we will not disturb the verdict of the jury rendered under these circumstances, and we think justice will be subserved by confirming this verdict.

Affirmed.

ULASKI v. MORRIS & CO. (No. 22191.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Master and servant $\Leftrightarrow$ 418(6) — District court's finding on conflicting evidence in compensation case conclusive.

"Where the district court in workmen's compensation case finds, on substantially conflicting evidence, that the employee was injured in a particular manner, such finding of fact will not be reversed on appeal unless clearly wrong." *Swift & Co. v. Prince*, 106 Neb. —, 183 N. W. 557.

2. Master and servant $\Leftrightarrow$ 387 — Compensation allowable for loss of finger stated.

Where the injured employee suffered 25 per cent. partial permanent loss of the normal use of his second or middle finger of his right hand, the extent of the injury not being ascertainable until 10 weeks after the accident, then he is entitled, under Rev. St. 1913, § 8662, as amended by Laws 1917, c. 85, to compensation for the period of 7½ weeks at \$15 a week, commencing, not with the day of the accident, but with the day when the extent of the injury is ascertainable, and in addition is entitled to \$15 a week for 10 weeks.

3. Witnesses $\Leftrightarrow$ 28(1) — Expert only entitled to statutory fee.

"One testifying as an expert on a subject requiring special knowledge and skill, in the absence of a special contract, is entitled only to the statutory fee." *Main v. Sherman County*, 74 Neb. 155, 103 N. W. 1038.

(Additional Syllabus by Editorial Staff.)

4. Master and servant $\Leftrightarrow$ 420 — Attorney's fee allowed compensation claimant held reasonable.

Seventy-five dollars, allowed compensation claimant by district court on appeal, held a reasonable attorney's fee provided for under Rev. St. 1913, § 8666, as amended by Laws 1917, c. 85, and Laws 1919, c. 91.

Appeal from District Court, Douglas County; Wakeley, Judge.

Application by Frank Ulaski to the Compensation Commissioner for an award under

the Workmen's Compensation Act, opposed by Morris & Co., employers, in which an award was made and upheld and increased on appeal to the District Court, and the defendant appeals. Modified and affirmed.

James C. Kinsler, of Omaha, for appellant.

A. H. Bigelow, of Omaha, for appellee.

Heard before MORRISSEY, C. J., and ALDRICH, DAY, DEAN, FLANSBURG, and ROSE, JJ.

ALDRICH, J. On September 11, 1920, Frank Ulaski, an employee of defendant, was injured while in the course of his employment. He was what is called a "beef lugger." On that day he says that a beef fell from an overhead rail, and in catching it a bone splinter was forced into the first joint of the middle finger of the right hand. The defendant's physician administered some iodine and bandaged the finger and he had daily dressings at the doctor's office. In the meantime an infection developed and it became necessary to open the wound. Finally, he was sent home, where he stayed during the succeeding week and two days. He was treated daily by the company physician and his finger was repeatedly lanced. He returned on September 29, under direction of the company's physician, and was assigned a lighter task in which he did not have to use the injured finger.

On October 1, he was called to the office and given a check for \$5 to cover his compensation for two days, the 27th and 28th of September, the first week being exempted by law. He signed a release; and then returned to work and was required to do work that necessitated the use of his finger. He told the foreman he could not do that work because of his sore finger. An altercation ensued and he was permanently discharged. This discharge occurred about two hours after he had signed the release, and, notwithstanding his discharge, he was treated by the company physician for several days afterwards. Later, while his finger was still swollen and open, the company physician refused him further treatment. It was on October 7 that he was refused further compensation, and then he went to the compensation commissioner, who informed the company's claim agent and told him that Ulaski was at that time entitled to a week's compensation. Ulaski then went to the company's office and was paid the sum of \$15 and was required to sign two releases. His finger was at that time still sore and swollen. He returned to the defendant company on November 16, seeking work. The defendant company had not at that time begun to lay off men, although they refused him employment. It is claimed that plaintiff was not

yet in condition to work and was not able to use the knife. Even at this time his finger was in such a condition that he was unable to work and was forced to quit after shoveling coal a few hours. January following he applied for compensation and was awarded a hearing and was allowed additional compensation. Upon a hearing in the district court being had, the trial court, among other things, held that—

"The plaintiff have and recover from the defendant company, in addition to the sum already paid, compensation at the rate of \$15 per week for a period of 17½ weeks, all of which is now due and payable forthwith; that the defendant company be and it is hereby ordered to pay to plaintiff the sum of \$75 for attorney's fee in this court, and to pay to the plaintiff for expert witness fees charged as costs the sum of \$50, and to pay into court the costs of this suit; that, unless said payments are made forthwith, the defendants shall also pay 50 per cent. of the said compensation for 17½ weeks as the statutory waiting time."

From the judgment so rendered the defendant appealed.

[1] In *Swift & Co. v. Prince*, 106 Neb. —, 183 N. W. 557, the court said:

"The trial court saw the witnesses and heard their testimony, and its findings, upon conflicting evidence, should not be disturbed. It is the rule in cases of this kind that finding of fact, supported by sufficient evidence, or findings of fact on substantial conflicting evidence, will not be reversed unless clearly wrong."

The rule announced in the *Prince Case* is applicable to the facts before us and we adhere thereto. The finding of fact is amply supported by the record. The court was justified in allowing *Ulaski* 10 weeks for total disability in addition to the week and two days formerly allowed by the court under the finding of fact.

[2] The record shows conclusively that plaintiff was allowed 10 weeks' compensation for time lost dating from October 7, 1920. After he had rested and had had time to make improvement it was further found that he had lost 25 per cent. of the normal use of his injured finger. His loss altogether, then, was 10 weeks for total disability and 7½ weeks for permanent partial loss of the finger, making a total loss of time of 17½ weeks at \$15 a week, as provided by statute. The defendant refused to pay the award as made by the compensation commissioner. Then the case was tried in the district court and the decision of the compensation commissioner affirmed.

As appears of record there was total disability of 10 weeks, and according to the spirit and intent of the statute the plaintiff was entitled to a recovery of \$15 a week pending that time, and to a permanent partial disability for a period of 7½ weeks. This in the aggregate constitutes the total

loss of the plaintiff for the entire time of the injury, and we concur in the finding of the court in this regard as it is amply sustained by the record. This case is not unlike the principle found in *Addison v. Wood Co.*, 207 Mich. 319, 174 N. W. 149. The principles of the statute as applied to this case are fully discussed and the application of the law which we follow is made. We adhere to the principle of law therein involved. It is in point in the instant case. We believe the court was right in allowing a total disability for a period of 10 weeks and was correct in allowing permanent partial disability at the rate of \$15 a week. The requirements of the statute have been amply complied with and the court has met the situation as shown in plaintiff's case.

We are not unmindful of the fact that in the discussion and conclusion of the instant case there are cases holding a different principle and conclusion from what we have arrived at, but at the same time we believe that our conclusion has the support of law and does ample justice to the parties under these facts.

[4] On the question of attorney's fees, section 8668, Rev. St. 1913, as amended by chapter 85, Laws 1917, and chapter 91, Laws 1919, provides as follows:

"Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are had before the compensation commissioner, a reasonable attorney's fee shall be allowed the employee by the court in the event the employer appeals from the award of the commissioner and fails to obtain any reduction in the amount of such award, the appellate court shall in like manner allow the plaintiff a reasonable sum as attorney's fees for the appellate proceedings."

The \$75 so allowed by the trial judge is correct and just and we affirm it. It follows that defendant must pay the costs of this suit.

[3] There is, however, no provision in the law for the payment of expert witness fees. The expert witnesses are therefore allowed the usual and lawful witness fee, and no more. *Main v. Sherman County*, 74 Neb. 155, 103 N. W. 1038.

The judgment of the district court is affirmed, except as modified herelu. It is ordered that the court disallow the expert witness fees in the amount of \$50, and that the expert witness recover only the usual and lawful witness fees; and that defendant receive credit for one and one third weeks' compensation which defendant has already paid on plaintiff's claim. It is further ordered that defendant pay an attorney fee for plaintiff, as costs, in this court, in the sum of \$100.

Affirmed as modified.

CHRISTIANY v. STATE. (No. 21830.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Criminal law §1167(2)—Refusing to require state to elect between two counts, where the first included the second, held without prejudice.

Where an information, having reference to a single transaction, contained two counts, one for statutory rape and the other for an assault with intent to commit rape upon the same woman, and the defendant's motion to require the state to elect was denied, *held*, that the ruling was without prejudice.

2. Criminal law §1166½(8)—Defendant not prejudiced by overruling of challenge to a venireman subsequently excused.

Where the defendant's challenge of a venireman for cause was denied, but the record shows that he was subsequently excused, *held*, the defendant was not prejudiced thereby.

3. Criminal law §1166½(7)—Sustaining state's challenge to venireman not prejudicial where a competent juror not challenged took his place.

Where the court sustained the state's challenge to a venireman because of his business relations with counsel for defendant, and a competent juror, who was not challenged, took his place and was retained, *held* that the ruling was not prejudicial.

4. Jury §33(1)—Defendant not entitled to a specific juror but only to an impartial jury.

The defendant was not entitled to a specific juror, if the members of the panel possessed the requisite qualifications and constituted an "impartial jury," that was all he could ask.

5. Criminal law §1170½(6)—County attorney's asking defendant questions not within his direct examination to which objection was sustained and jury admonished held not error.

Where on cross-examination the county attorney asked the defendant a question not within the range of the direct examination, but the court promptly sustained an objection thereto and informed the county attorney that the question was improper and should not have been asked, and at the defendant's request and on his own motion so instructed the jury, *held*, that there was no error.

6. Criminal law §1169(1)—County attorney's asking defendant to stand before jury held without prejudice.

Where, during the introduction of evidence the county attorney, for the ostensible purpose of thereby giving evidence of his age, requested the defendant to stand up in the presence of the jury, but it subsequently appeared that there was no dispute that the defendant at the time of the commission of the offense was more than 22 years of age, and nothing to show that he complied with the request, *held* to be without prejudice.

7. Rape §54(1)—Instruction that it was sufficient if the jury believed that prosecutrix was not unchaste previous to alleged statutory rape approved.

An instruction in these words approved: "As to the question of the previous chastity of Gladys Dyer, it is not necessary that her testimony that she was not previously unchaste be corroborated. It is sufficient as to this point if you are satisfied by the evidence, beyond a reasonable doubt, that she was not unchaste previous to the time of the alleged act of sexual intercourse complained of in the information."

8. Rape §59(8)—Instruction that the state must prove that prosecutrix was previously chaste approved.

The court instructed the jury that it was necessary for the state to prove, beyond a reasonable doubt, that the prosecuting witness was previously chaste; *held* to be the equivalent of "not previously unchaste."

9. Rape §59(8)—The phrases "previously chaste" and "not previously unchaste," as used in instructions, held synonymous.

The phrases "previously chaste" and "not previously unchaste" are synonymous; "previously chaste" is an affirmation that the prosecuting witness was "not previously unchaste."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chaste: Previously Unchaste.]

10. Criminal law §785(16)—Instruction as to disbelieving all testimony of witness swearing falsely to any material fact approved.

The following instruction approved: "If you believe that any witness has knowingly sworn falsely to any material fact in this case, you may, if you see fit to do so, disregard all of the testimony of such witness."

11. Rape §59(8)—Instruction that minor female who had had improper or unlawful sexual intercourse is not within the act held properly refused.

The defendant's request that the jury be instructed in substance that a "female under 18 years of age and over 15 years of age, who had improper or unlawful sexual intercourse with a man, is not within the act," *held* properly refused.

12. Rape §59(8)—Instruction that a female between 15 and 18 years of age who has had unlawful sexual intercourse is not within the act approved.

The following instruction approved: "The object of the statute under which the information is drawn is to protect the virtuous maidens and the undefiled virgins of the state; and a female under 18 years of age, and over 15 years of age, who has had unlawful sexual intercourse with a male, is not within the act."

13. Rape §52(1)—Evidence held to support verdict of guilty.

Evidence examined, and *held* sufficient to support verdict.

14. Rape ~~§~~ 64—Sentence of seven years held excessive and reduced to three.

Judgment and sentence reduced to three years' imprisonment in the penitentiary.

Error to District Court, Fillmore County; Brown, Judge.

Walter Christianity was convicted of statutory rape, and he brings error. Affirmed.

Sloan, Sloan & Keenan, of Geneva, for plaintiff in error.

Clarence A. Davis, Atty. Gen., John Barsby and Robert B. Waring, both of Geneva, and C. L. Dort, Asst. Atty. Gen., for the State.

Heard before MORRISSEY, C. J., ROSE, ALDRICH, and FLANSBURG, JJ., and ALLEN and REDICK, District Judges.

ALLEN, District Judge. The plaintiff in error was convicted by a jury in the district court for Fillmore county of the crime of statutory rape, and from a judgment of guilty thereon and the sentence to seven years' imprisonment in the penitentiary, he has brought the case to this court for review. For convenience, the parties will remain classified as they were in the district court.

[1] The information contains two counts, in the first of which it is charged that on September 18, 1920, the defendant, in Fillmore county, committed a statutory rape on the person of Gladys Dyer, and in the second count that at the same time and place he committed an assault upon her with intent to commit rape.

The defendant moved the court for an order requiring the state to elect on which count of the information it would proceed, (1) because "said counts contain different and repugnant charges," and (2) because "said charges contained in said counts are based upon fundamentally different statutes, which statutes severally denounce fundamentally different acts." This motion was denied, and the defendant assigns the ruling of the court is error. The second count was superfluous, as the defendant could have been convicted of an assault with intent to commit rape under the first count. Hubert v. State, 74 Neb. 220, 104 N. W. 278, 106 N. W. 774; Baxter v. State, 80 Neb. 840, 115 N. W. 534. However, the county attorney dismissed the second count before the case was submitted and there was no error in the ruling.

[2] It is contended that the court erred in overruling the defendant's challenge to a proposed juror, Charles Norton. Mr. Norton on his voir dire examination said that he had read quite an extended account of the transaction in the Nebraska Signal, which gave the nature of the charge and purported

to state some facts connected with it, and he supposed he did, at the time, form a natural mental conclusion as to the guilt or innocence of the defendant from what he had read. He had talked with no one who claimed to know the facts and had heard or read nothing to change his opinion, and had the opinion yet, and supposed that it would take some evidence to remove it. He stated on cross-examination that he could give the defendant the benefit of the presumption of innocence until he was proved guilty, if that was the law, and if the court instructed the jury that it was necessary to prove the defendant guilty beyond a reasonable doubt before he could be convicted, he could give him the benefit of it, and that his present opinion would in no wise control his verdict. A careful examination by the court disclosed that he had no opinion and was, within the rule recognized in Whitcomb v. State, 102 Neb. 236, 166 N. W. 553, qualified to act. But the record shows that the jury was composed of Wm. McNamara, Chas. Rocole, Carl Sandburg, M. L. Schelkopf, F. H. Sauer, John McCabe, Loren Teter, Frank Yetman, Lou Schafer, Arno Gunderman, Frank Hrdy and Mel Martin, and that Mr. Norton did not serve. It does not appear whether he was excused peremptorily by one of the parties, or by direction of the court, and it is sufficient to say that, as he did not serve, the defendant was not prejudiced.

[3, 4] As to the ruling of the court in sustaining the state's challenge to the proposed juror Stuckey, we think it was without error. Each party was entitled to an "impartial jury," and it was quite evident that Mr. Stuckey was so closely connected with counsel for the defendant in business and in another case that his ability to act impartially was open to question. He had a case pending in court, and the defendant's counsel were his attorneys in that case. See section 8158, Rev. St. 1913. A competent juror, who was not challenged, took his place and was retained. The defendant was not entitled to a specific juror. If the members of the panel possessed the requisite qualifications and constituted an "impartial jury," that was all he could ask.

[5] It is urged that there was misconduct on the part of the prosecuting attorney resulting in prejudice to the defendant. The trial is said to have lasted more than five days, and the verdict was returned within an hour and 20 minutes after the case was submitted.

"Prominent among the acts of the assistant prosecutor complained of," it is said, "was his asking the defendant upon cross-examination: 'Did you ever tell John Cromwell that the sheriff was looking for you from Colorado?'"

On cross-examination, the county attorney asked the defendant this question:

"Q. Did you ever tell John Cromwell that the sheriff was looking for you from Colorado?"

The defendant promptly objected and the court sustained him.

"Q. In the presence of John Cromwell, did you ever make the statement to John Cromwell that you had gotten into a similar scrape like this out in Colorado?"

The defendant's objection was promptly sustained, and at his request the court informed the jury that—

"The objection will be sustained, and that form of cross-examination is improper and should not be pursued further, and the jury should not in any way give any consideration to anything that might be inferred from the question, the objection to which has been sustained. Exception."

And the following colloquy took place:

"By Mr. Waring: Your honor, I want to get straightened out here, I am trying to perform my duty as well as I know how. Do I understand the court's ruling that if I should bring admissions of this sort, of the defendant—not saying that I have them—to the effect indicated in my question, does the court mean to say that I am unable to introduce those admissions?"

"By Mr. Sloan: Defendant objects distinctly and emphatically to the inquiry submitted to the court at this time under the circumstances, as being especially improper and prejudicial to this defendant under the circumstances, and should not, under any circumstances, be mentioned by the prosecutor; it is another and entirely different offense, if anything of that kind occurred, and I think that the court should render proper rebuke for the inquiry being submitted in the presence of the jury.

"By the Court: The court means to say, Mr. Waring, that you are not entitled to make any inquiry on cross-examination with respect to any offense except the one on trial in this case, and nothing with respect to anything else, if there should be anything of the kind, should be considered by the jury in any manner, and any matter of inquiry relating to the character of the defendant is not admissible until something of that character has been offered by the defendant himself.

"By Mr. Waring: If that is the ruling of the court, I will respectfully adhere to it, I had a different idea."

Not being satisfied with the court's statement, the defendant requested and the court gave the jury the following instruction:

"The jury are especially cautioned against giving any consideration or weight whatever to the question propounded by counsel for the state, relative to a purported statement made by defendant to one Cromwell concerning another alleged charge against defendant. Whether the assumption was true or false, the question should not have been propounded in your presence, and you should not permit the same to in any wise influence, bias, or prejudice you in the formation of a verdict."

And the court further instructed the jury on his own motion:

"You are cautioned against giving any consideration or weight whatever to the question propounded by counsel for the state, relative to a purported statement made by defendant to one Cromwell concerning another alleged charge against defendant. Whether the assumption was true or false the question should not have been propounded in your presence, and you should not permit the same to in any wise influence, bias, or prejudice you in the formation of a verdict."

Subordinate courts are not gifted with prescience and cannot in the midst of a heated trial, foresee what moment an improper question may be propounded to a witness. But where, as in this case, an objection is promptly made thereto and sustained, and the court fully instructs the jury that the question was improper and should not be considered by them, we think the defendant was not prejudiced. See *City of Shawnee v. Sparks*, 26 Okl. 665, 110 Pac. 884, L. R. A. 1918D, 1, and notes.

[6] It is said that there was error in the county attorney's assistant in demanding that the defendant stand up while the state's evidence was being submitted and before the defendant had offered himself as a witness or had signified his intention of going upon the stand, which, it is urged, was for the purpose of compelling the defendant to give evidence of his age, which at that time was a material allegation of the first count of the information and incumbent upon the state to establish beyond a reasonable doubt. But as there is no dispute that the defendant was more than 22 years of age at the time of the commission of the offense, and as there is nothing in the record to show that he complied with the request, or that the court's attention was called to it, he was not prejudiced.

[7, 8] The defendant claims that the court erred in giving instruction No. 13, which is as follows:

"As to the question of the previous chastity of Gladys Dyer, it is not necessary that her testimony that she was not previously unchaste be corroborated. It is sufficient as to this point if you are satisfied by the evidence, beyond a reasonable doubt, that she was not unchaste previous to the time of the alleged act of sexual intercourse complained of in the information."

The instruction correctly stated the law. *Leedom v. State*, 81 Neb. 585, 116 N. W. 496. The court's fourth instruction is in the following language:

"In order to find the defendant guilty of the offense charged in the information, you must be satisfied, beyond a reasonable doubt, that the defendant, Walter Christianity, was, on or about the 18th day of September, 1920, a male person of at least the age of 18 years; that the

prosecuting witness Gladys Dyer, was at said time a female child under the age of 18 years and over the age of 15 years and previously chaste; that she was at said time, and in the county of Fillmore and state of Nebraska, assaulted by the said Walter Christianity; and that he did then and there unlawfully and feloniously carnally know and abuse her."

[9] It is contended that "previously chaste" is not the equivalent of the phrase "not previously unchaste." We think these phrases are synonymous; that "not previously unchaste" is an affirmation that the prosecuting witness was previously chaste," and that the instruction did not mislead the jury.

[10] Complaint is made of the court's twentieth instruction, which is as follows:

"If you believe that any witness has knowingly sworn falsely to any material fact in this case, you may, if you see fit to do so, disregard all of the testimony of such witness."

The specific objections are that the word "willfully" and the phrase "unless corroborated," etc., were omitted. Knowingly is equivalent to willfully. *Fry v. Hubner*, 35 Or. 184, 57 Pac. 420. The words are synonymous; to do an act knowingly is to do it willfully, and to do it willfully is to do it knowingly. The phrase "unless corroborated," etc., is not an element of the maxim "Falsus in uno, falsus in omnibus," or, "False in one matter, deceitful in everything," and the court did not err in omitting it. *Titterton v. State*, 75 Neb. 153, 106 N. W. 421; *Atkins v. Gladwish*, 27 Neb. 841, 847, 44 N. W. 37. If a witness knowingly testifies falsely to one or more material facts, there is no reason why he should be given credit for telling the truth respecting a particular in which his testimony and that of reputable witnesses happen to concur. Indeed, in such a case, the credit would be given to the testimony of the reputable witnesses and not to that of the disreputable or perjured witness. The rule is clearly stated in *Starkie on Evidence* (9th Am. Ed.) p. 786:

"As the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim, 'Falsus in uno, falsus in omnibus.' The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected."

[11, 12] The defendant tendered and the court refused the following request:

"The jury are instructed that the object of the statute under which the first count of the information is drawn is to protect the virtuous maidens and the undefiled virgins of the state;

and the female under 18 years of age and over 15 years of age, who has had improper or unlawful sexual intercourse with a male, is not within the act."

But in that connection the court gave the following instruction:

"The object of the statute under which the information is drawn is to protect the virtuous maidens and the undefiled virgins of the state; and a female under 18 years of age, and over 15 years of age, who has had unlawful sexual intercourse with a male, is not within the act."

The evident purpose of the request was to impress the jury with the belief that, if the prosecuting witness had had "improper" relations with others short of sexual intercourse, that fact might be taken into consideration in determining whether she was or was not a woman of previous chastity. The drift of the request was to the effect that, if a woman between the ages of 15 and 18 years had had "improper" relations with another man, she would not be within the statute. The defendant does not claim that the prosecuting witness had intercourse with any other man, but he contends that she permitted others to take improper liberties with her person. Notwithstanding this, if such liberties stopped short of actual sexual intercourse, they were not within the meaning of the statute.

[13] It is urged that the verdict is contrary to and not supported by the evidence. It is admitted that the prosecuting witness was more than 15 and less than 18 years of age at the time of the flagrant act, and that the defendant was more than 22 years of age. It is said that they had sexual intercourse in Fillmore county on the night of September 18, 1920, and the only disputed question is whether the prosecuting witness was at that time "not previously unchaste." The drift of the testimony introduced by the defendant is directed to this question. On cross-examination of the prosecuting witness, defendant's counsel sought to show that she had been guilty of previous misconduct, and there was a studied effort to show that she was therefore to be classified as unchaste. Speaking of the criminal act, she said:

"Q. And now he stopped his car there; what happened then, Gladys? A. He started to talk to me; he told me that I had been in the habit of letting other boys do such things as he tried to do back there, I could let him do it now. I told him I hadn't, that there wasn't a boy that would do such things as that to me, or even dare to. He said, 'You may just as well let me, you have let other boys,' and I told him I hadn't, and he started to try to do it again, and I tried to tell him what it would mean to do such things as that, that it was sin, and he just kept on; he pushed me out of the car and I fell upon the ground, and I got up and started to run away, but I didn't know where to go, it

was dark and we was all alone, there were no houses close there, and then he got up and began to swear at me, and said now I was out there he would now, and he just picked me up and threw me down on the ground and got on top of me and choked me and slapped my face and pulled my hair and did what he was going to do, got me all wore out trying to."

On redirect examination she said:

"Q. Gladys, have you always been a good girl? Q. Have you, Gladys? A. Yes, sir. Q. Has any man ever taken these liberties with you before? A. No, sir. Q. Or since? A. No, sir. Q. And the statement made by the accused that you had, is or is not that true or false?"

We think her version of the transaction is corroborated by the testimony of the doctors, by her complaint to her parents made the next morning after the transaction, the condition of her apparel and the apparent evidence of the struggle at the scene of the act, and that the court was fully warranted in sending the case to the jury and the jury warranted in returning a verdict of guilty.

We have carefully examined other suggested objections to the rulings of the court, but we find them without error.

[14] Finally, the defendant claims that the penalty imposed upon him was excessive, and we are inclined to that belief. There was no testimony that he had ever been engaged in a like transaction, or violated the law in any other respect. Considering these things in connection with his youth, we think that the sentence should be reduced to three years' imprisonment in the penitentiary, and, with this modification, the judgment of the district court is

Affirmed.

DAPPEN et al. v. WEBER, County Superintendent of Schools, et al. (No. 21785.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

(Syllabus by the Court.)

1. Schools and school districts §42(2)—Organization held a de facto district.

Where a petition is filed with the county superintendent of schools under the proviso of section 6, c. 243, Laws 1919, containing the names of persons whom he holds to be not less than 51 per cent. of the school electors residing outside of an existing organized high school district and adjoining said high school district, asking that said territory be consolidated with said high school district, and he issues his order thereon declaring such territory to be annexed to and consolidated with said high school district and numbers the new or consolidated district, and he and the superintendent of public instruction recognize said consolidated district to be a legal entity: *Held*, that said consolidated district is a de facto school district.

2. Quo warranto §5—Schools and school districts §28—Legality of de facto district to be tested by quo warranto and not by collateral proceeding.

Where a de facto school district is shown to exist, its legality cannot be attacked by injunction or by other collateral proceeding, but must be tested by quo warranto.

3. Officers §82—Quo warranto §5—Where persons act as board of education under color of right right to their offices not to be tested by injunction, but by quo warranto.

Where it appears that certain persons are acting as the board of education of a school district under color of right, and they are recognized as such by the county superintendent of schools and the superintendent of public instruction, *held*, that the right to their offices cannot be questioned by injunction, but must be tested by quo warranto.

(Additional Syllabus by Editorial Staff.)

4. Appeal and error §893(2), 895(2)—Trial on appeal in equity is de novo and findings of trial court ignored.

On appeal from an equity decree dismissing plaintiff's action, the trial is de novo on the record and the Supreme Court is required to reach an independent conclusion without reference to that reached by the district court or the fact that there is some evidence to support it, Rev. St. 1913, § 8198, but the judgment should be affirmed if for any sufficient reason appearing in the record, it was correctly entered.

Appeal from District Court, Richardson County; Raper, Judge.

Action by Henry Dappen and others against Dan H. Weber, County Superintendent of Schools of Richardson County, and others, as member of the School Board of District No. 95. Judgment for the defendants, and the plaintiffs appeal. **Affirmed.**

Dort & Cain, of Falls City, for appellants.
John Wiltse, of Falls City, for appellees.

Heard before MORRISSEY, C. J., and LETTON, ROSE, DEAN, ALDRICH, DAY, and FLANSBURG, JJ., and ALLEN and REDICK, District Judges.

ALLEN, District Judge. May 14, 1920, Henry Dappen, M. C. Riley, Joseph Kean, Alfred Ramsey, Mike J. Tiehen, Charlie Schutte, Ambrose Tiehen, Joseph Lanning, George Funk, John Lyons, and George Utermohlen, plaintiffs, for themselves and on behalf of "one hundred thirty other qualified resident school electors and duly assessed taxpayers," filed their petition in equity in the district court for Richardson county against Dan, H. Weber, county superintendent of schools, and Joseph G. Helm, M. U. Riley, Gertrude Helm, L. L. Kinsey, H. W. Helm, and Daisy Smith, as the board of education of high school district No. 95 and acting as the board of education of consolidated

district No. 15, to obtain a decree adjudging void the order of said Weber as county superintendent of schools of March 24, 1920, attaching the major part of districts Nos. 34, 35, 42, 43, 44, and 98 to and consolidating the same with Dawson high school district No. 95, and out of said adjoining territory and said Dawson high school district No. 95, creating consolidated district No. 15.

The substance and purpose of the petition are well stated in the following excerpt from the brief of counsel for appellants:

"Upon May 14, 1920, Henry Dappen, and ten other school electors and taxpayers, filed a petition in behalf of themselves and one hundred thirty other school electors and taxpayers in the district court of said county, attaching thereto the record of the proceedings before the county superintendent, and alleging that the petition filed with the county superintendent was insufficient and that the order of annexation is void; alleging that the act under which the annexation was pretended to be made was void and unconstitutional; that the statutes pertaining to annexation had not been complied with; and praying that the annexation be declared void, the territory be restored as it previously existed, and that the defendants be restrained as county superintendent and members of the school board from exercising any jurisdiction or powers under or because of said order of annexation." "The answer admits that no written notice was given of the organization of school district No. 15, and no election was held for the purpose of organizing said school district and for the annexation; that, by virtue of the order of the county superintendent, the annexed territory was annexed to school district No. 95 and was thereby made a part of consolidated school district No. 15; that petitioners' protest had no valid force or effect and the county superintendent had no authority to grant the request."

Counsel for the defendants admits that:

"This action is brought to test the legality of such annexation or consolidation and to set aside the order of the district court holding such consolidation lawful."

Consolidated district No. 15 was organized under that part of section 6, c. 243, Laws 1919, which reads as follows:

"The new district when organized shall be governed by all laws enacted for the government of schools, provided, that if the proposed new district contains an organized consolidated or high school district, when a petition of not less than fifty-one (51%) per cent. of the school electors in said new district residing outside of the existing organized consolidated or high school districts shall be filed with the county superintendent, then he shall declare such territory to be so annexed, conditioned upon the approval of the board of education of said existing districts."

As we have just seen, the avowed purpose of this action is to obtain a decree setting aside and holding void consolidated district No. 15, and to prevent the board of education of Dawson high school district No. 95

from exercising authority over the adjoining territory as a board of said consolidated district. It is not claimed that the defendants, Joseph G. Helm, M. U. Riley, Gertrude Helm, L. L. Kinsey, H. W. Helm, and Daisy Smith, are not the legally qualified board of education of Dawson high school district No. 95, but it is urged that the organization of the consolidated district was defective (1) because, while the petition presented to the county superintendent for its establishment purported to contain over 51 per cent. of the names of the school electors in the adjoining territory, as a matter of fact it contained less than that number; and (2) because the order of the county superintendent was not approved by the board of education of the district from which the adjoining territory was taken. But the record shows that the county superintendent and the superintendent of public instruction recognized consolidated district No. 15 as a legal entity and the board of education of Dawson high school district No. 95 as its officers.

[4] This being an appeal from the judgment of the district court in a suit in equity dismissing plaintiffs' action without day, it is to be tried de novo on the record there made, and we are required to "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof." Rev. St. 1913, § 8198. It is our duty, under such circumstances, to affirm the judgment of the district court if, for any sufficient reason appearing in the record, it was correctly entered.

[1] Consolidated district No. 15 was at least a de facto public quasi corporation or governmental subdivision of the state for educational purposes, and the defendants, Joseph G. Helm, M. U. Riley, Gertrude Helm, L. L. Kinsey, H. W. Helm, and Daisy Smith, were, respectively, de facto officers thereof acting in good faith and under color of authority; 22 R. C. L. 681, § 171; 24 R. C. L. 564, § 7.

[2, 3] In *Osborn v. Village of Oakland*, 49 Neb. 340, 68 N. W. 506, it is said:

"It is patent that the object and purpose of this proceeding is to test the corporate existence of Oakland as a city of the second class, and the question presented is whether injunction is the appropriate action. It is a general rule, supported by the decisions of this and other states, that equity will not grant a party relief by injunction, where he has a plain and adequate remedy at law. It is likewise a well established doctrine in this country that quo warranto is the proper remedy to inquire whether a municipal corporation was legally created, as well as to oust persons exercising the privileges and powers of corporate officers when the municipal corporation has no legal existence. *State v. Uridil*, 37 Neb. 371; *State v. Dimond*, 44 Neb. 154; *State v. Mote*, 43 Neb. 663; *High, Extraordinary Legal Remedies* [8d

Ed.] § 684. An information in the nature of a quo warranto, and not a bill for injunction, is the appropriate remedy."

In 24 R. O. L. 565, § 8, it is said:

"The acts of a de facto school district, one operating under color of right, are valid. If a school district has been formed under color of law, its legality can only be determined by a suit brought for that purpose in the name of the state, or by some one under the authority of the state, who has a special interest affected by the existence of such corporation, and the fact that the complainant is a taxpayer, is not sufficient. It is generally stated that the legality of the formation of a school district can be determined only in a direct proceeding and cannot be questioned collaterally."

The following authorities are in point: State v. Stein, 13 Neb. 529, 14 N. W. 481; State v. Mayor & City Council, 28 Neb. 103, 44 N. W. 90; Hotchkiss v. Keck, 84 Neb. 545, 121 N. W. 579; State v. Northup, 79 Neb. 822, 113 N. W. 540; State v. Whitney, 41 Neb. 613, 59 N. W. 884; State v. Several Parcels of Land, 80 Neb. 11, 113 N. W. 810; School District No. 116 v. Wolf, 78 Kan. 805, 98 Pac. 237, 20 L. R. A. (N. S.) 358; State v. Olson, 107, Minn. 136, 119 N. W. 799, 21 L. R. A. (N. S.) 685, and notes; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, 406, 407; State v. Van Beek, 87 Iowa, 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397; Ward v. Sweeney, 106 Wis. 44, 82 N. W. 169; Demarest v. Wickham, 63 N. Y. 320; Newman v. United States, 238 U. S. 537, 35 Sup. Ct. 881, 59 L. Ed. 1446, 1451; Reynolds v. Moore, 9 Wend. (N. Y.) 35, 24 Am. Dec. 116; Ex parte Keeling, 54 Tex. Cr. R. 118, 121 S. W. 605, 130 Am. St. Rep. 884; Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Hovelman v. Kansas City H. R. Co., 79 Mo. 632; McQuillin, Municipal Ordinances, § 349, and note; 1 Abbott, Municipal Corporations, § 32 and note; Cooley, Constitutional Limitations (7th Ed.) 363, 364; 10 R. O. L. 343, § 93; 14 R. O. L. 374, § 76.

This rule is applicable to school districts, as like municipal corporations, they obtain their franchises from the state and are created for public purposes and to carry out strictly public policies. This view of the case renders it unnecessary to discuss other points presented in the briefs.

The judgment of the district court is affirmed.

In re BOWIE et al.

ROBINSON v. YEATMAN et al.

(No. 21935.)

(Supreme Court of Nebraska. Oct. 14, 1921.)

Appeal from District Court, Adams County; Dilworth, Judge.

In the matter of the delinquency of Alice Jane Bowle and John William Bowle, neglected children under the age of 18 years. Petition by Dr. Amy Robinson against Griffin E. Yeatman and another, in which the Nebraska Children's Home Society intervened, and from a judgment therein the respondents Yeatman appeal. Affirmed.

James & Danly, of Hastings, for appellants Yeatman.

James E. Addle, of Hastings, for appellee Dr. Amy Robinson.

Harry S. Dungan and Philip H. Fuller, both of Hastings, for intervenor Nebraska Children's Home Society.

Argued before MORRISSEY, C. J., and ROSE, ALDRICH, and FLANSBURG, JJ., and ALLEN and REDICK, District Judges.

REDICK, District Judge. After a careful and painstaking reading and study of the record and evidence in this case, we are forced to the conclusion that the judgment of the district court is right, and the same is Affirmed.

LEE v. LEE. (No. 22433.)

(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by Editorial Staff.)

1. Divorce $\S$ 271—In action for performance of a decree, judgment roll and deed admissible in evidence.

In an action to compel performance of a divorce decree, admission of the judgment roll in the divorce action, and of written tender of deed, and of deed from plaintiff to defendant for his share in the premises, was proper.

2. Divorce $\S$ 243—Where decree gave defendant right to purchase plaintiff's share in land, he must act within reasonable time.

Where a divorce decree gave defendant the privilege of purchasing plaintiff's share in real estate mentioned for a specific sum, but did not fix the time for so doing, payment was to be made and the deed delivered immediately, or within a reasonable time, and, failing to do so, the privilege should be canceled.

Appeal from District Court, Ramsey County; F. N. Dickson, Judge.

Action by Richard A. D. Lee against Ellen Mellem Lee to compel performance of conditions of divorce decree. Judgment for plaintiff, and defendant appeals. Affirmed.

Jesse E. Greenman, of St. Paul, for appellant.

Herbert P. Keller, of St. Paul, for respondent.

PER CURIAM. In a divorce decree the plaintiff herein was granted a divorce and

the defendant's title to her share, which was an undivided half interest, in certain lots was confirmed. The decree also provided that the plaintiff convey to the defendant his interest in said lots, "together with the dwelling house situated upon the same, upon payment by defendant to plaintiff of the sum of fifteen hundred (\$1,500) dollars, and that defendant have no other or further right, title, or interest in or to the property or earnings of plaintiff, present and future." Defendant neglected to pay the \$1,500, and, after waiting several months, plaintiff brought this action to compel a performance of the decree by defendant and for other relief. She appeals from the judgment.

[1, 2] There obviously was no error in the admission of the judgment roll in the divorce action, nor in receiving the written tender of the deed and the deed from plaintiff to defendant of his share in the premises. The only other assignment of error is that part of the findings and judgment "directing the defendant to pay to the clerk of court for the use of plaintiff said sum of fifteen hundred dollars (\$1,500) on or before April 1, 1921, and decreeing that if she fail to pay said sum on or before said day she shall be forever barred and foreclosed of all her right under and pursuant to said decree of divorce to purchase the plaintiff's interest in said property for said sum." The divorce decree gave defendant the privilege to purchase plaintiff's share of the real estate mentioned for a specified sum. It did not fix the time for so doing; hence the payment was to be made and the deed delivered immediately, or, at any rate, within a reasonable time. Defendant neglected to perform, and there seems to be no valid reason why the privilege given by the divorce decree should not be canceled for such failure. The court did no more. The status of the property as to being occupied as a home by defendant has nothing to do with the question of the court withdrawing a privilege granted in the divorce decree, when defendant refuses to comply with the condition annexed to the privilege. There is no error in the judgment of which defendant can justly complain.

The judgment is affirmed.

IN RE WOOD'S ESTATE.

WOOD et al. v. CONNELL. (No. 22359.)

(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

Wills §55(1), 166(1)—Evidence held to show testator of sound and disposing mind, and not under undue influence.

In a will contest, the evidence is held to sustain the findings of the trial court that tes-

tator was of sound and disposing mind, and was not induced to make the will by the undue influence of the principal legatee named therein, and, further, that the record presents no reversible error.

Appeal from District Court, Le Sueur County; I. M. Olsen, Special Judge.

Proceeding by H. S. Wood and another against David Connell, executor of the estate of David Wood, deceased, for contest of a will. The probate court ordered the will admitted to probate, from which contestants appealed to the district court, where probate was sustained, and contestants' motion for new trial was overruled, and they appeal. Order denying new trial affirmed.

O. C. Kolars, of Le Sueur Center, and Moonan & Moonan, of Waseca, for appellants.

Douglas, Kennedy & Kennedy, of St. Paul, for respondent.

BROWN, C. J. David Wood, late of Le Sueur county, died on June 5, 1919, leaving a last will and testament, by which he made disposition of his property and effects at his death. He left surviving, as heirs and next of kin, two brothers, a sister, and a half-sister. He had never been married; therefore left surviving no wife or children. Subject to a gift of \$1 to each of the brothers and the half-sister, he devised and bequeathed all his property to his sister, Mary Ann O'Leary. The will was presented to the probate court with a petition for its allowance and probate. The brothers appeared and joined in objections to the allowance of the will on the grounds, among others, that decedent was mentally incompetent, and was induced to make it by the undue influence of Mrs. O'Leary, the principal beneficiary named therein. The probate court upheld the will and ordered it admitted to probate, from which an appeal was taken to the district court. A like conclusion was reached after trial in the district court, that court having found the grounds of contest not sustained by the evidence. Contestants moved for a new trial, and appealed from an order denying the same.

The principal question presented by the assignments of error is whether the findings of the trial court to the effect that decedent had mental capacity to make the will, and that there was no undue influence exerted by Mrs. O'Leary, are sustained by the evidence. One or two assignments relating to rulings on the admission or evidence present no serious question or ground for a new trial, and we pass them without comment.

The rule guiding our conclusion upon the main question, the sufficiency of the evidence to support the findings of the trial court, is well settled. Unless the evidence is clearly, or as sometimes expressed manifestly, against the findings, this court will not inter-

tere. In the light of the rule we have read the record with care, and find no sufficient reason for disapproving the action of the trial court, and therefore sustain the findings. An extended discussion of the evidence would serve no useful purpose. Decedent had resided in Le Sueur county, in the neighborhood where he died, for a good many years. He was not above the intelligence of mankind in general, but rather below what is generally found in the common run of men. He had experienced some differences or disagreements with his brothers, but seems to have had full confidence in his sister, Mrs. O'Leary, and there existed between them the regard for the welfare of each usually found between brother and sister; she befriended him, while he thought that his property was the motive behind whatever interest his brothers may have shown him. There was an attempt to place him under guardianship, but it failed. *Wood v. Wood*, 137 Minn. 252, 163 N. W. 297. We then held that the evidence there presented was sufficient to support a finding of competency on the part of decedent.

In point of substance, the evidence now before the court, with one exception, is about the same as on that appeal. After the remand of that cause there was a motion for a new trial on the ground of newly discovered evidence, which was denied by the trial court. The order was reversed on appeal to this court, on the ground that the new evidence made a clear case of mental incompetency. The particular evidence then under consideration was a showing that decedent had disposed of all his property to his sister, without provision for his future support. The explanation given for the transaction was that decedent wanted the property to go to his sister in compensation for services rendered to him. It now appears that the transfer to his sister was a good-faith transaction and under advice of counsel; not an overreaching by Mrs. O'Leary or the result of incompetence on the part of decedent. This fact changes the appearance of the transaction from the improvident character shown on the former appeal. *Wood v. Wood*, 140 Minn. 130, 167 N. W. 358. Some 12 or 15 witnesses, neighbors who had known decedent for many years, testified to his average mental capacity; that he was qualified and competent to care for his property and effects. The sole witnesses to the contrary were his two brothers and their wives. The trial judge was confronted with each and all of them, and was in favorable position to judge the credibility and weight to be given their testimony. Therefrom he found decedent competent to make the will, and further that no undue influence was exerted to bring the execution thereof about. And, as heretofore remarked, we find from the evidence, taken as a whole, no sufficient reason for interference. *Walso v. Latterner*, 143

Minn. 364, 173 N. W. 711; *Woodville v. Morrill*, 130 Minn. 92, 153 N. W. 131; *In re Hess*, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665; *Thill v. Freiermuth*, 132 Minn. 242, 156 N. W. 260; *Buck v. Buck*, 126 Minn. 275, 148 N. W. 117.

Order affirmed.

NEMEC v. BROWN et al. (No. 22487.)
(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

1. Sheriffs and constables $\S$ 157(4)—Not civilly liable for premature delivery of prisoner under extradition warrant.

The fact that, pending an appeal in habeas corpus proceedings, a sheriff, in violation of the statute, prematurely delivered a prisoner whom he lawfully held in custody under an extradition warrant to the agent of the demanding state named in such warrant, and failed to accompany him to the state line as provided by the statute, does not of itself create a cause of action for damages where the wrongful act of the sheriff is not the proximate cause of the alleged damages.

2. Sheriffs and constables $\S$ 157(1)—Not civilly liable for disregarding statutory duty.

Where the Legislature prohibits or requires the doing of an act by a sheriff and prescribes a punishment for a violation of its mandate, the punishment furnishes the exclusive remedy for the wrong, and the act cannot be made the basis of an action for damages unless the aggrieved party has been specially injured thereby in his person or property.

Appeal from District Court, Hennepin County; Joseph W. Molyneaux, Judge.

Action by Frank E. Nemecek against Earle Brown, Sheriff of Hennepin County, and the National Surety Company, his bondsman. From an order sustaining a demurrer to the complaint, the plaintiff appeals. Affirmed.

H. K. Chance, of Minneapolis, for appellant.

Floyd B. Olson, Co. Atty., and Lancaster, Simpson, Junell & Dorsey, all of Minneapolis, for respondents.

QUINN, J. This action was brought to recover damages from the sheriff of Hennepin county and his bondsmen, for an alleged delinquency of the sheriff in the performance of his official duties. From an order of the district court sustaining defendants' demurrers to the complaint, plaintiff appealed.

[1] Plaintiff was arrested by the sheriff under an extradition warrant issued by the Governor of Minnesota upon the requisition of the Governor of Illinois. After arrest

plaintiff obtained a writ of habeas corpus from the district court. Upon hearing the writ was quashed and plaintiff remanded to the custody of the sheriff. On the same day plaintiff appealed to the Supreme Court from the order quashing the writ and served notice of such appeal upon the sheriff and county attorney. Before a hearing on the appeal was had the sheriff turned plaintiff over to the agent of the state of Illinois, and he was taken to that state, where he was tried and acquitted on the requisition charge. But the habeas corpus appeal was without merit, and this court ordered plaintiff remanded to the custody of the agent. Plaintiff therefore was bound to go to Illinois on the warrant of extradition, and he suffered no injury by the premature action of defendant in surrendering custody to the Illinois agent.

This action is brought to recover exemplary damages for the delinquency of the sheriff in turning plaintiff over to the Illinois agent while such appeal was pending, and for his failure to accompany plaintiff to the state line before turning him over to the Illinois agent. The action is based upon the provisions of G. S. 1913, §§ 9038-9043. Section 9038, after providing for an investigation by the Attorney General or county attorney of the ground of a demand for a fugitive and the issuance by the governor of his warrant authorizing a sheriff to take the person to the state line and there deliver him to the agents of the state making the demand, provides that—

"Upon receipt of such warrant, such officer may arrest and retain in his custody the person whose surrender is demanded; but no person arrested on such warrant shall be delivered to the agent designated therein, or to any other person, until he shall have been notified of the demand made for his surrender, and of the nature of the criminal charge made against him, nor until he has had opportunity to apply for a writ of habeas corpus, if he shall claim such right of the officer making the arrest. Whenever such writ shall be applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the Attorney General or the county attorney of the county in which the arrest is made. Every sheriff or other officer making such arrest, who shall deliver over to the agent named in such warrant, or to any other person for extradition, the person so in custody under such warrant, without having complied with the provisions of this subdivision, shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than one thousand dollars, or by both."

[2] The statute creates no substantive rights in persons arrested on extradition warrants, nor does it give to such persons a civil right of action for its breach. There can be no recovery unless special injury or damage to plaintiff resulted from the sheriff's illegal acts; that is, the delivery of plaintiff

to the agent pending the appeal and his failure to accompany plaintiff to the state line. The rule applicable is clearly stated in 1 Corpus Juris, 985-989. See, also *Rex v. Robinson*, 2 Burr, 799; *City of Faribault v. Misenner*, 20 Minn. 396 (Gil. 347); *Ward v. Severance*, 7 Cal. 128; *Mairs v. Ry. Co.*, 175 N. Y. 409, 67 N. E. 901. The same principle is recognized in *Mix v. Nez Perce County*, 18 Idaho, 695, 112 Pac. 215, 32 L. R. A. (N. S.) 534; *Ware-Kramer Tob. Co. v. American Tob. Co. (C. C.)* 180 Fed. 160; *Mack v. Wright*, 180 Pa. 472, 36 Atl. 918; *McKinney v. Monongahela Nav. Co.* 14 Pa. 65, 53 Am. Dec. 517.

The rule is based upon a correct theory. The turning over of a prisoner lawfully held to one not lawfully entitled to hold him is, in effect, discharging such prisoner. Our statute makes it a crime to assist in the escape, or to receive a gratuity for assisting in the escape, of a prisoner. The mere defining of this breach of duty and the provision for punishment therefor does not create a private cause of action for damages. In such case it will not be presumed that the Legislature, by prohibiting the act, intended to establish a substantive duty, the violation of which would create a private right of action for damages. The statute contains many similar provisions for the procedure of officers in criminal matters the violation of which could not afford bases for private actions. Whether a liability arises from a breach of the duty of an officer in such matters must depend upon whether an individual right existing under substantive law has been violated.

In his complaint plaintiff alleges "that because of the * * * acts of defendant sheriff plaintiff was caused great pain, anguish, and physical and mental suffering, and was branded and advertised as a common criminal, falsely, and suffered great agony of mind thereby" to his damage in the sum of \$200,000, for which amount he asks judgment. The mere fact that plaintiff was transferred from the custody of the sheriff to that of the agent while being detained in Minnesota could not cause the pain and mental suffering nor the disgrace complained of. It appears from the face of the complaint that the alleged branding of the plaintiff as a common criminal was because of the indictment against him on insufficient facts, taken in connection with his arrest under the extradition warrant, and not because of his premature delivery by the sheriff to the Illinois agent, nor the failure of the sheriff to accompany him to the state line. In order to sustain a civil action against a sheriff in such a proceeding, it must appear that the complaining party has sustained injury through some act or default of the officer. *Liljengren v. Ege*, 48 Minn. 488, 49 N. W. 250; 35 Cyc. 1785; *Larson v. Chase, et al.*

47 Minn. 307-311, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; Beaulieu v. Ry. Co., 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564, 14 Ann. Cas. 462; Lesch v. Ry. Co., 97 Minn. 503, 106 N. W. 955, 7 L. R. A. (N. S.) 93; 17 Corpus Juris, 831. We think the demurrers were properly sustained. There is no merit in the discussion of the holding in the case of State ex rel. Nemeck v. Sheriff, 181 N. W. 640.

Affirmed.

EVERETT v. WALLIN. (No. 22351.)

(Supreme Court of Minnesota. Oct. 21, 1921.)

(Syllabus by the Court.)

1. Public lands § 5111—Reference by United States Land Department to special agent does not amount to contest until there is a formal proceeding to cancel.

Following the construction placed by the federal decisions upon the proviso to section 7 of the act of March 3, 1891 (U. S. Comp. St. § 5113), relating to the issuance of patents for government lands, it is held that after individual contests of a homestead entry had terminated there was no pending contest of or protest against the entry, and that the reference of the entry by the Land Department to a special agent for investigation did not amount to a contest or protest until a formal proceeding to cancel the entry was instituted by the United States.

2. Public lands § 5111—Entryman, perpetrating fraud, entitled after lapse of two years to have patent issued.

The fact that the entryman perpetrated a fraud upon the United States in making and establishing his entry did not take the case out of the operation of the proviso, and after the lapse of two years from the date of his final receipt he was entitled to have a patent issued to him.

3. Equity § 65(1)—Party thereto cannot apply clean hand maxim as against one purchasing government homestead at time when he had no valid claim.

Neither does that fact preclude plaintiff, who has succeeded to the rights of the entryman, from maintaining an action against defendant, to whom the patent was issued, to have the legal title to the land transferred to her. The maxim, "He who comes into equity must come with clean hands," does not apply where a suitor asserts rights in land acquired from a third person by fraud at a time when defendant had no valid claim to the land and was himself a party to the fraud.

Appeal from District Court, Beltrami County; W. S. McClenahan, Judge.

Action by Rose Everett against Emanuel Wallin. Findings in plaintiff's favor, and from an order denying his motion for new trial, the defendant appeals. Affirmed.

Middleton & Middleton, of Baudette, for appellant.

Marshall A. Spooner, of Bemidji, for respondent.

LEES, C. By this action plaintiff seeks to have defendant adjudged to be the holder of the legal title to certain lands in trust for her and that he be required to execute a conveyance to her. The findings were in plaintiff's favor, and defendant has appealed from an order denying his motion for a new trial.

These are the undisputed facts so far as material to the present litigation:

On November 12, 1903, one Peter Extram made a homestead entry, upon which he offered commutation proof on August 6, 1906, and on August 17, 1906, obtained the receiver's final receipt and a certificate of final entry covering the lands in question. Extram and the defendant, Wallin, were fellow workmen, natives of Sweden, and unfamiliar with our laws, and in good faith agreed before the entry was made that Wallin should bear half the expense of making and perfecting the entry and obtaining title, and that when title was obtained, Extram would convey a specified half of the land to Wallin.

Subsequently their agreement was reduced to writing and signed by both on December 10, 1903. Wallin carried out his part of the agreement, and both parties made permanent improvements, each on the portion of the land which was to be his under the terms of their agreement. We assume that the agreement was contrary to public policy and unenforceable. *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272; *Hofmann v. Gross*, 199 U. S. 342, 26 Sup. Ct. 80, 50 L. Ed. 220; *Bailey v. Sanders*, 228 U. S. 603, 33 Sup. Ct. 602, 57 L. Ed. 985; *St. Peter Co. v. Bunker*, 5 Minn. 192 (Gil. 153).

In making final proof Extram testified that he had not theretofore sold, conveyed, or mortgaged any portion of the land, and Wallin, who was one of his witnesses, testified that he was not interested in the claim.

August 22, 1906, Extram conveyed the entire tract to plaintiff. November 23, 1906, Wallin filed a contest affidavit, attacking Extram's entry on the ground that it was fraudulently made and established. The ground of the contest was that he (Wallin), at all times had an interest in the land under his contract with Extram.

December 11, 1906, the Commissioner of the General Land Office rejected the application for leave to contest the entry, advising the Crookston land office, where it had been filed, that the entry would be referred to a special agent for investigation. March 29, 1907, the Secretary of the Interior affirmed the Commissioner's action, and repeated that the entry would be referred to

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a special agent. June 19, 1907, the case was closed, leaving the Extram entry intact. February 11, 1907, one Norton filed an application to contest the entry on substantially the same charges as Wallin had made. June 16, 1907, the Commissioner directed the Crookston office to hold the contest in suspense pending an investigation of the entry in behalf of the government. June 8, 1908, the order suspending proceedings was revoked, and the Crookston office directed to hear the contest. Due notice of hearing was given, but Norton did not appear, and finally on February 4, 1909, his contest was dismissed for want of prosecution. April 29, 1909, the case was closed and the Extram entry again held intact. December 24, 1908, one Severtson filed a third application to contest the entry on the same charges. April 29, 1909, it was denied on the ground that it was not made within two years after the final certificate was issued to Extram. May 22, 1909, a special government agent reported to the General Land Office that he had investigated the matter, and found that Extram did not make the entry for his own benefit alone, but partly for Wallin's benefit, and that before making final proof he had agreed to convey part of the land to Wallin. June 14, 1909, the Commissioner directed the Crookston office to proceed against the Extram entry upon the charges in the special agent's report. June 17, 1909, such proceedings were begun, and after a hearing, and on June 16, 1910, cancellation of the entry was recommended. April 17, 1911, the Commissioner affirmed the action of the Crookston office, the Secretary of the Interior sustained the action on an appeal to him, and on November 11, 1911, the Extram entry was finally canceled, no patent having ever been issued thereon. In making his ruling the Secretary said:

"There is no ground for thinking that this entry is protected by the proviso to section 7 of the act of March 3, 1891. The Department is not disposed to construe that act as to hold that the government is at any time bound to issue a patent upon entry or certificates procured by fraud or suppression of facts. But under no interpretation of the act does it apply to this entry."

Reference to the direction that the entry be investigated was then made, and the Secretary proceeded to say:

"The proceeding here is the result of that order, so that since March 29, 1907, within two years after the final certificate, the entry has been under investigation of the Land Department, and this proceeding here is the result of that investigation instituted by order of the Department of March 29, 1907."

The proviso to section 7 referred to by the Secretary reads:

"After the lapse of two years from the date of the issuance of the receiver's receipt upon

the final entry of any tract of land under the homestead * * * laws, * * * and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him." Section 5113, Comp. Stat. 1918.

May 21, 1914, Wallin made application to enter the lands at the Crookston office, and the entry was accepted, and on January 5, 1916, a patent was issued to him, and duly recorded. Then plaintiff brought this action on the theory that by virtue of the proviso to section 7 she became entitled to the patent when the Norton and Severtson contests were finally disposed of, and Extram's entry declared to be intact. As we read his answer, Wallin defended on the ground that Extram had never complied with the homestead laws, and was not entitled to the receiver's final receipt or to a patent based thereon; that his entry was being contested at all times after November 23, 1906, until it was finally canceled. There were allegations of fraud on the part of plaintiff's husband and agent in procuring the conveyance from Extram which we do not regard as important. There was also an allegation of plaintiff's knowledge of the fraudulent character of Extram's entry.

[1, 2] The case was disposed of on the theory that after the three individual contests had been terminated and the entry held intact there was no pending contest or protest until after the commencement of the formal proceeding by the government for the cancellation of the entry, and that the reference of the matter to the special agent for investigation did not amount to a contest or protest within the meaning of the proviso. The proviso has been twice construed by the Supreme Court of the United States, and the views of the learned trial judge harmonize with such construction. *Lane v. Hoglund*, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. Ed. 1066; *Payne v. United States*, 254 U. S. 438, 41 Sup. Ct. 368, 65 L. Ed. —, See, also, *Jacob A. Harris*, 42 Land Dec. Dept. Int. 611; *Gildner v. Hall* (D. C.) 227 Fed. 704. This construction entitled plaintiff as Extram's grantee to the patent issued to Wallin. In issuing it to him the Land Department misapplied the law, and erroneously deprived plaintiff of the legal title, thus bringing the case within the rule stated in *Clearwater County State Bank v. Ricke*, 137 Minn. 438, 163 N. W. 793. The fact that Extram perpetrated a fraud upon the United States in obtaining the final receipt and certificate is of no consequence, in view of the explicit holding in *Payne v. United States*, supra. At the end of two years after it was issued the Land Department had no jurisdiction to cancel the entry or withhold the patent. Authority to deal with any controversy over the validity of

the entry was then transferred to the courts, where the government might sue to cancel the entry or annul the patent had one been issued. *Payne v. United States*, supra. The right to bring suits of that nature is recognized both by statute and by repeated decisions of the federal Supreme Court. Section 5114, U. S. Comp. Stat. 1918; *Colorado Coal Co. v. United States*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182; *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747; *McCaskill v. United States*, 216 U. S. 504, 30 Sup. Ct. 386, 54 L. Ed. 590; *Exploration Co. v. United States*, 247 U. S. 435, 38 Sup. Ct. 571, 62 L. Ed. 1200.

Possibly the United States still retains such an interest in the land or is under such a duty to Wallin as is sufficient to entitle the government to maintain a suit to cancel the entry for his benefit unless barred by the statute of limitations. Section 5114, supra. See *United States v. San Jacinto Tin Co.*, supra; *United States v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; *United States v. Chicago, etc., Ry. Co.*, 116 Fed. 972, 54 C. C. A. 545. That, however, is a matter in which action by the Attorney General must be applied for and is something with which we are not concerned.

[3] Whether in the present action defendant may attack plaintiff's title on the ground that the entry was a fraud upon the United States is not open for consideration. The defense tendered by the answer was that plaintiff had been deprived of whatever title she got from Extram by virtue of the determination by the Land Department of the contests of his entry, and that as a result the land had been restored to the public domain and had again become subject to entry, so that defendant had gained the title by his subsequent entry and the issuance of the patent to him. This seems to have been the one defense relied on, and it was not good under the federal decisions we have cited and are bound to follow.

Defendant urges that plaintiff cannot maintain this action because of the maxim that "he who comes into equity must come with clean hands."

It is not always easy to apply the maxim to a particular case. Of course it does not mean that a suitor shall have led a blameless life. Mr. Pomeroy says, and many courts repeat his statement, that in general terms it means that he has been guilty of substantial misconduct in regard to or in connection with the matter in litigation, affecting in some measure the equitable relations subsisting between the two parties and arising out of the transaction involved. *Pom. Eq. Jur.* 399. The cases are collected and reviewed in an extended note to *Langley v. Devlin*, 4 A. L. R. 44. We think it clear that when one who has the legal title to land asks the aid of a court in vindicating

his title against an adverse claimant, the latter cannot have him turned out of court because he got title by a fraud practiced upon the former owner, especially where, as here, the defendant himself was a party to the fraud. It may be said in the case at bar, as was observed in *Teal v. Scandinavian-American Bank*, 114 Minn. 435, 131 N. W. 486, that—

"Plaintiff's hands, in so far as concerns defendant, are clean. * * * His [her] hands may, perhaps, be somewhat soiled as to others; but that fact does not inure to the benefit of defendant."

It has been remarked that "clean hands" means a clean record with respect to the transaction with defendant and not with respect to any third person." *Am. Assoc. v. Innis*, 109 Ky. 595, 60 S. W. 388. In that case it was held that the maxim could not be invoked by a junior patentee against a senior patentee on the ground that the senior patent was obtained by fraud. Another well-considered case in point is *Oochran Timber Co. v. Fisher*, 190 Mich. 473, 157 N. W. 282, 4 A. L. R. 9. Plaintiff sued to remove a cloud upon its title arising from a deed to defendant from their common grantor. Defendant claimed that plaintiff had procured its deed by fraud. Defendant was the grantee in the second deed. The court was of the opinion that he was complaining of a fraud practiced upon his grantor at a time when he had no interest in the land and of which he was advised when he took his deed. It was held that the maxim had no application to such a situation. It was also held that the right of action for the fraud was personal to the grantor, and not assignable, and in any event the deed to defendant did not purport to operate as an assignment of the grantor's personal right to sue for a cancellation of plaintiff's deed on the ground of fraud. The latter conclusion is well fortified by authority. See *Graham v. Railway Co.*, 102 U. S. 154, 26 L. Ed. 106; *French v. Shotwell*, 5 John Ch. (N. Y.) 565; *Crocker v. Bellangee*, 6 Wis. 687, 70 Am. Dec. 489; *Chicago v. Union Stockyards*, 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; *Whitney v. Kelley*, 94 Cal. 146, 29 Pac. 624, 15 L. R. A. 813, 28 Am. St. Rep. 103. Note to *Marshall v. Means*, 58 Am. Dec. 444; *Stanek v. Libera*, 73 Minn. 171, 75 N. W. 1124. It is not in conflict with the views expressed in *Cornell v. Upper Michigan Land Co.*, 181 Minn. 337, 155 N. W. 99.

Granting that Extram perpetrated a fraud upon the government, and that under the doctrine of *Hawley v. Diller*, 178 U. S. 476, 20 Sup. Ct. 988, 44 L. Ed. 1157, plaintiff stands in his shoes, we think the clear result of the cases cited is that defendant cannot resist the granting of equitable relief on the strength of the maxim he invokes.

Order affirmed.

ERIKSSON v. BOYUM. (No. 22390.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

*(Syllabus by the Court.)***1. Attorney and client §143 — Have unrestricted right to contract as to compensation.**

Under Gen. St. 1913, § 7973, a client has the unrestricted right to agree with his attorney as to the compensation to be paid him.

2. Attorney and client §143—Contract changing prior agreement for stipulated amount to reasonable value is not void, in the absence of fraud.

A contract between attorney and client, entered into during the existence of the relation, changing a prior agreement as to the attorney's compensation from a stipulated amount to the reasonable value of the service rendered, is not void, but in the absence of fraud is valid and binding.

3. Corporations §320(1)—Volunteer stockholder's action against trustees to compel restoration of profits wrongfully appropriated is in effect a suit by corporation.

An action against trustees of a corporation to compel a restoration of profits claimed to have been wrongfully appropriated to their use, brought by a volunteer stockholder after refusal of the corporation to bring it, is in legal effect a suit by the corporation, though under the control of the volunteer plaintiff.

4. Corporations §320(1)—Volunteer stockholder, suing trustees for wrongful appropriation of profits, cannot bind corporation for expenses if suit fails.

The plaintiff in such a suit is without authority to bind the corporation for the cost and expense thereof in the event it fails of its purpose.

5. Attorney and client §144—Contract construed as obligating client to compensate attorney in case suit failed.

The contract between the attorney and client in this case, under which a suit of the kind was commenced, construed to obligate plaintiff in the action in the event of failure of the action to compensate the attorney for his services.

6. Attorney and client §143, 156—Stipulation to submit question of value of attorney's services to court held valid.

A stipulation in the contract to submit the question of the value of the attorney's services to the court at the conclusion of the action held valid and binding on the parties, and to confer upon the court by a supplemental proceeding in the action jurisdiction to hear and determine the matter.

7. Attorney and client §141—Allowance by court for services in unsuccessful speculative litigation held excessive.

The award of compensation made by the court held excessive, and a reduction thereof is ordered.

8. Record held not to require new trial, and evidence held to support findings.

The record presents no error requiring a new trial, and the evidence supports the findings of the trial court.

Appeal from District Court, Ottertail County; John A. Roeser, Judge.

Suits by Leonard Eriksson against Iver J. Boyum, in each of which was a judgment for the plaintiff, and in each case a motion for new trial was denied, and from the separate judgments the defendant appeals. Judgment in first action affirmed, judgment in second action reversed, and new trial granted, unless plaintiff files a remittitur in the sum of \$1,500, in which case the judgment will be affirmed.

Charles L. Alexander, of Fergus Falls (N. F. Field, of Fergus Falls, of counsel), for appellant.

J. W. Mason and Leonard Eriksson, both of Fergus Falls, for respondent.

BROWN, C. J. Defendant in this action owned a majority of the common stock in the Fergus Falls Woolen Mills Company, a corporation, and 77 shares of its preferred stock. He had been general manager of the affairs of the company for some time, of and concerning which other stockholders had expressed considerable dissatisfaction. The corporation under his management had apparently become insolvent and unable to pay its bills, and was compelled, at least it was deemed advisable, to transfer its property and effects to certain trustees for the benefit of creditors. The assignment was accordingly made, bearing date December 23, 1913, and the trustees assumed charge of the company affairs. Fergus Falls Woolen Mills Co. v. Boyum, 136 Minn. 411, 162 N. W. 516, L. R. A. 1918A, 919. They continued the business and succeeded in restoring prosperity to the company, and during their stewardship there was a reorganization and a new set of officers placed in charge; the trustees completed their work in June, 1914. Boyum v. Jordan, 146 Minn. 68, 178 N. W. 158.

Defendant had pledged his stock to a local bank as security. The bank converted some of it, and threatened to sell and dispose of the balance, and suit was brought by defendant to enjoin the same. Pending the litigation the parties effected a settlement of the matter, and to that end entered into a "stock-voting agreement" by which certain of the stockholders were authorized to vote defendant's stock in all corporation affairs. The settlement included a stipulation that defendant should have employment with the company in some capacity and be made one

of the directors. Defendant thus parted with control of his stock and of the company, and it was thereafter managed by others chosen by the new directors.

Some time in 1918 defendant discovered what he believed to be misconduct on the part of the trustees, who had charge of the business pending the temporary insolvency of the company, by which they had realized large profits to themselves in dealing with the assets and effects committed to them. He demanded that the new officers of the company bring suit against them to recover for their alleged misconduct and the officers refused, having first made inquiry into the matter and finding the trustees free from the charge made against them. At about the same time defendant became dissatisfied with the stock-voting agreement, and was anxious to have it set aside and the full control of his stock restored to him. This necessitated a lawsuit, for the other parties to the agreement would not consent to its cancellation.

With these two prospective lawsuits in mind defendant sought out plaintiff in this action, Leonard Eriksson, an attorney in good standing at Fergus Falls, the place of residence of all the parties, and counseled with him in reference thereto. The subject was thoroughly gone over, and defendant was advised that he could maintain an action against the trustees, in behalf of the corporation, to recover the profits alleged to have been realized by them in the conduct and management of the corporate affairs in the creditor proceedings, and that he could also maintain an action for the dissolution of the stock-voting agreement. Negotiations finally resulted in the employment of Eriksson to take charge of the contemplated litigation. The agreement was put in writing, and by the terms thereof Eriksson agreed to commence and conduct to a conclusion the action to set aside and dissolve the stock-voting agreement, and his compensation was fixed at the sum of \$160; and to conduct the action against the trustees, for which his compensation was fixed at the reasonable value of his services, the same to be ascertained and determined by the court in the action at the end of the litigation. The actions were both subsequently commenced by Eriksson, and they were thereafter tried and determined by the court. Defendant prevailed in the stock-voting suit, and the stock held up by that agreement was returned to him. He lost the action against the trustees; the court having fully exonerated the trustees from the charge of wrongdoing made against them therein. *Boyum v. Jordan et al.*, 146 Minn. 66, 178 N. W. 158.

Thereafter Eriksson applied to the court in the action against the trustees, as provided by the agreement, for an order fixing

his compensation for services rendered in that litigation. In response to an order to show cause in the matter defendant appeared generally, and by counsel interposed a somewhat lengthy answer, containing much irrelevant and immaterial matter, but, construed as a whole, fairly putting in issue the merits of Eriksson's claim to compensation. No objection was therein made to the jurisdiction of the court to hear and determine the issues in that manner.

Eriksson filed a lien against the stock involved in the other action, claiming compensation for his services in excess of that stipulated in the contract of employment, and subsequently brought this action to have the value of those services determined, and the amount thereof declared a lien against the stock. The basis of the action is that the original agreement fixing his fees at \$160 was subsequently modified by mutual agreement to the reasonable value of the services rendered in that suit. Defendant put in issue this claim of modification and pleaded payment of the agreed amount of \$160.

Upon issues thus formed both proceedings came before the court for trial at the same time. They were tried separately, and submitted to the court upon the record made in each. The court made findings of fact in each, determining the issues in favor of Eriksson and fixing his compensation in the action against the trustees at the sum of \$3,250; and the value of his services in the stock-voting suit at the sum on \$2,500, less \$160 conceded to have been paid. A motion for a new trial was made in each case and denied, and from separate judgments for Eriksson in harmony with the findings defendant appealed. The appeals were argued together in this court.

It is contended in this action, being the one to recover compensation for services rendered in the stock-voting suit: (1) That the alleged modification of the contract fixing the compensation of the attorney at \$160, if entered into at all, was void and unenforceable because made pending the relation of attorney and client, after the action had been commenced and before the trial thereof, and required defendant to pay a larger compensation than stipulated by the original agreement; (2) that the evidence does not sustain the findings of the trial court to the effect that the contract was modified as claimed by plaintiff; and (3) that the amount awarded plaintiff is excessive and unreasonable in amount.

[1, 2] 1. It is well-settled law that contracts between attorney and clients, entered into during the existence of the relation, are not void. When fairly entered into and free from fraud, whether in reference to the compensation of the attorney or as to dealings in the subject-matter involved in the

relationship, they are as valid and binding as contracts between strangers, where no fiduciary relations are involved. In some jurisdictions an agreement entered into during the existence of the relation by which the attorney secures an increase in the compensation originally agreed to are held invalid. That, however, is not the prevailing rule in this country. The subject is usually covered by statute. 2 *Ruling Case Law*, 1037; *Shirk v. Nelble*, 156 Ind. 66, 59 N. E. 281, 83 Am. St. Rep. 150, note on page 159. It is provided by statute in this state, G. S. 1913, § 7973, that a party shall have the unrestricted right to agree with his counsel as to compensation, and the measure and mode thereof. This necessarily includes the right to modify an existing contract on the subject, and if the modification be free from fraud or unfairness, the courts are bound to respect it. It is not void. There is here no claim of fraud, and the change from a fixed fee to the reasonable value of the service to be rendered is neither unreasonable nor unfair, and is based upon a sufficient consideration. The attorney is thereby placed in position to claim more than the amount agreed upon originally, and the client occupies equally as advantageous a situation, for he may be heard to insist that the stipulated amount was excessive and unreasonable, and that a lesser amount would be reasonable compensation, thus leaving the amount to be paid, from the standpoint of both parties, open to inquiry and judicial determination.

2. The evidence made the question whether the modified agreement was in fact entered into one for the trial court to determine. We find from the record no sufficient basis for disapproving its conclusion therein. In fact the finding that the contract was so modified seems amply supported by the evidence.

3. Although the amount of compensation awarded by the trial court seems large, we are satisfied, in view of the substantial benefits accruing to defendant as the result of that litigation, that the amount awarded is not out of proportion to the importance of the case to defendant and the services rendered, and we approve of the allowance made.

[3] 4. The provisions of the contract in reference to the attorney's fees are as follows:

"In consideration of the services to be performed by my said attorney I promise and agree to pay to him \$160 for the first suit, on or before November 1, 1918, * * * and for compensation for services to be rendered in the second suit my said attorney shall have such fee as the court may, in said action, determine to be a reasonable fee for the services rendered, to be paid by the Fergus Falls Woolen Mills Company."

[4, 5] The second suit referred to in the contract, was to subject the trustees to liability for their alleged misconduct in the management of the trust estate. The corporation, through its officers, had refused to bring the action, and it was brought by defendant, as he had the right to do under the law. *Bailey v. Strachan*, 77 Minn. 526, 80 N. W. 694; 3 *Pomeroy's Eq. Jur.* 1095. It was, however, in legal effect a suit by the corporation, conducted by defendant as its voluntary representative. But, though in charge of the litigation, he was without authority to bind the corporation to the payment of either costs or attorney's fees in the event the suit was unsuccessful. If in such cases failure attends the result, he who volunteers his service and brings the action is alone responsible for the cost and expense incurred. When successful the court may make the expense including attorney's fees a charge against the corporation. *Graham v. Dubuque Machine Works*, 138 Iowa, 456, 114 N. W. 619, 15 L. R. A. (N. S.) 729. The provision of the contract in this case by which attempt was made to charge the attorneys' fee to the corporation can therefore have no binding force or effect. Nor can the contract as a whole be construed as a matter of law an undertaking on the part of the attorney to conduct the suit without compensation if unsuccessful. The most that can be said for the contract in this respect is that it is perhaps sufficiently ambiguous on the point to justify explanation by parol evidence. But no such evidence was tendered on the trial. And having instigated the litigation and employed counsel to conduct it, defendant necessarily must be deemed, in the absence of some showing to the contrary, to have intended to pay counsel for his work if there was a failure in results. The contract must be so construed.

[8] 5. The contentions (1) that the agreement for submission of the question of the attorneys' fees to the court is invalid, conferring no jurisdiction on the court to hear or determine the matter, and (2) that the contract is void as against public policy, are not sustained. It is immaterial whether the contract be considered as one of arbitration, or as a plain submission of the question to the court for determination as an incident following the failure of the suit. We discover no reason for holding it invalid as against public policy or otherwise. Clearly under our statute the client may enter into such an agreement. The record presents no suggestion of unfairness, and the special contention that the client is thus wrongfully deprived of a jury trial is without substantial merit. Similar proceedings, had in the main action, to determine the attorney's compensation for services rendered therein have

often been entertained by the court on the petition of the attorney, in the absence of contract stipulation. *Forbush v. Leonard*, 8 Minn. 303 (Gil. 287); *Crowley v. Le Duc*, 21 Minn. 412; *Weicher v. Cargill*, 86 Minn. 271, 90 N. W. 402; *Farmer v. Stillwater Co.*, 108 Minn. 41, 121 N. W. 418. If the attorney may maintain such a proceeding in the main action, in the absence of a contract consent of the client, no reason occurs to us why the parties may not voluntarily stipulate such a submission. It is not a differentiating fact that in the cases cited the asserted lien of the attorney was involved. The authority and jurisdiction of the court to entertain the proceeding and determine the attorney's compensation is the same in either case. Nor is the client by the agreement deprived of a jury trial. The court has the right to grant a jury in such cases when application therefor is seasonably made. G. S. 1913, § 4956. A jury trial was had in the *Farmer Case* just cited. Defendant in this case made no demand for a jury. The objections to the validity of the agreement were therefore properly overruled by the trial court.

[7] 6. Defendant also contends that the amount awarded, \$3,250, is excessive and beyond what the facts of the case really justify. In this we concur. The litigation to an extent, as between defendant and the attorney, was speculative. Both expected and hoped to win and to recover a judgment against the trustees in a substantial amount. Their hopes and expectations were not realized. The suit was a total failure, leaving in its wake nothing but disappointment, grief and expense. In fixing the attorney's compensation the facts stated should be considered; the result of the litigation—the disaster to the client—as well as the quantum of legal work performed by the attorney. And from that viewpoint we conclude that \$1,500 will be fair compensation for the services rendered in that litigation.

[8] 7. There was no error in the denial of the motion for a new trial on the ground of newly discovered evidence. The findings of the court in each action and proceeding are sustained by the evidence, and the record presents no error requiring a new trial.

The judgment in the first action, No. 22390 in this court, is in all things affirmed. The judgment in the second action, No. 22389 in this court (*Boyum v. Jordan*, 184 N. W. 964), will be reversed, and a new trial granted upon all issues presented therein, unless within 10 days from the going down of the cause to the lower court plaintiff shall file a written consent to the reduction of the judgment to the sum of \$1,500. If the consent be so filed, the judgment will be, and it is in all things, affirmed.

BOYUM v. JORDAN et al. (No. 22389.)

(Supreme Court of Minnesota. Oct. 28, 1921.)

Appeal from District Court, Ottertail County; John A. Roeser, Judge.

Action by Iver J. Boyum against J. F. Jordan and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Charles L. Alexander, of Fergus Falls (N. F. Field, of Fergus Falls, of counsel), for appellants.

J. W. Mason and Leonard Erikssen, both of Fergus Falls, for respondent.

PER CURIAM. For reasons stated in the foregoing opinion (*Erikssen v. Boyum*, 184 N. W. 961), the judgment appealed from in this cause is reversed and a new trial granted as to all issues in the case, unless plaintiff within 10 days after the cause is remanded to the court below shall file a written consent to a reduction of the amount of the judgment to the sum of \$1,500. If such consent be filed the judgment will be and is hereby in all things affirmed.

SCHMIDT v. MINOR et al. (No. 22434.)

(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

1. Master and servant §302(3)—Master held liable for assault.

The facts stated in the opinion bring this—an action for damages for assault and battery—within the rule that a master is responsible for the torts of his servant in the course and within the scope of his employment with a view to the furtherance of the master's business and not for a purpose personal to himself.

2. Master and servant §331—Exemplary damages recoverable for assault by servant.

Such facts warranted the jury in their discretion in awarding exemplary damages. Such damages may be recovered from the master even though he did not participate in, authorize, or ratify his servant's acts if done in the course of the performance of the duties of his employment and within the scope thereof.

3. Assault and battery §40—Verdict for \$550 against master for servant's assault held proper.

The damages were not excessive.

Appeal from District Court, Ramsey County; Hugo O. Hanft, Judge.

Action by Emil H. Schmidt against C. J. Minor, sole trader, and another. Verdict and judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Arthur E. Shanahan, of St. Paul, and F. W. Murphy, of Wheaton, for appellants.

Albin E. Bjorklund, of St. Paul, for respondent.

LEES, C. This is an action for damages for assault and battery committed on plaintiff by the defendant Reid Minor. Plaintiff recovered a verdict of \$550, and defendants appealed from an order denying their motion for a new trial.

The defendant C. J. Minor was the owner and proprietor of the Aberdeen Hotel in the city of St. Paul. The defendant Reid Minor is his son, and was employed by him in the hotel. Plaintiff is a cook, who was employed in the hotel when he was assaulted.

The principal grounds on which a reversal is asked are: (1) That the defendant C. J. Minor is not answerable for the acts with which his son is charged; (2) that the court erred in instructing the jury that they might award exemplary damages; (3) that the damages are excessive, and were given under the influence of passion and prejudice.

[1] 1. According to the testimony of Reid Minor, at the time of the assault and for several years before he was employed to keep the books and look after his father's interests generally. He made out the menus, rented rooms, occasionally hired and discharged help and had supervision over the employees. In his father's absence he had general supervision over the hotel. Plaintiff began to work on August 26, 1919, as a second cook. He had supposed he was to receive \$4 and work eight hours a day. The chief cook told him he was to work on a split shift of nine hours a day. He was dissatisfied, and gave notice he would not stay after the second day, or August 27. At about 5 o'clock in the afternoon of that day Reid Minor, having learned that plaintiff was going to leave, went to the kitchen to try to persuade him to stay until after the State Fair, which was to be held about a week later. He was unsuccessful. There was an exchange of profane and abusive language, and finally plaintiff was told to leave at once. He picked up his tools, left the kitchen, and started for the dressing room to change his clothes. Minor followed him to see, as he testified, "that he didn't take what didn't belong to him; that is my duty there." It was then that the alleged assault was committed. Minor was victorious in the combat, and when he released plaintiff after the struggle was over the latter seized a knife and struck at him, hitting his hand with the back of the blade. According to plaintiff's testimony Minor was the aggressor up to that point in the affray. The facts outlined bring the case within the rule that a master is responsible for the torts of his servant in the course and within the scope of his employment with a view to the furtherance of the master's business and not for a purpose personal to himself. *Sina v. Carlson*, 120 Minn. 283, 139 N. W. 601; *Burnham v. Elk Laundry Co.*, 121 Minn. 1, 139 N. W. 1069; *Roemer v. Jacob Schmidt Brewing Co.*, 132 Minn. 399, 157 N. W. 640,

L. R. A. 1916E, 771; Sunderland v. Northern Express Co., 133 Minn. 158, 157 N. W. 1085, *L. R. A. 1916E, 1151.*

[2] 2. The circumstances under which the assault was committed, if plaintiff related them truthfully, were such that the jury might find the assault was wanton and malicious; that, angered by plaintiff's refusal to stay, Minor heaped abuse upon him, and when plaintiff returned insult for insult he was attacked and beaten. If plaintiff's version of the affair was correct the case was one where it was within the discretion of the jury to award exemplary damages (*Baumgartner v. Hogdon*, 105 Minn. 22, 116 N. W. 1030; *Moore v. Fisher*, 117 Minn. 339, 135 N. W. 1126), and such damages might be assessed against C. J. Minor as the employer of his son, although he was not present and did not authorize or ratify his son's acts. There is some conflict in the authorities as to when and how far a principal or master is liable for exemplary damages for the torts of his agent or servant. The Supreme Court of the United States has held that guilty intention on the part of the defendant is required in order to charge him with exemplary damages, that since such damages are awarded not by way of compensation to the sufferer, but by way of punishment of the offender and as a warning to others, they can only be awarded against one who has participated in the offense. *Lake Shore etc., R. R. Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97. In some jurisdictions the rule is that such damages may not be recovered from the principal or master unless he participated in the acts of his agent or servant, or previously authorized or subsequently ratified them. 8 R. C. L. p. 597, § 143; 17 C. J. p. 989, § 290. In other jurisdictions the rule is that if the agent or servant is liable for exemplary damages such damages may be recovered from the principal or master, even though the acts of the agent or servant were not authorized or ratified, provided of course they were done by the agent or servant in the course of the performance of the duties of his employment and were within its scope. 8 R. C. L. p. 599, § 144; 17 C. J. p. 991, § 290. This court has adopted the rule last above stated. *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 77 N. W. 985, 43 L. R. A. 581, 74 Am. St. Rep. 502; *Anderson v. International Harvester Co.*, 104 Minn. 49, 116 N. W. 101, 16 L. R. A. (N. S.) 440; *Hammer v. Forde*, 125 Minn. 146, 145 N. W. 810; *Helppie v. N. W. Drainage Co.*, 127 Minn. 360, 149 N. W. 461; *Daigle v. Summit Merc. Co.*, 144 Minn. 178, 174 N. W. 830. The alignment of the states on opposite sides of the question is given in *Voves v. G. N. Ry. Co.*, 26 N. D. 110, 143 N. W. 760, annotated in 48 L. R. A. (N. S.) 35. It was remarked in that case that the rule permitting the award of exemplary damages in

any case is an anomaly in the law with no sound reason behind it—"a hybrid between a display of ethical indignation and the imposition of a fine." Be that as it may, the doctrine is too deeply implanted in the law to be uprooted for no better reason than that it is illogical. Justification for the extension of the doctrine to include a master whose servant wantonly and maliciously assaulted another is thus stated in *Boyer v. Coxen*, 92 Md. 366: "The master selects his servants and ought to know what sort of persons he is investing with authority to act for him. A business of any considerable proportions is for the most part conducted through agents and servants, and if the principal or master cannot be held for exemplary damages, in many instances it would be equivalent to abolishing that character of damages, for a judgment against an employé is often uncollectible and no punishment to the wrongdoer. Somewhat similar was the reasoning of this court in *Peterson v. West. Union Tel. Co.*, supra.

We hold there was no error in the court's refusal to instruct the jury that in no event could they assess exemplary damages against C. J. Minor.

[3] 3. The trial judge in a memorandum following the order denying a new trial, said he took little stock in plaintiff's assertion that he had been severely injured, or in the claim that the assault was malicious, but was satisfied that, although the jury was generous in awarding damages, neither passion nor prejudice had entered into the verdict, and therefore it should not be set aside or reduced. We find nothing in the record warranting us in interfering with this exercise of the rather broad discretion which a trial court possesses in acting on an application to vacate or reduce a verdict on the ground that it is excessive.

The other assignments of error have not escaped our attention. None are of sufficient merit to require discussion. The order denying a new trial is affirmed.

HALLAM, J., took no part.

FARMERS' STATE BANK OF EVANSVILLE v. FORSGREN et al. (No. 22360.)

(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

1. Partnership §241—Where retiring partner authorizes continued use of his name to obtain credit, one knowing it may extend credit till notified authority is withdrawn.

Where, on dissolution of a partnership, the retiring partner authorizes the continuing partners to use his name, they are authorized

to use it for obtaining credit for the legitimate purposes of the partnership business, and a person having knowledge of such authority, and extending such credit in reliance on it, may continue to extend credit until he is notified that the authority has been withdrawn.

2. Partnership §241—Retiring partner charged with knowledge of continued use of his name.

There were no errors in the rulings of the court on evidence nor in the charge of the court. The retiring partner was charged with knowledge of the use of his name in connection with transactions properly incident to the business.

Appeal from District Court, Douglas County; Wm. L. Parson, Judge.

Action by the Farmers' State Bank of Evansville against Carl August Forsgren and others. Judgment for plaintiff, new trial denied, and defendant C. H. Larson appeals. Order affirmed.

Constant Larson, of Alexandria, for appellant.

Gunderson & Leach, of Alexandria, for respondent.

HALLAM, J. 1. This action is brought against defendant Carl A. Forsgren, J. Walford Forsgren and C. H. Larson to recover on two promissory notes, executed and signed by one of the defendants Forsgren, in the name of Forsgren Bros. & Larson. Defendant Larson defends on the ground that the note was signed without his authority. The jury found for plaintiff and defendant Larson appeals.

In January, 1902, defendant Larson was engaged in the mercantile business at Evansville, Minn. At that time he formed a partnership with the defendants Forsgren under the name of Forsgren Bros. & Larson, and together they conducted the business until 1908. At that time the partnership was dissolved. Notwithstanding the dissolution of the partnership, defendant Larson told the Forsgrens, "You can use my name for a while," and the Forsgrens with his consent did continue to use Larson's name after the dissolution of the partnership. This was done for the purpose of enabling the Forsgren Bros. to obtain credit. Up to the spring of 1911 they ordered most of their goods in the name of Forsgren Bros. & Larson. During the whole period of the existence of the partnership the defendants carried a deposit account in plaintiff's bank in the name of Forsgren Bros. & Larson, and the use of that name continued in this connection until after the giving of the notes sued on. Plaintiff's officers knew of the dissolution of the firm. They also knew that Larson had thereafter permitted the Forsgrens to use his

§241 For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

name. There is evidence that upon one occasion Larson was asked by plaintiff's cashier if the Forsgrens had authority to use his name and that he answered, "Yes." The indebtedness which is now evidenced by the notes in suit arose out of two loans of money negotiated by the Forsgrens and used in the business prior to 1911.

The original notes were renewed when due. There were several subsequent renewals. All the notes were executed by one of the Forsgren brothers in the name of Forsgren Bros. & Larson.

[1] It seems very clear that defendant Larson was liable on the original notes, not on the theory that he was a partner or that he held himself out as a partner, but on the theory that he had in terms authorized the Forsgrens to use his name. As we understand the authority given, it was an authority to use his name for the purpose of obtaining credit for the legitimate purposes of the partnership business, whether credit was asked of a banking institution or of a mercantile concern.

Before the notes sued on were given, defendant Larson had given the Forsgrens directions to discontinue the use of his name. We are of the opinion that this did not relieve him from liability. In view of the authority given by Larson to the Forsgrens and of the fact that the bank knew of it and acted upon it, we are of the opinion that the authority would continue until the bank received notice that it had been withdrawn. The court charged the jury in substance to this effect, and the jury by its verdict must have found that the bank had no such notice. We think the evidence is sufficient to sustain that finding. Plaintiff's cashier so testified and it appears also that during all of the time up to the giving of these notes the bank account was continued in the name of Forsgren Bros. & Larson and deposit slips and checks were made in that name and that defendant Larson received some of these checks. In addition to these facts there is the significant fact that defendant Larson was liable on the original indebtedness and there is nothing in the case to show that his liability had ceased.

[2] 2. Exception is taken to certain rulings of the court on admission of evidence. We have examined them with care and hold them not well taken.

It was proper to show the manner in which the Forsgrens used Larson's name in their transactions with plaintiff though Larson did not have knowledge of every form in which it was used. Having authorized the use of his name he was charged with knowledge of their use of it in connection with transactions properly incident to the business.

It was proper to show the purpose for

which the money was borrowed, that is to show that it was borrowed for a partnership purpose.

Defendant Larson's letter of instruction to the Forsgrens to discontinue the use of his name was not important in the absence of proof that the bank had notice of it.

The charge of the court was in accordance with the rules above stated. We find in it no error.

Order affirmed.

POWER v. NORDSTROM et al. (No. 22375.)
(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

1. Theaters and shows $\Leftrightarrow$ 1(1)—Exhibition of moving pictures may be licensed.

Though a lawful business, the exhibition of motion pictures may be licensed and regulated by the state and the political subdivisions thereof in the exercise of the police power.

2. Sunday $\Leftrightarrow$ 2—Cities may forbid public exhibitions of moving pictures on Sunday.

In the exercise of the discretion delegated to village councils by sections 1268, 1269, Gen. St. 1913, they may ordain that there shall be no public exhibitions of motion pictures within the village on Sundays.

3. Sunday $\Leftrightarrow$ 2—Prohibiting of moving pictures on Sunday is not to secure Sabbath observance, but to regulate a business.

Such an ordinance is not aimed to secure the observance of the Sabbath day, but to regulate a business, and is not in conflict with the general law or public policy of the state.

Hallam, J., dissenting.

Appeal from District Court, Chisago County; J. N. Searles, Judge.

Action by Charles Power against August Nordstrom and others to restrain the enforcement of a city ordinance. From an order overruling a demurrer to the complaint, the defendants appeal. Reversed.

Alfred P. Stolberg, of Center City, for appellants.

Moore, Oppenheimer & Peterson, of St. Paul, for respondent.

LEES, C. The village of North Branch was incorporated under the provisions of chapter 9, R. L. 1905. It has less than 1,000 inhabitants.

Section 727, R. L. 1905, now section 1268, G. S. 1913, grants power to village councils to adopt such ordinances as they deem expedient for certain enumerated purposes. Among such purposes is preventing or licensing and regulating the exhibition of circuses, theatrical performances, or shows of any kind. Section 1269, G. S. 1913, contains a

similar grant of power coupled with a proviso authorizing village councils to refuse to grant a license "where in their opinion, the public interests of the citizens of the village require it."

In October, 1920, the village council of North Branch adopted an ordinance entitled "An ordinance to regulate and license peddlers, hawkers, auctioneers, transient merchants, amusements and shows." It required one following such an occupation or engaged in such a business within the village to take out a license and pay a specified license fee. Section 9 of the ordinance reads:

"The exhibition or attempt to exhibit in said village of any moving picture show, show, circus, menagerie, vaudeville or theatrical entertainment for the amusement of the public on Sunday is prohibited and forbidden."

Plaintiff applied for and was granted a license to operate a motion picture theater and paid the required license fee. The village officers threatened to arrest and prosecute him under the ordinance if he exhibited motion pictures on Sunday, and he has accordingly desisted thereby sustaining a financial loss. He is the owner of a modern and well-equipped theater where he exhibits motion pictures in an orderly manner to respectable audiences. The pictures are of moral character, and tickets are sold only in the vestibule of the theater without any calling out or announcement of the exhibition or of their sale.

Setting out these facts in his complaint plaintiff brought this action to restrain the village officers from enforcing section 9 of the ordinance on the ground that it is illegal and void. The defendants demurred on the ground that the complaint failed to state a cause of action, the demurrer was overruled, the court certifying that the question presented was doubtful, and defendants appealed from the order.

[1] No question is or could be raised about the meaning of the word "shows" as used in the statute. Clearly enough it is sufficiently broad to include exhibitions of moving pictures. 38 Cyc. 253. It must be conceded that the motion picture business is a lawful business. Nevertheless it is a business which is subject to regulation by the state by virtue of its police power and by the political subdivisions of the state to which the power has been delegated by the Legislature. 2 Dillon, Mun. Corp. 664; 38 Cyc. 255, 258; Mut. Film Corp. v. Ohio Indust. Com., 236 U. S. 230, 244, 35 Sup. Ct. 387, 59 L. Ed. 552, Ann. Cas. 1916C, 296; Greenberg v. West. Ass'n, 148 Cal. 126, 82 Pac. 684, 113 Am. St. Rep. 216; note to Zucarro v. State, L. R. A. 1918B, 361.

This court has twice declared that places of public amusement such as theaters and motion picture houses are proper subjects for police regulation and control. State v. Scaffer, 95 Minn. 311, 104 N. W. 139; Hig-

gins v. La Croix, 119 Minn. 145, 137 N. W. 417, 41 L. R. A. (N. S.) 737. The reasons leading to that conclusion are convincingly stated in the latter case and need not be repeated.

[2] Possibly the power to license and regulate shows includes the power to prohibit them. State v. Redinton, 119 Minn. 402, 138 N. W. 430. But, assuming it does not, can it be said that to forbid the carrying on of the business at specified times as on Sundays or between certain hours of the day, is beyond the power of a municipal corporation? Under a grant of police power to license and regulate a business the municipal authorities have power to determine where and within what limits the business may be conducted. In re Wilson, 32 Minn. 145, 19 N. W. 723. They may impose reasonable restrictions as to the time, place, and manner of conducting the business. State v. Barge, 82 Minn. 256, 84 N. W. 911, 53 L. R. A. 428. They may prohibit exhibitions of motion pictures in portions of a city in which for reasons of public welfare it is undesirable to have them. State v. Redinton, supra. An ordinance enacted under a grant of power to license billiard and pool halls may impose any reasonable conditions or terms to make the license efficacious as a police regulation. The licensees may be required to keep an orderly house, or to keep it closed on certain days and during certain hours at night. State v. Pamperin, 42 Minn. 320, 44 N. W. 251. That was a case where the ordinance required billiard and pool halls to be kept closed on Sundays and after certain hours at night. Generally speaking, a city, under its authorized police power, may regulate any business the unrestrained pursuit of which might affect injuriously the public health, morals, safety, or comfort. City of St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171. And in respect to theatrical exhibitions and amusements of a similar character a larger discretion is recognized than in the case of ordinary trades because they are liable to degenerate into nuisances and also because they require more police surveillance. City of Duluth v. Marsh, 71 Minn. 248, 73 N. W. 962. It is our opinion that in the exercise of such discretion pursuant to the powers granted by sections 1268 and 1269, G. S. 1913, a village may ordain that motion picture exhibitions shall not be given on Sundays, unless such a provision in an ordinance is inconsistent with the Constitution or general laws of the state or is unreasonable. The Legislature in the exercise of police power may prohibit all manner of labor and business on Sundays except works of necessity of charity, and may delegate authority to municipal corporations to enact ordinances with like prohibitions. State v. Ludwig, 21 Minn. 202. Sunday laws are generally sustained on the theory that there should be one day of rest in each week to promote the moral and physical well-be-

ing of society, and hence the enactment of such laws falls within the scope of the police power of the state. *State v. Pettit*, 74 Minn. 376, 77 N. W. 225; *State v. Justus*, 91 Minn. 447, 98 N. W. 325, 64 L. R. A. 510, 103 Am. St. Rep. 521, 1 Ann. Cas. 91; *State v. Weiss*, 97 Minn. 125, 105 N. W. 1127, 7 Ann. Cas. 932; *State v. Dean*, 184 N. W. 275. But it is urged that an ordinance requiring motion picture houses to close on Sundays is inconsistent with the general laws of the state. Section 8753, G. S. 1913, as construed in *State v. Chamberlain*, 112 Minn. 52, 127 N. W. 444, 30 L. R. A. (N. S.) 335, 21 Ann. Cas. 679, and followed in *Houck v. Ingles*, 126 Minn. 257, 148 N. W. 100.

[3] Counsel for respondent say that, stripped of all camouflage, the ordinance is simply and solely Sunday legislation in direct conflict with and an attempt to override the general statutes and the well-settled public policy of the state. We do not regard it as legislation of that character. It is not the aim of the ordinance to compel the observance of the Sabbath day by the people of North Branch. Its only aim is to regulate the several occupations and kinds of business to which it refers. It is no more Sunday legislation than is section 3141, G. S. 1913, prohibiting the sale of intoxicating liquors on Sundays or the same provision commonly found in city and village ordinances regulating the liquor traffic.

The contention that section 9 conflicts with the general law and public policy of the state is supported by a skillful and plausible argument, in substance this: Section 8753, G. S. 1913, is a legislative declaration of public policy relative to Sunday observance which prohibits the doing of certain things on Sunday, but not the indoor exhibition in an orderly manner of motion pictures. By failing to prohibit such exhibitions the Legislature has impliedly sanctioned them, while section 9 of the ordinance expressly prohibits them.

We have examined all the cases cited in support of this contention as well as others dealing with the vexed question of when a local ordinance must be held inconsistent with the general law. The conclusion we have reached is that the contention should not be sustained. It is elementary that an ordinance must not be repugnant to, but in harmony with, the laws enacted by the Legislature for the government of the state. It cannot authorize what a statute forbids or forbid what a statute expressly permits but it may supplement a statute or cover an authorized field of local legislation unoccupied by general legislation. Every business and occupation is subject to the reasonable exercise of the police power of the municipality where it is carried on and in the ex-

ercise of the power a city or village may regulate that which the state has failed to regulate. There can be no conflict between a statute and an ordinance where there is no statute covering the subject-matter of the ordinance. Such is the case here. The statute is silent upon the subject of the exhibition of motion pictures on Sundays. It does not prohibit their exhibition. Neither does it expressly permit it as it does the playing of baseball on Sunday between certain hours. By refraining from legislating on the subject and by authorizing villages not only to regulate the business, but to refuse to grant licenses and so prevent such exhibitions, the Legislature has treated the whole matter as one properly within the domain of the police power of villages. The public policy of the state should be determined by the Legislature, and not by the courts. We see no reason why reasonable local regulations adapted to local conditions and in harmony with the wishes of a majority of the inhabitants of a village should not be permitted to stand, and such has been the opinion of the Attorney General. Opinion 637, Rep. of Atty. Gen. 1916. Previous decisions of this court, cases in other states, and the text-writers have expressed views which support the conclusion we have reached. *State v. Ludwig*, supra; *Evans v. City of Redwood Falls*, 103 Minn. 314, 115 N. W. 200; *City of Mankato v. Olger*, 126 Minn. 521, 148 N. W. 471; *State v. City of Duluth*, 134 Minn. 355, 159 N. W. 792, Ann. Cas. 1918A, 683; *McPherson v. Village of Chebanse*, 114 Ill. 46; ¹ *City of Clinton v. Wilson*, 257 Ill. 580; ² *McQuillin*, Mun. Corp. §§ 647, 878; 19 R. C. L. 803; 25 R. C. L. 1419. Whether it is wise or unwise to prohibit theatrical and other like performances on Sundays is a question with which we are not concerned. North Branch has local self-government. If its people want an ordinance of this kind, they may have it. If they no longer want it, they can have it repealed.

For the reasons stated, we are constrained to hold that the learned trial judge erred in overruling the demurrer, and therefore the order appealed from must be and is reversed.

HALLAM, J. (dissenting). In my opinion the ordinance in question so far as it relates to picture shows is not regulation, but Sunday legislation, and is repugnant to the statutes of the state as construed in *State v. Chamberlain*, 112 Minn. 52, 127 N. W. 444, 30 L. R. A. (N. S.) 335, 21 Ann. Cas. 679, and that it is therefore invalid. This is in accordance with the New York decisions on similar legislation. *People v. Lent*, 166 App. Div. 550, 152 N. Y. Supp. 18; *People ex rel. Kieley v. Lent*, 215 N. Y. 626, 109 N. E. 1088.

¹ 28 N. E. 454, 55 Am. Rep. 867.

² 101 N. E. 192.

STATE v. WORMACK. (No. 22476.)

(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

1. Homicide $\S$ 253(1), 308(4)—Evidence held to justify instruction on and conviction of first degree murder.

The evidence justified an instruction submitting murder in the first degree to the jury; and the record warrants a conviction of murder in that degree.

2. Criminal law $\S$ 706—Action of prosecuting attorney held not objectionable on account of race prejudice.

Nothing in the trial furnishes a basis for an assignment of error on the ground of race prejudice.

Appeal from District Court, Ramsey County; Hascal R. Brill, Judge.

Ethel Wormack was convicted of murder in the first degree, and she appeals. Affirmed.

J. Louis Ervin, of St. Paul, for appellant.
O. L. Hilton, Atty. Gen., Jas. E. Markham, Asst. Atty. Gen., and R. D. O'Brien, Co. Atty., and Chris. D. O'Brien, Jr., Asst. Co. Atty., both of St. Paul, for the State.

HOLT, J. Defendant was convicted of murder in the first degree, and sentenced accordingly. She appeals.

There was no motion for a new trial; and in the trial no exception to any ruling or instruction of the court was taken. Hence the appeal narrows down to the proposition whether the evidence sustains the verdict of first degree murder. If it does, the court was also right in instructing the jury as to the elements constituting that degree of crime.

[1] The circumstances attending the killing of Edna Kelsy, as shown by the state's witnesses were these: On the morning of September 20, 1920, defendant and her husband were in attendance at the municipal court in St. Paul. Edna Kelsy and one Barnett, with whom Edna was then cohabiting, were also in court. Defendant invited Edna and Mr. Barnett to her home, situated in an alley in State street, West St. Paul. The party arrived there shortly after 11 o'clock in the forenoon and spent some time in playing cards. At about 1:30 Barnett left. One Clarence Johnson, who stayed at another house in the alley, joined the party. Defendant's husband procured lemon extract and root beer for the guests. The stuff was potent; for both Johnson and Edna became somewhat drunk. Shortly before 4 o'clock Edna and defendant's husband had a bolsterous quarrel that attracted the attention of the neighbors in the alley. Edna was seen and heard coming away from defendant's home. She en-

tered one of the neighboring houses in the alley. But after a few minutes' stay she returned towards defendant's house, and renewed the dispute with defendant. One witness says she dared defendant to come out and fight with her. According to the testimony of the state's witnesses she did not attempt to enter defendant's home, but stood a few feet outside the screen door. As she so stood, defendant approached this door from the inside, pushed it open with one hand, and fired a revolver three times at Edna, who started off toward State street, but fell as she reached the street. One bullet passed through Edna's lower jaw, lodged near the spinal column, and caused death within a few hours. It also appears that one bullet passed through defendant's hand. Directly after the shooting defendant stated to one of the witnesses, "I shot her, but I shot myself like a damn fool," and that a few moments thereafter she walked over to where Edna was lying on the ground, caught hold of and pulled at her clothes, saying, "Get up, bully." The state's case leaves it clear that no assault was made upon defendant by Edna. The nearest to it was the invitation to come out and fight. She made no move to open the screen door, and was standing several feet from it, when defendant began to shoot from the inside. The question is whether there was room for finding a premeditated design to effect death. The jury could find from the evidence recited an intentional killing, and this justifies a verdict of guilty of murder in the first degree. *State v. Lentz*, 45 Minn. 177, 47 N. W. 720. As said in *State v. Brown*, 41 Minn. 319, 43 N. W. 69, of first degree murder:

"The offense may be found to be of this grade from the mere fact and circumstances of the killing; and where there are no circumstances to prevent or rebut the presumption, the law will presume that the unlawful act was intentional and malicious, and was prompted and determined on by the ordinary and natural operations of the mind. *State v. Lautenschlager*, 22 Minn. 514-526. The law will not, therefore, attempt to lay down a more specific rule. It cannot define the length of time within which the determination to murder or commit the unlawful act resulting in death must be formed."

The evidence justified the verdict and judgment rendered.

[2] There is an attempt to assign error on the ground that the prosecuting attorney raised the race issue. It appears that Edna Kelsy was a colored woman, as were also all the persons at the party and the eyewitnesses of what occurred in connection with the shooting, except defendant. For some reason, not apparent to us, the prosecuting attorney asked several witnesses whether defendant was generally considered white or colored. No exception was taken to the inquiry

by the very able attorney who represented defendant in the trial. And we fail to see any prejudice to defendant, even if an exception had been saved. The trial was undoubtedly had in a well-lighted courtroom, where the jury could very readily determine whether the complexion of defendant was such that she could be considered of the white race. The husband of defendant was one of the party; he was seen at the house a few minutes prior to the shooting; he was there immediately after. It cannot be considered as prejudicial that, he being present at the trial, the prosecuting attorney requested him to stand up so that he could be identified by a witness as one of the persons present during the afternoon of the murder. No objection whatever to his doing so was made.

Had defendant's account of the occurrence been accepted by the jury, the verdict should have been not guilty, as the learned trial court specifically instructed; but evidently the testimony of the state's witnesses, neighbors and acquaintances of defendant, impressed the jury as being the truthful and reliable version of the circumstances under which Edna Kelsy met her death at the hands of defendant.

The judgment must be, and it is, affirmed.

PARAS v. CHICAGO GREAT WESTERN R. CO. (No. 22459.)

(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

1. Master and servant §278(18), 281(2)—Finding as to negligent derailment of track motorcar justified.

Plaintiff was injured when a track motorcar on which he was riding was derailed. The evidence sustains a finding that the operator of the car was negligent, and that plaintiff was free from contributory negligence.

2. Master and servant §276(10)—Evidence held to show injury to cook, transported on track motorcar, was within course of employment.

Plaintiff was a cook hired and paid by defendant to cook and obtain supplies for a crew of trackmen. The men paid the cost of the supplies obtained. *Held*, that the evidence sustains a finding that plaintiff was in the course of his employment while going to a nearby town for the purpose of procuring necessary supplies and that the use of the motorcar to transport him was an authorized use.

Appeal from District Court, Ramsey County; Chas. O. Haupt, Judge.

Action by Frank Paras against the Chicago Great Western Railroad Company, for dam-

ages for personal injuries. Verdict and judgment for plaintiff, and defendant appeals. **Affirmed.**

Briggs, Weyl & Briggs, of St. Paul, for appellant.

Barton & Klukead, of St. Paul, for respondent.

HALLAM, J. 1. Plaintiff was in the employ of defendant as laborer, and was assigned to a crew doing track work along the line of defendant's road. There were about 60 men in the crew in charge of a foreman. The company assigned to them 10 bunk cars in which they lived and slept and two cook cars in which their meals were prepared. The custom was for the foreman to select cooks from among the men and if none of them were qualified to cook, he might hire "another cook from the town." The cook was paid by the defendant the same wages as the other men and it was his duty not only to cook for the men but to buy the supplies. The company did not furnish either supplies, dishes or utensils. To cover the cost of these each man contributed his share. The custom was to purchase some supplies in St. Paul but it was necessary to purchase part of what was needed at towns along the way. In January, 1920, the crew was located at Eden, Minn., a small town on defendant's road. They wanted supplies which were not procurable there and the nearest town at which they might be procured was Dodge Center, eight miles away. The foreman picked out three men from the gang and plaintiff, who was one of the cooks, and together with these men started for Dodge Center on a motorcar. This motorcar was similar to a hand car, except that it was operated by power. It belonged to the company and had been furnished some time before and the foreman and men were accustomed to use it for the purpose of procuring supplies when needed. The car was operated part of the way by the foreman and part of the way by one of the men under his authority. During the progress of the trip the car ran into an open switch and plaintiff was injured. There was a semaphore which indicated that the switch was open but the operator of the car paid no attention to the semaphore. This action was brought to recover damages. Plaintiff had a verdict and defendant appeals.

[1] The operator of the car was an employé of defendant and he was guilty of negligence in the operation of the car. As to these propositions there is no room for doubt.

Plaintiff was riding on the front seat of the car and it is argued that he was guilty of contributory negligence. Had the jury so found, such a finding would have been sustained, but we are of the opinion that his

contributory negligence was not established as a matter of law.

[2] 2. The principal question in the case is whether defendant is answerable for the negligence of the operator of the car.

Defendant contends that these men were not in the course of their employment but were on an errand personal to themselves and that therefore defendant is not answerable. The jury found against defendant on this proposition and in our opinion their finding is sustained by the evidence. Plaintiff was within the course of his employment. He was procuring supplies, a duty which was imposed upon him by the defendant and for which he was paid by the defendant. The fact that the men contributed to the cost of the supplies is not inconsistent with the fact that the relation of employer and employé subsisted between plaintiff and defendant. *Philadelphia, B. & W. R. R. Co. v. Smith*, 182 Md. 345, 103 Atl. 945, 10 A. L. R. 1175; *Philadelphia, B. & W. R. R. Co. v. Smith*, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. 869.

Defendant further contends that the use of the motorcar for the purpose of procuring supplies was unauthorized. It appears that the motorcar was placed in the hands of the foreman without particular directions as to the purpose for which it should be used. He was never told not to use it for that purpose. He had habitually used it for that purpose and while the knowledge of this fact by his superior officers was not affirmatively shown, we think it may be implied from the extended use.

Judgment affirmed.

HESNARD v. LARIVE et al. (Nó. 4739.)

(Supreme Court of South Dakota. Nov. 4, 1921.)

1. Payment $\S$ 45—Payee held bound to apply payments on notes in order of maturity.

Where it was the intention of all parties that an indebtedness should be paid in the order evidenced by the dates of maturity of the notes given therefor, the payee had no right, under Rev. Code 1919, § 757, relating to application of payments, to apply payments made to notes not due, instead of to notes due, on the theory that the maker had manifested no desire as to the application.

2. Chattel mortgages $\S$ 253—Right to foreclose for failure to maintain insurance held waived.

Where mortgagee claimed a right of reimbursement for insurance premiums paid on the mortgaged property, and sought to foreclose on that ground, and it appeared that he never made claim for such reimbursement until several months after he had received from the mortgagor a payment out of which he might

have reimbursed himself, but which he applied to notes not due instead, the right to foreclose on such ground was thereby waived.

3. Insurance $\S$ 580(2) — Mortgagee held to have equitable lien on insurance policy, although mortgage clause not attached.

Where a mortgage provided that mortgagor should keep the property insured for the mortgagee's benefit, but no mortgage clause was attached to the policy, the mortgagee would still, because of the provisions in the mortgage, have an equitable lien on the policy and its proceeds.

4. Chattel mortgages $\S$ 253 — Right to foreclose for failure to pay taxes held waived.

Where mortgagee claimed a right to foreclose because mortgagor had failed to pay certain taxes on real estate mortgaged to secure the same debt, and it appeared that mortgagee made no claim in that respect until several months after mortgagor made a payment out of which the mortgagee might have reimbursed himself, but which he applied on notes not due instead, the right to foreclose was waived.

Appeal from Circuit Court, Fall River County; Levi McGee, Judge.

Replevin by Frank P. Hesnard against George B. Larive and another. From a judgment for defendants and a denial of a new trial, plaintiff appeals. Affirmed.

Martin & Mason, of Deadwood, for appellant.

Robert C. Hayes and John T. Haffron, both of Deadwood, for respondents.

WHITING, J. Plaintiff, as the mortgagee under a chattel mortgage, brought this action seeking to replevin the personal property described in said mortgage, which property was in possession of the defendants, the mortgagors. Plaintiff based his claim of right to possession upon an allegation that defendants had defaulted in certain covenants contained in the mortgage, and upon an allegation that he deems himself "insecure"—there being a provision in said mortgage giving a right of foreclosure if the mortgagee "shall at any time deem himself insecure." Defendants, answering, denied all the grounds upon which plaintiff's claim of possession rests. Trial was had before the court without a jury. Findings and conclusions were entered in favor of defendants. From a judgment thereon and from an order denying a new trial, this appeal was taken.

The sole question for our determination is whether the evidence sustained sufficient of the findings of the trial court so that its conclusions and judgment should stand; this resolves itself to the one question, Was plaintiff, under the evidence, entitled to foreclose his mortgage?

It appears that plaintiff sold defendants a

large amount of live stock and farm machinery, certain real estate and personal property used in an ice business at Hot Springs, S. D., and numerous tracts of real property situated in Fall River county, and took from defendants, in payment therefor, 9 notes for \$2,000 each and 1 note for \$16,250. The \$2,000 notes were due one on or before the 1st day of January of each year commencing with the year 1918 and ending with the year 1926, and the \$16,250 note was due on or before January 1, 1927. To secure these notes, a chattel mortgage was given covering the personal property purchased, and a real estate mortgage covering the land purchased, as well as a farm then owned by defendants. The chattel mortgage had a clause therein authorizing the defendants to sell any of the live stock therein described, "providing the moneys received from such sales are turned over to the mortgagee to be applied on the principal of the indebtedness." Appellant claims default by respondents in three respects: In failure to pay the first \$2,000 note in full when it became due; in failure to keep the buildings upon the mortgaged real estate insured for the benefit of the mortgagee as agreed in the real estate mortgage; and in failure to pay certain of the taxes as they became due on the real estate. The chattel mortgage contained no provision whereby default in the payment of taxes or in keeping the buildings insured for benefit of mortgagee should give the mortgagee a right to foreclose the chattel mortgage; but the real estate mortgage provided that, in case of such failure to pay taxes or to keep property insured, the mortgagee might declare the whole indebtedness due. It is because of such provision that appellant contends that he had the right, at the time this action was brought, to foreclose the mortgage, and therefore the right to the possession of this property for the purpose of such foreclosure.

These facts are undisputed. This action was brought in August, 1918. All interest due on the mortgage indebtedness had been paid up to and including that due July 1, 1918. The mortgagors had sold some of the mortgaged stock at different times during 1917, and had applied the money received for same to this mortgage indebtedness. Four portions of this money, aggregating \$1,075, had been applied upon the principal of the note to become due on January 1, 1918. In September and November, 1917, other stock was sold, and the proceeds thereof, \$675 and \$942.09, were turned over to the mortgagee, who, without the knowledge or consent of the mortgagors, applied same to the principal of the \$16,250 note, which would not become due until more than eight years from the time of such payments. In June, 1918, the mortgagors made a payment of \$325, which the mortgagee, without the consent of the mortgagors, applied upon the principal of the first

note. No other payments having been applied on the first note, due January 1, 1918, there was apparently a default in the payment of such note when this action was brought. Appellant contends that, in the absence of any directions by the mortgagors, he had a right to apply the two payments on the large note.

The law as to application of payments is prescribed by section 757, R. C. 1919. Appellant contends that the respondents manifested no intent or desire as to the application of the payments which appellant applied to the large note, and that, under subdivision 2 of such section, he had the right to apply such payments to such note as he chose. It is at least doubtful whether this subdivision of such section has any application to payments made where debts are not due; and certainly it has no application where the debtor has manifested his intent or desire as to application of payments. Such manifestation of intent or desire may be made at any time prior to payment, and may be evidenced by any fact or facts showing same. 2 Parsons on Contracts (5th Ed.) 630. That it was the intent of all parties to this transaction that this indebtedness should be paid in the order evidenced by dates of maturity of notes is clear. These notes evidenced but one debt, which the parties contracted that the mortgagors should be obligated to pay in installments, and these installments in a certain order as evidenced by the due dates of the several notes. They contracted that the mortgagors might sell off the live stock and apply the proceeds to the principal of the indebtedness. It is unreasonable to suppose that they intended application of the proceeds of this property in any other order than as evidenced by the notes. The clear intent, as evidenced by the notes and mortgage, was carried out in the application of the first four payments made. As said in *Dorris v. Cummins*, 157 Ill. App. 10:

"There is * * * no * * * rule of law requiring the court to disregard the evident understanding of all the parties concerned in the transaction," and "if there are circumstances which would render it unreasonable or unjust to the debtor to permit the creditor to apply the payment to whatever debt he pleases, the court will not permit it to be done."

[1] If appellant was right, and respondents had sold off all the personal property and turned it over to appellant in one lump sum without specific directions as to its application, appellant could have applied the whole thereof to the note that would not be due for over eight years, and then, if there was any money remaining, applied it to the \$2,000 notes in the reverse order of their maturity, and still have been in a position to have claimed a default on the first note unless the whole debt was paid. A contention that might, under the facts of this case, lead to such results, is monstrous. The mortga-

gors were never in default in the payment of the debt evidenced by the notes.

[2, 3] There was evidence that warranted the trial court in finding that, at the time appellant sold the property to defendants, the real property sold was insured in the sum of \$2,000, the amount of insurance which respondents, in the real estate mortgage, agreed to keep upon the property for the benefit of appellant; that appellant agreed to leave that insurance running; that the insurance company, through its agent, insisted that a new policy be taken out because of the change in ownership; that appellant took out a new policy, surrendering the old policy and paying upon the substitution of the new policy a balance of 80 cents, the amount of the earned premium on the old policy; that, when this insurance ran out, the mortgagors renewed the same; that, afterwards, they canceled this insurance, taking out insurance in a larger amount upon this property, but neglecting to have attached to the policy the ordinary clause providing that loss, if any, should be paid to the mortgagee. Appellant contends that he has a right to foreclose because respondents have not repaid him the amount of the first policy that he took out after the property was transferred to defendants; and because the last policy did not provide for payment to him as his mortgage interest might appear. As above noted, there was evidence warranting the court to find that it was agreed that the policy on the property at the time of the sale should remain in existence. Therefore appellant could only claim to be entitled to be reimbursed the 80 cents; and it appears that he never made any claim for such 80 cents, or notified the defendants in relation thereto, until the bringing of this action. There is no merit in appellant's contention based on the fact that the last policy did not have the usual mortgage clause attached. Without such mortgage clause, the mortgagee would still, because of the provisions in the mortgage, have an equitable lien on the policy and its proceeds. 27 Cyc. 1263.

[4] It appears that, when the time arrived for payment of taxes, respondents went to the treasurer's office and sought to pay all the taxes due upon the property that was covered by appellant's real estate mortgages; that the treasurer, knowing that the property for which respondents desired to pay the taxes was the property formerly belonging to appellant, made out what he supposed was a complete list of such property, and respondents paid the taxes thereon as well as on the real property not purchased of appellant; that the treasurer overlooked certain of the property that had been sold to the respondents; that, as a result, respondents, though they were seeking in good faith to pay all of these taxes, did in fact omit to pay the taxes on some two or three tracts of land; that ap-

pellant, noticing that such tracts were advertised for sale, did himself go to the treasurer's office and pay the same, paying thereon, in all, \$26.62; that appellant never called respondents' attention to the fact that they had failed to pay some of the taxes; that respondents remained in absolute ignorance that they had failed to pay all of the taxes, until this action was instituted; that the real estate mortgages provided that, if taxes were not paid, appellant might pay the same, and the amount paid would be added to the mortgage indebtedness; that after appellant paid out this \$26.62 he received from respondents a payment of \$325, from which he might have reimbursed himself for this \$26.62 as well as the 80 cents insurance money, as there was then no principal due on any of the notes.

Did appellant have any reason whatsoever to deem himself insecure? It appears, by appellant's complaint, that the value of the property he sought to replevin was, at the time this suit was brought, in excess of the selling price for which he sold, not only the property described in the chattel mortgage, but in excess of the selling price of all the property, real and personal, which he sold to respondents. The evidence supported a finding made by the trial court to the effect that, at the time of this action, at which time all interest due had been paid and some \$3,000 had been paid upon the principal indebtedness, the mortgage security had increased in value very materially over the value thereof at the time the mortgages were given. Appellant showed nothing to support his claim that he deemed himself insecure.

In view of the above facts, we agree with respondents' attorneys that, "The mortgagee has shown no decent reason, either in law or morals, for this action." Certainly no grounds existed under which he would have a right to foreclose this mortgage, thus causing, as it undoubtedly would, great loss to respondents. To summarize: Respondents had, so far as they were aware, lived up fully to the provisions of the notes and mortgages. The only grounds upon which appellant could possibly claim a right to exercise his option to declare the indebtedness due was because of failures to pay 80 cents insurance premium and \$26.62 taxes. These failures occurred several months prior to the bringing of this action. Respondents had never been advised, prior to the bringing of this action, of such alleged defaults. Appellant never expressed any election to exercise his claimed option to declare the whole debt due until several months after he had received from respondents money which he might have applied to the payment of such \$27.42. By failure to exercise his option until several months after he had received such money, he waived any right to declare the whole debt

due and to foreclose his mortgage because of such failures on the part of respondents.

The judgment and order appealed from are affirmed.

McCOY, J., not sitting.

FULLERTON LUMBER CO. v. HOSFORD.
(No. 4904.)

(Supreme Court of South Dakota. Nov. 4, 1921.)

Trial ¶90—Motion to strike necessary to exclude evidence not properly connected up.

In action for price of coal, the admission in evidence of weight slips purporting to show that several loads of coal hauled by a third party were sold to the defendant *held* not error, since, if not properly connected up with defendant by evidence showing that coal was received by the defendant, defendant should have moved to have the weight slips stricken from the record.

Appeal from Circuit Court, Charles Mix County; R. B. Tripp, Judge.

Suit by the Fullerton Lumber Company against P. A. Hosford. From judgment for plaintiff and from order denying a new trial, defendant appeals. Judgment and order affirmed.

G. M. Caster, of Lake Andes, for appellant.
Roy E. Willy, of Platte, for respondent.

WHITING, J. Suit to recover the selling price of several loads of coal. Judgment for plaintiff. Appeal from the judgment and from an order denying a new trial.

Appellant assigns as error the admission of certain exhibits, the weight slips for the several loads of coal. These weight slips purport to show on their face, that the coal therein referred to was sold to the defendant and hauled by a third party. The weight slips were admissible in evidence. If other evidence was not introduced showing that this coal was received by appellant, he should have moved to have such exhibits stricken from the record and their consideration taken from the jury.

Appellant assigns as error the giving of certain instructions and the refusal to give an instruction sought by him. With the exhibits in evidence, the instructions given were proper, and the one refused would have been erroneous, unless there was no evidence from which the jury could properly find that this coal was received by defendant. It clearly appears that the attention of the trial court was not called to the fact, if in truth it was a fact, that these exhibits had not been properly connected up with the defendant.

There was evidence to the effect that appellant, after the delivery of this coal, which concededly went to appellant's farm, but which appellant claims was furnished to, and should have been paid for by, parties doing breaking for him, received from respondent an itemized statement of respondent's account and promised to pay for same. No suggestion is made that the evidence failed to show the amount of such statement and that such amount agreed with the amount sued for, or that such statement failed to agree with the weight slips, thus connecting appellant with such slips.

The judgment and order appealed from are affirmed.

McCOY, J., not sitting.

IN RE WHITMAN'S ESTATE.
WHITMAN v. WHITMAN.
(No. 4620.)

(Supreme Court of South Dakota. Nov. 4, 1921.)

1. **Wills ¶55(10), 166(5)—Weight of unnatural disposition of property in showing undue influence and testamentary incapacity depends on motives controlling testator.**

On the questions of testamentary capacity and undue influence in determining the weight to be given the fact that there was what might be deemed an unnatural disposition of property, the controlling motives influencing the actions of the decedent prior to and up to the time of making the will should be considered.

2. **Wills ¶55(1), 166(1)—Evidence held sufficient to show testamentary capacity and that testator was not unduly influenced.**

In suit to contest will, evidence *held* sufficient to show testamentary capacity, and absence of undue influence.

Polley, P. J., and Hughes, Circuit Judge, dissenting.

Appeal from Circuit Court, Minnehaha County; L. L. Fleeger, Judge.

In the matter of the estate of Joseph H. Whitman, deceased. Suit by Charles J. Whitman against Alice M. Whitman. On judgment of the county court for plaintiff, appeal was taken to the circuit court, which sustained a will. From this judgment and an order denying a new trial, plaintiff appeals. Affirmed.

G. J. Danforth, of Sioux Falls, and E. E. Wagner, of Sioux City, Iowa, for appellant.
Charles P. Bates, and Davis, Lyon & Bradford, all of Sioux Falls, for respondent.

WHITING, J. One Joseph H. Whitman died testate. By his will there was be-

queathed to his only son, Charles Joseph Whitman, the sum of \$100, the remainder of his estate, which was of considerable size, being devised and bequeathed to his sister, Alice Whitman. The testator stated in said will, in apparent explanation of such disposition, "reposing full confidence in her that she will see that my said son is properly educated and provided for, and that she will make such provision for him in her last will as she may deem advisable." This will was admitted to probate in the county court of Minnehaha county. Thereafter a contest was filed by testator's son, and, upon trial in the county court, contestant was successful. Upon appeal to the circuit court, the will was sustained. It is from the judgment of the circuit court sustaining such will and from an order denying a new trial that this appeal was taken.

Contestant alleged lack of testamentary capacity and undue influence; such undue influence being charged against the said Alice Whitman. In support of contestant's allegations he relies largely upon what he contends are unnatural provisions in said will, being the provisions above referred to.

[1, 2] We find no evidence which would have warranted the trial court in finding deceased to have been either mentally incompetent to make the will or to have been unduly influenced in its making. In determining the weight that should be given to the fact that, by the terms of the will, there was what might be deemed an unnatural disposition of decedent's property, we should and do take into consideration what appeared to have been the controlling motives influencing the actions of decedent prior to and up to the time of the making of said will. The married life of decedent was exceedingly unhappy. We need not determine the cause of his domestic trouble, as that is immaterial. It is absolutely undisputed that most serious family discord did exist, and that decedent laid the blame therefor, in part at least, upon his wife's family. Decedent was a very keen and shrewd business man, and he accumulated a large amount of property, largely real estate. During his married life he placed the title to his real estate and also to his moneys in the names of third parties—the greater part thereof in the name of his sister, Alice Whitman. It appears that the purpose in the mind of decedent was to keep his property in the names of other persons so that his wife would be unable to reach such property in case she should seek to do so in divorce or other proceedings. Divorce proceedings were eventually instituted by decedent's wife. She was granted a divorce and allowed certain alimony that had been agreed upon. It was immediately after the decree in the divorce proceedings, and at a time when his sister was visiting decedent, that decedent executed the will now in question.

The only bases whatsoever for the claim of undue influence are the fact that the sister was visiting decedent during the period of the divorce trial and down to the execution of said will, and the further fact that practically all the property was willed to her. There is absolutely no evidence of mental incapacity on the part of decedent; but it is clear that decedent's mind was obsessed with the purpose to see to it that his former wife and her people acquired no benefits from his estate; and it is also clear that it was to carry out such purpose that the above-mentioned provisions of this will were placed therein. The son remained with testator after the decree of divorce, and testator was very devoted to him. But, when we consider that decedent had shown absolute confidence in his sister by placing it within her power to have deprived him of the larger part of his property while he was living, we find nothing strange or even unnatural in the fact that he continued to repose such confidence in her, or that, in order that he might be assured that his wife and her people should receive no part of his estate, he placed the title to all of his property in his sister, leaving it to her honor to make proper provision for the education and care of such son during her lifetime, and also just provision for him in her will. It has been suggested by one of our Colleagues that, if the sister were honest, she, instead of resisting this contest, would voluntarily release or convey to the son the property covered by the will. It would seem, however, that a moment's consideration would demonstrate the unsoundness of this suggestion. We must assume, in the absence of any evidence to the contrary, that Alice Whitman intends, honestly and conscientiously, to carry out the expressed desires of her brother. If she should now place the title to his estate in the name of his son so that it was within the son's power, either during his lifetime or upon his death, to confer such estate or any part thereof upon his mother or her people, such act on her part would be an unjustifiable breach of the confidence reposed in her by decedent. It is her duty to decedent to uphold the will, so that she will be able to carry out his wishes. Of course, it may be that decedent placed too great confidence in his sister; but no one can urge that it would be the province of a court to set aside the will of a decedent simply because the court was of the opinion that the recipients under the will were unworthy.

No question is raised but that decedent knew the contents of the instrument which he executed. If decedent supposed such instrument created a trust enforceable at law, and it did not create such a trust—a matter we do not decide—it is not within the province of courts to make a new will to carry out his intent.

Contestant seeks a new trial upon the ground of newly discovered evidence; but we find nothing in the newly discovered evidence which to our minds might properly change the result reached upon the trial in the circuit court. There would still be left the controlling facts that there is no evidence showing testamentary incapacity, and that, when we consider that what decedent did through his will was in exact harmony with the course that he had pursued for years, there is nothing, even if the newly discovered evidence had been before the trial court, that would have justified such court in concluding that Alice Whitman exercised any undue influence over the mind of her brother.

The judgment and order appealed from are affirmed.

HUGHES, Circuit Judge, sitting in place of Justice GATES, dissents.

POLLEY, P. J. (dissenting). I am unable to concur in the majority opinion. There is no question that the testator desired that his son should have his property, and that when about to make his will he directed his attorney to so frame the will that his son would get all his property; but he was laboring under such a state of mental perturbation, and was so obsessed with the one idea of placing his property beyond the reach of the Burroughs family, that he failed to appreciate the fact that the will was so framed as to place the property not only beyond the reach of the Burroughs family, but beyond the reach of his son as well. A careful reading of the testimony touching the conduct of the proponent just before and at the time of the execution of the will can leave no doubt that she either dictated the will or that she influenced the testator in the framing of the will, and that he executed it under the belief that he was leaving his property to the proponent in trust for his son.

The judgment ought to be reversed, and the will canceled.

• **STRUCKMAN v. BROWN.** (No. 4988.)

(Supreme Court of South Dakota. Nov. 4, 1921.)

1. Trial $\Leftrightarrow$ 333—Verdict held insufficient for failure to find the amount of recovery.

In action for money paid out for defendant's benefit, verdict that jury "find for the plaintiff on all the issues and assess his damages at" specified sum held insufficient, under Rev. Code 1919, § 2521, providing that, in an action for the recovery of money, verdict for the plaintiff must find the amount of the recovery.

2. Appeal and error $\Leftrightarrow$ 930(1)—Not presumed to uphold verdict failing to find amount of recovery that court could have directed verdict.

In action to recover money, in which the court did not direct a verdict, omission from verdict of finding as to amount of plaintiff's recovery, as required by Rev. Code 1919, § 2521, held fatal to judgment rendered thereon, which did not recite that it was undisputed under the evidence that plaintiff had expended the amount of the judgment, since the Supreme Court will not assume in support of the judgment that evidence was such as to have warranted the trial court in directing a verdict for the amount of the judgment.

Appeal from Circuit Court, Codington County; W. N. Skinner, Judge.

Action by A. J. Struckman against Sarah De Graff Brown. Judgment for plaintiff, and defendant appeals. Reversed.

Sherin & Sherin, of Watertown, for appellant.

M. J. Russell, of Watertown, for respondent.

WHITING, J. Plaintiff alleged that, at the request of defendant and under a promise by her to repay him, he did pay out, part for her benefit and part for the benefit of a third party, five certain sums of money aggregating \$275.80; that this money, together with interest thereon at 10 per cent., was to be repaid within three months; that no part had been repaid. Defendant pleaded a general denial; pleaded a specific denial that she made the agreement alleged by plaintiff, ever borrowed any money from him, or ever agreed to pay him any interest; and alleged that the moneys which plaintiff claimed were paid out for her benefit, were paid in consideration of her accompanying plaintiff to Minneapolis and with the understanding that defendant was not to repay the same. The cause was tried before a jury, which returned the following verdict:

"We, the jury * * * find for the plaintiff upon all the issues, and assess his damages at the sum of ——— dollars."

Plaintiff moved for judgment. Defendant objected, among other grounds, upon the ground that such verdict was incomplete—it did not comply with the provisions of section 2521, R. C. 1919; and that, because thereof, the court was without jurisdiction to render judgment. The court overruled the objection, and rendered judgment for \$273.10 and costs. From such judgment defendant has appealed, assigning error in the overruling of the objections to the rendition of such judgment, and in the rendering of any judgment on such verdict. Respondent contends the assignments are insufficient to

present any question on appeal. In this contention he is clearly in error.

Said section 2521 provides that:

"When a verdict is found for the plaintiff in an action for the recovery of money, * * * the jury must also find the amount of the recovery. * * *

[1] It is clear that this verdict was incomplete; but respondent contends it should stand: (a) Because there was no issue in the pleadings as to the amount plaintiff was entitled to recover, if entitled to recover at all; and (b) because it must be assumed, in support of the trial court's action, that the evidence was such as to have warranted the trial court in directing a verdict for the amount of the judgment, and that, because of that fact, the court did not err in rendering such judgment.

In support of the first contention, respondent relies upon the case of *English v. Goodman*, 3 N. D. 129, 54 N. W. 540, decided by the Supreme Court of our sister state under a statute identical with said section 2521. That this case is not in point is disclosed by the opinion, wherein it is stated that:

"In this case, under the pleadings, the trial court would have been fully warranted in instructing the jury that, in case they found the plaintiff entitled to recover, they should fix the amount of his recovery at \$50 [the amount of the judgment entered by the court]."

It thus appears that, in that case, the pleadings aided the verdict; in this case they do not, as there is a clear issue not only as to agreement, but also as to amount plaintiff is entitled to recover even if agreement was as claimed by him. Moreover, the amount of the judgment as rendered is not the same as the amount sued for. The case now before us is, in its facts, like that of *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1027, also decided by the Supreme Court of our sister state, wherein a judgment on findings of the jury, which were incomplete because they failed to find the amount which plaintiff was entitled to recover, was set aside. The court held that this was not a general verdict under the above section, because it omitted to find any amount; and that it was equally essential that a special verdict find the amount. The court said:

"In this case the omission is fatal, and cannot be supplied by reference to the pleadings."

So it is in the case at bar, the omission "cannot be supplied by reference to the pleadings."

[2] The omission is therefore fatal unless respondent is correct in his contention that this court must assume, in support of the judgment, that the evidence was such as to have warranted the trial court in directing a

verdict for the amount of the judgment. The trial court did not direct a verdict, and the judgment rendered does not purport to stand upon any finding of the court that the evidence is undisputed, but recites that the plaintiff introduced "evidence in support of his cause of action"; that the defendant introduced "evidence in support of her defense"; that the jury "returned a verdict, the material part of which is, * * * 'We, the jury, * * * find for the plaintiff upon all the issues'"; that it was upon such verdict that judgment was moved; and that such motion was granted. It clearly appears that the trial court rendered judgment upon the theory that the verdict was a sufficient verdict. If there had been a recitation in such judgment reciting that it was undisputed under the evidence that plaintiff had expended the amount of the judgment, thus removing, any issue thereon, there might be some claim that the verdict covered the other issues, and that the judgment should stand.

The judgment appealed from is reversed.

McCOY, J., not sitting.

LYNN v. SCHIRBER. (No. 4899.)

(Supreme Court of South Dakota. Nov. 4, 1921.)

1. Evidence $\S$ 84—Government bonds presumed of their face value.

It is presumed that government bonds are of their face value.

2. Appeal and error $\S$ 1005(4)—Approved verdict, supported by substantial evidence, conclusive, regardless of weight of evidence.

Where there is substantial evidence supporting a verdict, the appellate court may not inquire into the question of the weight thereof, especially when the trial court has denied a new trial.

3. Deeds $\S$ 211(1)—Evidence sustained finding that plaintiff's intestate was incompetent.

Evidence held sufficient to sustain finding that plaintiff's intestate was incompetent to understand the nature and effect of a deed and a bill of sale conveying title to his property for an agreement for his support for the rest of his life.

Appeal from Circuit Court, Campbell County; J. H. Bottum, Judge.

Action by George W. Lynn, administrator of the estate of John F. Nicholson, deceased, against Martin J. Schirber. From judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

See, also, 183 N. W. 864.

A. A. Brown, of Mobridge, and Campbell & Walton, of Aberdeen, for appellant.

A. H. Wells, of Mound City, and Lynn & Lynn, of Linton, N. D., for respondent.

WHITING, J. This is an action brought to recover the value of certain property alleged to have been unlawfully converted by defendant. Trial was had before the court and jury, and verdict and judgment were for plaintiff. Defendant has appealed from the judgment and from an order denying a new trial.

The property in question had formerly been the property of one Nicholson, and had all been taken into the possession of defendant just prior to Nicholson's death, some of it prior to the execution of the agreement hereafter referred to. Respondent is the administrator of Nicholson's estate. Appellant admits that he took such property into his possession and had converted it to his own use, but he attempts to justify his actions because of an alleged bill of sale of this property to him. Respondent does not concede that Nicholson ever executed this bill of sale, and contends that, if it was executed by him, that he was mentally incompetent to understand the nature of what he was doing, and, further, that its execution was procured through fraud.

Respondent sought exemplary damages, basing such claim on the alleged fraud. Appellant complains of an instruction in relation to exemplary damages, contending that such instruction was not warranted by the evidence, and that it was prejudicial, he contending that the size of the verdict shows that it included exemplary damages. Appellant is wrong in this last contention. The only basis upon which such contention is based is that the jury had no right, in arriving at its verdict, to take into consideration certain government bonds that appellant had converted.

[1] Appellant contends that there was no evidence as to the value of these bonds, and that therefore they could not be considered by the jury. Without evidence as to value, it would be presumed that they were of their face value. Appellant says, however, that this court must take judicial notice that these bonds were not worth par. There is nothing showing what issue of bonds these were; but, if this court should take judicial notice of the market value of same, it would take judicial notice that they were worth at least enough to compel the jury to render a verdict as large as the one rendered if their verdict was for respondent; and this without allowing exemplary damages.

[2,3] Nicholson was some 71 years of age. He owned the home in which he lived, the household goods therein, several certificates of deposit for money deposited by him in the bank of which appellant was an officer,

several government bonds, quite a sum of cash, and a few small notes of little or no value. In all, he had something over \$12,000 of personal property in cash, bonds, and certificates, the amount of which was fully known to appellant when the conveyances hereinafter referred to purport to have been made. He is alleged to have conveyed his home to appellant by deed and his personal property to appellant by bill of sale, and to have entered into a written agreement with appellant wherein appellant undertook, in consideration of said conveyances, to see that, out of the proceeds of this property, he was cared for during life, and his debts and funeral expenses paid; to see that, out of what might then be remaining, certain payments should be made to one Mrs. Rische and one Warschawsky, and that the home was conveyed to Mrs. Rische. The main question before us is whether there was evidence to sustain a finding that Nicholson was incompetent to understand the nature and effect of the transaction evidenced by these three instruments, admitting he executed same. Appellant contends that, at best, the evidence merely showed Nicholson to be physically weak, and that mere weakness is not, in and of itself, evidence of mental incompetency; and that therefore there was absolutely no evidence of mental incompetency. Respondent, while conceding the law to be as above stated, contends that mental incompetency may result from physical weakness, and that, in this case, there was evidence sufficient to warrant the jury in concluding that this very sick man had become mentally incompetent to understand the nature and effect of this whole transaction. Under the established law of this state, if there was substantial evidence supporting this verdict, it is not for this court to inquire into the question of the weight thereof; and this is especially true in view of the fact that the trial court, who, as well as the jury, saw the witnesses and heard them testify, has seen fit to deny a new trial.

No good purpose would be subserved in making a detailed statement of the evidence which we deem warrants the verdict. There was evidence showing that Nicholson, at the time he executed these instruments, had been sick for several months; and that, for a few days just prior to the execution of such instruments, he had become much worse, and was in more or less of a stupor a large part of the time, only, as a rule, answering questions that could be answered by yes or no, and showing little understanding of what was being said or done. He died early Wednesday morning. While appellant testifies that, some considerable time prior to his death, Nicholson advised him that he wished him to draw up some papers for him, yet it was not earlier than Friday evening before his death, and when he was

admittedly very sick and weak, that appellant claims to have learned that it was the desire of Nicholson to turn over his property in consideration of appellant's agreeing to see that he was cared for during his lifetime. Appellant claims that conversations in relation to the disposition of Nicholson's property were had on Friday, Saturday, Sunday, and, lastly, on Monday, the writings themselves being executed some time during Monday afternoon, about 36 hours before Nicholson died.

In our opinion, the strongest evidence of the mental incompetency of Nicholson, and evidence from which the jury might well infer that he was incapable of understanding and did not understand the nature and effect of the instruments executed by him, is the relationship of Nicholson to appellant and to certain other parties, the unreasonable provisions of the written agreement, and the discrepancies between the conditions of such agreement and the instructions which appellant testified were given to him by Nicholson. The only relationship existing between Nicholson and appellant, so far as the testimony shows, was that commonly existing between an officer of a bank and a patron of such bank. There were no social relations existing between them. Appellant had not, so far as the evidence shows, personally cared for Nicholson during this last sickness. Mrs. Rische lived in Nicholson's home, and had been the one who had mainly cared for him. Warschawsky and wife had taken deep interest in Nicholson, had kept watch over his condition during his sickness, had visited him often; and Warschawsky had sat up with him nights during his later sickness. Nicholson expressed deep gratitude for what Mrs. Rische and Warschawsky had done for him. Appellant, after testifying to the four different days upon which he conversed with Nicholson in relation to the terms of the prospective agreement, testified that Nicholson directed him that "Mrs. Rische should receive the house and lot where he lived, and his personal property, and \$1,000 in money;" that "Warschawsky was to receive \$500;" that "the expense there might be or the debts he might have were to be paid;" that "he was to have a decent burial, and a tombstone erected on his grave; that he also mentioned the fact that appellant "could probably arrange to have him taken care of at Redfield, at a home of the feeble"; that, when he was asked if he wanted to leave anything to his relatives (a brother and sister), he said "No," that he believed "those who take care of me should have what I have got, or should have the benefit of it;" and that, when he asked him what should be done with the money that was left, he said, "That goes to yourself. You keep that."

Defendant claims to have made a notation

of all of these instructions, and that it is upon such notations that he drew the contract. He did not produce his notations, and he gave no other or further testimony as to the directions he received from Nicholson. From such directions, it is apparent that it was Nicholson's intention that Mrs. Rische should have the house, certain personal property, and the \$1,000 in money, undoubtedly to be given her in consideration of what she had done for Nicholson. There was no suggestion or hint that Nicholson expected Mrs. Rische to continue to care for him as a condition to her receiving such property and money, or that she was to wait until Nicholson's death before receiving same. Under such directions, it would appear that Nicholson desired that Warschawsky should receive \$500 for what he had already done, as there was no suggestion that he should wait for the same until the death of Nicholson. In view of such directions the jury might well have wondered why the deed to the home was not made directly to Mrs. Rische, the \$1,000 and other personal property not transferred directly to Mrs. Rische, and the \$500 not transferred directly to Warschawsky. The jury may well have inferred, from the fact that the instruments as drawn did not conform, in the above respects, with the instructions, that Nicholson did not comprehend the import of the instruments which he signed. But what is much more important and may have led the jury to believe that Nicholson did not comprehend the nature of the papers he was signing, was the fact that, under the written agreement, the purposes expressed by Nicholson would not be carried out, even if appellant complied with the covenants of such agreement.

In such agreement, appellant covenanted that, "out of the property so turned over to him," he would provide proper care and necessities and all comforts reasonably possible during the remainder of Nicholson's life, and would pay "out of such property" all the expenses for such care, together with the debts owing to any one by Nicholson, and, after his death, provide a proper burial and have a monument erected. There was absolutely no covenant whereby appellant bound himself, in any way, to care for or provide for Nicholson after the proceeds of Nicholson's property had all been used in providing for his care. This feature of the agreement might have impressed the jury as being somewhat "jug-handled," and one which no sane man would execute when he was turning over to defendant over \$12,000 worth of personal property, as well as a house and lot, and especially in view of the fact that there is no evidence that Nicholson was owing a dollar. What may have impressed the jury even more forcibly with the belief that Nicholson did not understand the im-

port of the written agreement is the fact that, under such agreement, neither the house and lot, nor the \$1,000, nor the other personal property, or any part thereof, was to be paid or turned over to Mrs. Rische, unless the house and lot and sufficient money were left at the time of Nicholson's death, it being provided that all this property should be first charged with the care of Nicholson, and with his debts and burial expenses, prior to its being charged with the payment of anything to Mrs. Rische; and, more monstrous than that, in the light of the instructions which appellant testified to, this written agreement, after speaking of this \$1,000 and the home and the personal effects, which were to go to Mrs. Rische (if they all remained after Nicholson had died), contained the further provision in relation to all of this property:

"Which he shall give to her only in the event that she will take proper care of the party of the first part during his natural life; and should she not take proper care of the said party of the said first part during the remainder of his natural life, said party of the second part shall pay her only a reasonable sum for the time she did actually care for first party."

In other words, this writing was so conditioned that nothing whatever would go to Mrs. Rische until Nicholson's death, and even then nothing but a reasonable compensation for what she had done, unless she continued to perform, during the whole lifetime of Nicholson, the very thing which was to be the greater, if not the sole, consideration for over \$10,000 coming to defendant. The writing also provided that the payment to Warschawsky, while it was to be made for what Warschawsky had already done for the first party, yet should not be made until after the death of Nicholson; this result being effected by a provision that the payments, both to Mrs. Rische and to Warschawsky, were to be made only in the event that enough property remained after Nicholson's death, and that, in case there was not enough property, the payments to Mrs. Rische and to Warschawsky were to be made pro rata. Certainly the jury had a right to believe that, when Nicholson put his cross to this agreement, if he ever did, he had no comprehension whatsoever of the terms thereof; it was not the agreement appellant had been instructed to prepare, and some of its provisions were such that no competent man, seeking to do justice between all the beneficiaries therein named, would have placed them therein.

The judgment and order appealed from are affirmed.

McCOY, J., not sitting.

PETERSON v. OGLAND et al.

(Supreme Court of North Dakota. Oct. 31, 1921.)

(Syllabus by the Court.)

Attachment $\S$ 47(2)—Should be dissolved where grounds are denied by defendant and not sustained by plaintiff.

Where, on a motion for dissolution of an attachment, the existence of the grounds of the attachment is properly denied by the defendant, the burden is placed upon plaintiff to show the existence of such grounds; and, where he fails to sustain such burden, the attachment should be dissolved.

Robinson, J., dissenting.

Appeal from District Court, Williams County; Moellring, Judge.

Action by John Peterson against Isaac Ogland and another. From an order denying a motion to discharge an attachment, the defendants appeal. Order reversed, with costs to appellants.

Fisk & Shafer, of Williston, for appellants.

Burdick & Knox, of Williston, for respondent.

PER CURIAM. This is an appeal from an order denying a motion to discharge an attachment. The grounds specified in the affidavit for attachment are:

"That the defendant has removed or is about to remove his property, or a material part thereof, from this state, not leaving enough therein for the payment of his debts: Has sold, assigned, transferred, secreted or otherwise disposed of, or is about to sell, assign, transfer, secrete, or otherwise dispose of, his property with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts. Is about to remove his property, or a material part thereof, from the state with the intent or to the effect of cheating or defrauding his creditors or hindering or delaying them in the collection of their debts or judgments."

Under the warrant of attachment issued upon such affidavit, the sheriff levied upon an automobile belonging to the defendant Isaac Ogland. The defendants moved to discharge the attachment on the ground that the charges in the affidavit for attachment were untrue. They submitted in support of said motion an affidavit of each of the defendants, completely traversing all the statements in the affidavit for attachment, and showing that both of the defendants are residents of the state of North Dakota, own real and personal property therein, and that neither of them had committed, or were about to commit, any of the acts charged in the affidavit for attachment. Upon the hearing of the motion to discharge the attachment, the plaintiff

and his wife were sworn and testified orally. Their testimony was to the effect that on the evening of April 12, 1921, the two defendants came to a room where plaintiff was then confined on the second floor of a building known as the Royal Café, in the city of Williston; that they wanted to see the plaintiff, but plaintiff's wife refused to admit them, and locked the door. She claimed that both of the defendants were intoxicated. According to her testimony they became quite angry because she would not let them see her husband. The defendants thereupon went down stairs. And plaintiff and his wife testified that when the two defendants were on the sidewalk in front of the Royal Café, they (plaintiff and his wife) heard the defendant Isaac Ogland say: "I am going to get my car and get out of this country here and they can all go to hell." (At the time this statement was made, the car was in the possession of the chief of police of the city of Williston, who apparently, had taken charge of it in connection with some charges against defendants for violation of the traffic regulations of the city of Williston.) This constitutes the sole showing made by the plaintiff in support of the averments in the affidavit for attachment. Both defendants were also sworn and gave oral testimony. It appears from the testimony of the defendant Nels Ogland that he was and is the owner of real property in Williams county, N. D., with improvements thereon consisting of a house, barn, and other buildings, which is worth \$4,000; and the owner of personal property, consisting of horses, cows, pigs, chickens, harnesses, household furniture, etc., worth \$700; that said Nels Ogland was the owner of all of said property at and prior to the time the summons and complaint in this action were served upon him, and is still the owner of all of said property. It further appears that the said Nels Ogland is a widower, with five children to support and care for, and has resided in Williams county for the past 12 years. These facts are not disputed. The defendant Isaac Ogland testified positively—and on this point his testimony is not contradicted—that he is the owner of a house and lot in Crosby, N. D., where he has been, and is making his home; that he is the owner of personal property, consisting, among other things, of the automobile levied upon in this case, and a set of carpenter tools, which personal property he claims to be worth \$1,000. It appears, further, that Isaac Ogland has been living at his present place of residence at Crosby for many years. Both defendants denied that Isaac Ogland made the statement attributed to him by plaintiff and his wife. Both, also, denied that they had committed, were about to commit, or ever had the slightest intention of committing, any of the several acts charged in the affidavit for attachment.

In passing on a motion to discharge an attachment, the trial court exercises judicial

powers. Due weight will be given to its determination. But where that determination relates to the truth or falsity of the charges set forth in the affidavit for attachment, and involves a consideration of evidence bearing upon such question, there must be some basis in the evidence for the conclusion reached by the trial court. This court has ruled:

"In motions for dissolution of an attachment, the facts stated in the original affidavit being denied, the burden is on plaintiff to support the allegations thus made; failing so to do this, the attachment should be dissolved." *Weil et al. v. Quam*, 21 N. D. 344, 131 N. W. 244.

See, also, 6 C. J. 451; 2 B. C. L. 878. In our opinion the plaintiff wholly failed to show the existence of any of the grounds specified in the affidavit for attachment; and the trial court should have ordered the attachment to be dissolved.

The order appealed from is reversed, with costs to the appellants.

GRACE, C. J., and CHRISTIANSON, BIRDZELL, and BRONSON, JJ., concur.

ROBINSON, J. (dissenting). This is an appeal from an order denying a motion to vacate an attachment. The plaintiff sues to recover \$500 damages on the ground that by fast and reckless driving defendants ran an automobile against the plaintiff, doing him severe injury. On the usual statutory affidavit the plaintiff obtained a warrant of attachment and levied on the offending automobile, which was appraised at \$300. On counter affidavits defendants moved to dissolve the attachment, and on the hearing of the motion the plaintiff and his wife were sworn and testified and each testified that defendants called on them, and on leaving defendant Isaac Ogland, the owner of the automobile, said:

"I am going to get my car and get out of the country, and they can all go to hell."

It also appeared that Isaac Ogland had no property of any account, excepting the automobile and some carpenter tools. Defendants were sworn and denied the testimony of the plaintiff and his wife. Now, in such cases, the statute provides thus:

"If on such hearing it appears to the satisfaction of the court or judge that the attachment was irregularly issued or that the affidavit upon which it was issued is untrue, the attachment must be discharged. Code, § 7561.

We may assume for a certainty that the judge would have discharged the attachment if it had appeared to his satisfaction that the affidavit upon which it was issued is untrue. It did not so appear to his satisfaction, nor does it appear to the satisfaction of this court. Furthermore, the fact that defendant has gone to the trouble and expense of a motion

to dissolve the attachment and of an appeal to this court may well be considered as some evidence that his purpose was to get the automobile clear, take his carpenter tools, and leave the country. When the motion was denied Isaac Ogland gave a counter bond, as provided by statute, for the release of the attachment. That is what he should have done in the first instance.

Order affirmed.

NORTHERN PAC. R. CO. v. TUCKER, County Auditor.

(Supreme Court of North Dakota. Oct. 19, 1921.)

(Syllabus by the Court.)

Counties $\S$ 190(2)—Act construed as limiting total taxes to one-third of combined levies for years 1918–1920.

Chapter 122, Session Laws of 1921, construed, concerning particular language and held to mean that the total amount of taxes levied for all purposes shall not exceed an amount equal to one-third of the total combined levies which were made for the years 1918, 1919, and 1920.

Appeal from District Court, Cass County; Cole, Judge.

Action by the Northern Pacific Railway Company against W. R. Tucker, County Auditor of Cass County, to enjoin levy of certain taxes. From an order and judgment of injunction, the defendant appeals. Reversed and dismissed.

George E. Wallace, of Bismarck, for appellant.

Young, Conmy & Young, of Fargo, for respondent.

BRONSON, J. This is an action to enjoin the levy of certain taxes. The defendant has appealed from an order and judgment of injunction. The facts are stipulated. The material portions of chapter 122, Session Laws of 1921, read as follows:

"The total amount of taxes levied for any purpose, * * * shall not exceed an amount equal to one-third of the total combined levies which were made for the years 1918, 1919, and 1920."

One-third of the total county levy for Cass county, or the average during such years, is \$423,280. The total levy in Cass county for 1921 is \$392,289. One-third the bridge levy for Cass county, or the average during such years, is \$57,600. For 1921, the commissioners of Cass county have made a bridge levy of \$80,000. This alleged excess levy the plaintiff seeks to restrain. In effect, it contends that the quoted section means that the

total amount of any tax levied for any purpose shall not exceed an amount equal to one-third of the total combined levies for such purpose in the years 1918, 1919, and 1920. In effect, the defendant contends that the section means that the total amount of taxes levied for all purposes shall not exceed an amount equal to one-third of the total of all levies made for the years 1918, 1919, and 1920. The plaintiff maintains that the language of the statute refers to specific statutory levies. The defendant claims that the statute deals with the total amount of the budget, and not with the individual items composing the budget. Upon processes of definitional analysis, the meaning of the statute does not appear clear. We are of the opinion, however, that the legislative intent may be fairly gleaned from the language used when considered in connection with cognate legislation. Reversing the language of the statute, it may be thus stated:

"One-third of the total combined levies for the years 1918, 1919, and 1920, shall be the limit of the total of taxes levied for any purpose."

If the words, "for any purpose," were eliminated, the meaning of the statute would appear clearer. If these words must be applied to a particular levy, such as a bridge tax, road tax, gopher tax, etc., or to a particular levy authorized by statute, then the statute is more restrictive than if otherwise applied to the total combined levies for all purposes. For instance, the total combined levies for Cass county for all purposes is within the limits prescribed by the statute. The particular bridge levy for Cass county is in excess of the limit. Again, if the statute be applied to a particular levy—even those limited or authorized by statute—it may be more restrictive than if otherwise construed. For it might happen that, during the years 1918, 1919, and 1920, no levy for a particular purpose had been made at all, although authorized and limited by statute. Accordingly, the effect of the statute might be to abrogate the right to make any levy by reason of the failure during such years to make any levy. A legislative restriction upon a power or authority theretofore granted by legislation should not be imposed nor increased unless the legislative language and intent is clear to so do. Tax legislation enacted in 1919 changed methods of determining assessed value. Chapter 220, Laws 1919. These methods greatly enhanced assessed values. They operated to remove or far extend limitations (in amounts of moneys) upon levies as theretofore made by political subdivisions of the state. Accordingly, in a restrictive way, in 1919, a statute was also enacted (chapter 214, Laws 1919) which provides that the total amount of the taxes

levied for any purpose for the years 1919 and 1920, etc., shall not exceed by more than 10 per cent. the amount that would be produced by the levy of the maximum rate upon the assessed valuation of 1918. Thereafter, the special session of the Legislative Assembly in 1919, re-enacted said chapter 214, and imposed, in addition, a penalty for its violation, and further enacted another statute reducing the levy and amount of state taxes 25 per cent. These acts serve to throw some light, though scant, upon legislative intent, concerning the levy and amount of taxes. The language of the statute speaks in terms of totals: "The total amount of taxes;" "the total combined levies." If a comma should be inserted after the word "taxes," the statute would read: "The total amount of taxes, levied for any purpose." Thus, the phrase, "levied for any purpose," considered in connection with the other language of the statute, might equally as well refer to an inclusive purpose or purposes, as to a particular purpose. We are of the opinion that no legislative intent can be deduced, either from the language used or, upon principles of construction, to abrogate the right to make a particular levy otherwise authorized by statute, as might occur under plaintiff's construction.

Accordingly, we are of the opinion that the language of the statute, considered in its entirety, and in connection with existing cognate legislation, was intended to apply to the total amount of the budget. In other words, the statute intends to mean as if it read: "The total amount of taxes, levied for all purposes of the political subdivision shall not exceed an amount equal to one third of the total combined levies," etc. No constitutional questions have been presented or decided in this action. The action accordingly should have been dismissed.

It is so ordered, without costs.

CHRISTIANSON, ROBINSON, and BIRDZELL, JJ., concur.

GRACE, J., concurs in the result.

OLSON v. LARSON.

(Supreme Court of North Dakota. Nov. 1, 1921. Rehearing Denied Nov. 18, 1921.)

(Syllabus by the Court.)

1. Sales $\S$ 72(5)—Buyer agreeing to keep property if it works satisfactorily must be honestly dissatisfied.

Where property is sold, or contracted to be sold, to a vendee, who agrees to keep and pay for the same on condition that it works satisfactorily, the buyer, relying upon such condi-

tion, must be honestly dissatisfied with the property.

2. Sales $\S$ 364(4)—Instruction held not erroneous as requiring a finding contrary to evidence.

Certain instructions are examined, and held not to be prejudicial.

Grace, C. J., dissenting.

Appeal from District Court, Williams County; Fisk, Judge.

Action by W. R. Olson against William Larson. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Craven & Converse, of Williston, for appellant.

George F. Shafer, of Watford City, for respondent.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff for \$1,349.10, and costs, which was entered on the verdict of a jury. The questions involved can most readily be understood by reference to the issues raised by the pleadings and to the facts developed at the trial. The complaint states four causes of action, the first and principal one being for the purchase price of a certain Fordson tractor and two Oliver plows, alleged to have been sold and delivered to the defendant for the price of \$1,025. The second cause of action is for certain merchandise, to wit: Two breaker bottoms, two breaker lays, two stubble lays, and other extra lays; also gasoline and oil, all alleged to have been reasonably worth the sum of \$183.55. The third cause was for table board and lodging furnished defendant and an employee in the sum of \$15, and the fourth was for the reasonable worth of services rendered defendant in delivering certain property and in making certain trips on his behalf, in the sum of \$12.40. The answer admits the third cause of action (for board and lodging), but denies the others. It alleges that the defendant agreed with the plaintiff that he would attempt to do plowing with a certain Fordson tractor and Oliver plows which he, the plaintiff, was desirous of selling; that in case the plows and tractor did the work which the defendant desired to have done in a manner satisfactory to him and to his hired man, the defendant in that event would buy the machinery; that it was specifically agreed that there should be no sale and no obligation on defendant's part to buy either the tractor or the plows unless they did the work to the entire satisfaction of the defendant and his hired man; and then it is alleged that the defendant made every reasonable effort to do plowing with the machinery and gave it a thorough trial, but that the tractor did not develop sufficient power to plow in a manner satisfactory to the defendant and the hired man. It is al-

leged that, because of this failure, the defendant never purchased the property embraced in the first and second causes of action. As to the fourth cause of action, it is alleged that the trips were not made for the benefit of the defendant, but for the plaintiff, on account of his desire to make the sale of the machinery.

The plaintiff lived at Charlson, N. Dak., an inland town in McKenzie county, some 20 miles distant from the railroad station of Sanish. He conducted a store and hotel business transporting his freight overland from Sanish. At the time of the transaction in question, he had a subagency for the sale of Fordson tractors. The defendant lived at Tioga in Williams county, and owned certain land in the vicinity of Charlson, which he desired to put into crop in 1919. On or about May 14th, the defendant was in Charlson, en route to his farm, for the purpose of making arrangements for plowing. While there he became interested in the purchase of a Fordson tractor, and went with the plaintiff to see one in operation. On or about the 15th, an arrangement was made whereby the plaintiff was to furnish a tractor for the price of \$1,025, or \$20 above the list price. The defendant gave his check for \$50 which the plaintiff claims was in part payment of the price, and which the defendant contends was simply an evidence of his good faith. The plaintiff was to bring the tractor from Sanish to Charlson. This he did. On the following Monday (May 18th), the defendant returned to Charlson, and he, together with a man furnished by the plaintiff, took the tractor to the defendant's farm. Late that evening the defendant returned to the plaintiff's place of business, and, according to the latter, reported that the tractor worked fine. This is disputed by the defendant. Next day defendant Larson returned to Tioga. The testimony is altogether conflicting concerning the exact nature of the transaction, and particularly with regard to the negotiations subsequent to the delivery of the tractor, the plaintiff claiming that the defendant, after trying the machine, promised to give him a check for the balance of the price, and the defendant that the plaintiff had guaranteed that the tractor would work to the satisfaction of him and his hired man, which he claims it failed to do. The defendant, however, stopped payment on the \$50 check, never paid the balance, and never returned the tractor. The plaintiff admitted that he had agreed that, if the tractor did not pull the two plows on the ground that was to be plowed, the defendant was at liberty to bring it back. The case was submitted to the jury, and a verdict returned for \$1,235.

[1] The principal assignments of error argued upon this appeal relate to the instructions of the court to the jury. It is argued that the instructions did not cover the issues joined, and that they ignored or

failed to properly state the law applicable to the contract if made according to the defendant's version of the facts. Regarding the principal issue, the court instructed the jury that the plaintiff, in order to recover, must prove by a fair preponderance of the evidence that, on or about the 15th of May, 1919, he sold and delivered to the defendant the Fordson tractor and two Oliver plows, for which the defendant agreed to pay \$1,025 in cash; that the defendant accepted the property, but failed to pay this sum. This was followed by a charge that, if from the evidence the jury should find that a sale was made upon approval or on trial or on satisfaction, and that the defendant signified his approval or acceptance to the plaintiff, or did any other act adopting the transaction, they should find for the plaintiff. Then a further instruction was given that, if the jury found from the evidence that a contract for the sale of the tractor was made upon approval or on trial, and the tractor delivered, they should find for the plaintiff if defendant failed to return or tender the tractor within the time agreed upon or within a reasonable time, if no time was agreed upon. A further instruction was given to the effect that, if the sale was made upon approval or on trial or satisfaction, and the plaintiff warranted the tractor and plows to do certain work, and they failed after a fair trial to do such work, and did not fulfill the warranty, then the defendant would have a right to rescind the contract or sale, and, if the tractor and plows had already been received by him, to return them or offer to return them to the seller. This instruction was accompanied by the following statement of law, to which particular exception is taken:

"You are further instructed that, where an agreement is made whereby the party is to take goods on trial, and is to keep said goods, and pay for the same only upon condition that they work satisfactorily to the buyer, the buyer cannot arbitrarily say that he is not satisfied with the goods, but there must be some actual breach of warranty in the property upon which the buyer bases his refusal to accept the goods, or his claim that the same are not satisfactory to him. In other words the buyer must act honestly in his refusal to accept and keep the goods."

Then follows this hypothetical statement referring to the defendant's contention:

"On the other hand, if you find that no contract of sale was made between the parties as claimed in the defendant's answer, but that the defendant simply agreed to take the tractor and plows and give them a trial, and, if satisfactory to him and his hired man after such trial, that he was then going to enter into a contract for the purchase of such tractor, and that previous to such trial no terms had been agreed upon, and that said tractor did not work satisfactory, and would not do the work which it was guaranteed to do by the plaintiff, and that the defendant so notified the plaintiff to

that effect, within the time in which he was to make said trial, or, if no time was specified, then within a reasonable time, then your verdict should be for the defendant upon said first cause of action."

We are of the opinion that these instructions fairly state the law applicable under the issues, and the conflicting evidence relating to the transaction. When read as a whole, we think the instructions in effect stated to the jury that they should not return a verdict for the plaintiff unless he had proved the contract, as alleged by him, accompanied by such condition or warranty as they believed the evidence supported, and that such condition or warranty had been fulfilled or treated as fulfilled by the defendant; and that, if the transaction was as contended for by the defendant, they should bring in a verdict in his favor, if he was honestly dissatisfied with the tractor.

It is claimed that palpable error was committed in that part of the instruction in which the court told the jury that, where a purchaser agrees to keep and pay for goods on condition that they work satisfactorily to him, he cannot arbitrarily say that he is not satisfied with the goods, "but there must be some actual breach of warranty in the property upon which the buyer bases his refusal to accept the goods," and the case of *Garland v. Keeler*, 15 N. D. 548, 108 N. W. 484, is relied upon. That case is authority for the rule that, where a vendor agrees that the property sold shall work satisfactorily to the purchaser, the contract is not fulfilled unless the purchaser is actually satisfied, and that it is not sufficient that the article would satisfy an ordinary man. In the instruction before us the reference in this connection to breach of warranty in the property might be considered as more or less unfortunate, but in our opinion it could not have prejudiced the defendant, for in the immediately following sentence the rule intended to be stated was put in other language which rendered the meaning clear beyond a doubt. The court stated: "In other words, the buyer must act honestly in his refusal to accept and keep the goods." That is the essence of the whole of the preceding statement, and it does accord with the law. The case of *Garland v. Keeler*, supra, recognizes this rule in connection with the actual satisfaction rule applied in that case. It is the law that, where satisfaction is contracted for the buyer cannot escape obligation by an arbitrary declaration that he is not satisfied. There must be honest dissatisfaction.

[2] It is said that the court, in instructing or attempting to instruct upon the defendant's theory of the case, erroneously imposed as a condition of finding for the defendant that the jury should find that previous to the trial no terms had been agreed upon. It is pointed out that this is contrary to all of the evidence, and that the defendant was prej-

udiced by the requirement that the jury must so find a condition contrary to the undisputed facts before they could render a verdict for the defendant. We do not believe that a jury would so construe the clause in question. This part of the instruction related to the defendant's theory as outlined in the answer—i. e., that he simply agreed to take the tractor and plows and give them a trial, and that he would become a purchaser if satisfied after trial. We are of the opinion that, under the instructions as a whole, the jury clearly would have found for the defendant had they believed his version of the transaction, and that no prejudicial error was committed in the instructions. We think the record discloses that a fair trial had been had, and that no prejudicial error was committed. It is therefore unnecessary to consider the other assignments of error raised on this appeal.

The judgment appealed from is affirmed.

ROBINSON and CHRISTIANSON, JJ., concur.

BRONSON, J., concurs in the result.

GRACE, C. J. (dissenting). The following is a part of the instructions:

"You are further instructed that, if you find from the evidence that a contract of sale for said tractor was made upon approval or on trial or on satisfaction, and that the purchase price agreed on was \$1,025, and further find that said tractor was delivered to the defendant by the plaintiff, and that the defendant failed to return said tractor to the plaintiff, or to tender a return thereof within the time agreed upon, or within a reasonable time, if no time was agreed upon, then you should find for plaintiff on the first cause of action; and you are instructed that the question of what is a reasonable time is a question of fact for you to determine under all the facts and circumstances connected with this particular case."

"If from the evidence in this case you find that there was a contract of sale or a sale entered into between the plaintiff and defendant of the tractor and plows as claimed by plaintiff, and further find that said contract of sale was made upon approval or on trial or satisfaction, and further find that the plaintiff warranted said tractor and plows to do certain work, and that they failed after a fair trial to do such work, and did not fulfill the warranty, then the defendant would have the right to rescind the contract of sale or the sale; and if the tractor and plows had already been received by him to return them or offer to return them to the seller and recover any portion or part of the purchase price, if he had paid the same."

"You are further instructed that, where an agreement is made whereby a party is to take goods on trial, and is to keep said goods and pay for the same only upon condition that they work satisfactorily to the buyer, the buyer cannot arbitrarily say that he is not satisfied with the goods, but there must be some actual breach of warranty in the property upon which the buyer bases his refusal to accept the goods,

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or his claim that the same are not satisfactory to him. In other words, the buyer must act honestly in his refusal to accept and keep the goods."

In our opinion such instructions were erroneous, and the giving of them was prejudicial reversible error. In this case there was no contract of warranty as that term is usually understood. If defendant's version of the contract be true—that the tractor and machinery purchased were to work to his satisfaction and to that of his hired man—then the contract was much broader than that of warranty. It was an entirely different contract, and the law of warranty did not apply to it; hence, it was error in the court to have given the instructions on warranty, where the court gave the jury to understand it was the defendant's duty to return the tractor and plows, or to offer to return them, after first having rescinded the contract. If the contract were as defendant claims, he was not required to return or offer to return or to rescind the contract if he were dissatisfied; all that was necessary for him to do was to inform defendant that he was not satisfied, or that they were not satisfied.

There is sufficient evidence in the record to show that he did so inform plaintiff, and also to show that the machinery did not do its work properly, so that assuming the truth of defendant's testimony in this respect, there was a basis for his dissatisfaction. Under the instructions, the defendant not having returned or offered to return the machinery, it is not improbable that this, under the foregoing instructions, was the turning point in the case, and that on account of this the jury found in favor of plaintiff, whereas it is plain defendant was under no obligation to return or offer to return the property. The only instruction in this branch of the case proper to be given was that, if the jury believed from the evidence that defendant was honestly dissatisfied with the tractor and plows, then the jury should find in his favor. The instructions as given was highly prejudicial, and did not state the law applicable. *Garland v. Keeler*, 15 N. D. 549, 108 N. W. 484; *McCormick Harvesting Machine Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846. In the latter case in the syllabus, it is stated:

"If, upon such reasonable trial, it does not work satisfactorily, it is not necessary for him to return it (in the absence of an express agreement to that effect), but it is sufficient if, within a reasonable time, he notify the person furnishing it in substance that it does not work satisfactorily, and that he declines to accept it."

It is wholly immaterial whether plaintiff was making much or little profit in the transaction. The important question is: What was the contract? And in the circumstances

of this case that was the question for the jury, under proper instructions by the court, which in this case the court wholly failed to give.

CITIZENS' STATE BANK OF SELFRIDGE v. SMELAND.

(Supreme Court of North Dakota. Nov. 8, 1921. Rehearing Denied Nov. 18, 1921.)

(Syllabus by the Court.)

1. Garnishment $\S$ 101 — Statute requiring publication of summons against defendant within 60 days held applicable in garnishment proceedings.

Where a garnishee summons was served upon a garnishee alone on January 8, 1918, a disclosure by the garnishee made on January 12, 1918, and the summons and complaint filed in the district court on January 18, 1918, and where, about 2½ years later, an affidavit for publication of the summons was filed upon the ground that the defendant was and had been a nonresident, publication thereof had, and judgment subsequently upon default rendered against the garnishee, it is held that the provisions of section 7383, O. L. 1913, requiring the publication of a summons within 60 days, applies, and the judgment is void.

2. Appeal and error $\S$ 224—Direct action to vacate void judgment upheld where not objected to below.

A direct action to vacate such void judgment (when entertained by the trial court without objection), instead of a motion or other proceeding therefor, may be upheld.

Christianson, J., dissenting in part.

Appeal from District Court, Morton County; Berry, Judge.

Action by the Citizens' State Bank of Selfridge against Olaf Smeland, and from an order sustaining a demurrer the plaintiff appeals. Reversed.

Norton & Kelsch, of Mandan, for appellant.

Jacobsen & Murray, of Mott, for respondent.

BRONSON, J. [1] This is an action to vacate a judgment against the plaintiff as garnishee. An appeal has been taken from an order sustaining a demurrer to the complaint. Among other things, the complaint sets forth the following allegations: On January 3, 1918, the defendant prepared a summons and complaint in an action against one Flynn, also a garnishment summons and affidavit therein, naming the plaintiff herein as garnishee. On January 8, 1918, the garnishment summons and affidavit were served upon the garnishee. On January 12, 1918, the garnishee disclosed the possession of a

note for about \$340, owned by Flynn. On January 18, 1918, the summons and complaint were filed in the district court. More than two years later, on June 28, 1920, there was filed in the district court an affidavit for publication of the summons, stating that the defendant Flynn was not a resident of the state and that the place of his residence was unknown. On November 20, 1920, there were filed, by the attorneys for Smeland, affidavits of default, stating that the summons was published for six weeks from July 1, 1920, to August 5, 1920, and that no answer or demurrer had been served upon them, although the statutory time therefor had expired. Pursuant to findings of the trial court, judgment for \$310.15 and costs in favor of Smeland and against Flynn was entered on November 20, 1920. Likewise pursuant to the order of the trial court, judgment for \$240.44 and interest in favor of Smeland and against the plaintiff herein, as garnishee, was entered on December 27, 1920. The complaint also alleges that the defendant did not make publication of the summons within 60 days, as required by statute; that the plaintiff, several months after its disclosure, believing that the action of Smeland had been discontinued, paid to others the property of Flynn in its possession; that the judgment against the garnishee is void; that its remedy by motion is not now available (section 7483, C. L. 1913); and that it possesses no other plain, speedy, or adequate remedy at law. The trial court, in sustaining the demurrer, held that the complaint did not state a cause of action; that there is no statutory limitation, in garnishment proceedings, upon the time when an affidavit for publication must be filed; that it was not necessary for Smeland to proceed with publication of the summons against Flynn within 60 days after the service upon the garnishee.

We are of the opinion that the trial court erred. The jurisdiction of the trial court in the action against Flynn and in the garnishment proceeding were mutually dependent upon appropriate proceedings in each action. The garnishment proceedings, although deemed an action (section 7581, C. L. 1913), were nevertheless dependent upon jurisdiction in the main action. If no jurisdiction would be secured against the defendant, no jurisdiction would remain in the garnishment proceedings upon which a judgment might be rendered against the garnishee. To permit the garnishment process to be served and the jurisdiction of the trial court to obtain over the "res," it was necessary that a summons in the main action simultaneously issue. Section 7568, C. L. 1913. The court might acquire a jurisdiction either by the service of the summons or the service of the garnishee summons. Section 7583, C. L. 1913. Upon the service of

the garnishee summons herein the court acquired a jurisdiction. The garnishment proceedings thereupon were deemed an action by Smeland against the plaintiff, as garnishee, and Flynn, as the defendant. Section 7581, C. L. 1913. The garnishment action was then an action pending. The court then possessed jurisdiction to proceed by publication of the summons in the main action. The main action and the garnishment action were then mutually dependent upon the other for the retention of jurisdiction.

Jurisdiction, if it existed at all, was necessarily predicated upon the nonresidence of the defendant. Otherwise, the garnishment proceedings would be void because no service was made upon the defendant. Section 7571, C. L. 1913.

Section 7383, C. L. 1913, provides that an action is commenced by the service of a summons; that an attempt to commence an action is deemed equivalent to the commencement thereof, when the summons is delivered with the intent that it shall be actually served to the sheriff or other officer of the county in which the defendant resides, etc.; that such an attempt must be followed by the first publication of the summons or the service thereof within 60 days.

The contention of the respondent that this section only concerns the statute of limitations, as stated in the subsequent sections, must be denied. The section is a general provision in the Code of Civil Procedure. Thus it has been during and since territorial days. Section 62, Code Civ. Proc. 1877. The policy of the law expressed throughout the Code of Civil Procedure is for the expedition of litigation. Sections 7423, 7425, 7432, 7539, C. L. 1913. It must be presumed that when the garnishee made its disclosure, and Smeland thereafter filed his summons and complaint, there was an intent to hold jurisdiction and to deliver the summons and complaint for purpose of securing service upon the defendant as a nonresident. Otherwise there existed no jurisdiction. Such delivery and filing, together with the jurisdiction acquired over the garnishee, brought the proceedings, in our opinion, within the purview and policy of the statute, and required a publication within the time prescribed. Such publication was not made, and the judgment accordingly is void. See *Atwood v. Tucker*, 26 N. D. 622, 631, 145 N. W. 587, 51 L. R. A. (N. S.) 597; *Rhode Island v. Keeney*, 1 N. D. 411, 45 N. W. 341.

[2] Respondent contends that plaintiff's remedy was by motion and not by action, unless satisfactory reasons are alleged for not proceeding by motion. This is an action to vacate a void judgment. The proper practice undoubtedly was to seek the exercise of the inherent powers of the court by motion, or to appeal from the judgment. *Gaar, Scott & Co. v. Spaulding*, 2 N. D. 414,

51 N. W. 867. Such proceedings would be more expeditious. Section 7483, C. L. 1913, does not apply. *Martinson v. Marzolf*, 14 N. D. 301, 309, 103 N. W. 987. However, an action to vacate a void judgment may be entertained. 23 Cyc. 946; *Freeman v. Wood*, 11 N. D. 1, 8, 88 N. W. 721. The trial court did entertain this action without objection. We are not disposed to disturb the action of the trial court because of the existence of other more appropriate methods of procedure.

The order is reversed, with costs.

ROBINSON, J., concurs.

GRACE, C. J., concurs in the result.

BIRDZELL, J. In my opinion the proceeding should have been by motion, but as the whole matter was before the lower court, and it apparently considered the merits as fully as if a motion had in fact been made, I am of the opinion that this court should consider the merits. I agree with the principal opinion.

CHRISTIANSON, J. (concurring in part and dissenting in part). This is an equitable action to vacate and annul a certain judgment. There was a general demurrer to the complaint. The trial court sustained the demurrer, and the plaintiff has appealed. The question presented to the trial court, and also presented to this court, is whether the complaint did or did not state a cause of action. I am inclined to the view that the complaint did not state a cause of action, and that the trial court was correct in so ruling. There is no question but that the relief which plaintiff seeks to obtain in this action might have been obtained by a motion to vacate the judgment made in the action in which the judgment was entered. For it is well settled that the remedy by motion applies not only in cases which fall within the provisions of section 7483, C. L. 1913 (authorizing the vacation of the judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect), but is equally applicable, and exists wholly independent of the statute, in cases where judgments have been rendered without jurisdiction or obtained through fraud upon the injured party and the court. *Yorke v. Yorke*, 3 N. D. 343, 353, 55 N. W. 1095; *Williams v. Fairmount School District*, 21 N. D. 198, 204, 129 N. W. 1027. Inasmuch as it clearly and indisputably appears that a remedy by motion was and is both available and adequate, it seems to me that the complaint wholly fails to set forth a cause of action for the vacation and annulment of the judgment. See *Freeman v. Wood*, 14 N. D. 95, 105, 103 N. W. 392; *Free-*

man on Judgments (4th Ed.) § 497; 15 R. C. L. p. 748.

Inasmuch as my Associates are of the opinion that an action will lie under the facts set forth in the complaint in this case, even though the remedy by motion is available, and hence have found it necessary to also discuss and decide questions relative to the validity of the judgment, I deem it proper to say that I agree with what is said by Mr. Justice Bronson in that portion of his opinion covered by paragraph 1 of the syllabus. In other words, I am entirely agreed that if the facts set forth in the plaintiff's complaint in this case were presented in support of and established upon a motion to vacate the judgment in the original action, it would be the duty of the trial court to set aside, vacate, and annul the judgment.

MOEN et al. v. KILZER LUMBER CO.

(Supreme Court of North Dakota. Oct. 19, 1921.)

(Syllabus by the Court.)

Chattel mortgages § 197(1)—Creditor attaching engine prior to filing of purchase-money mortgage held not subsequent creditor in good faith.

For the conversion of a Case engine plaintiffs bring this action and recover a judgment for \$400 and costs. The plaintiffs claim under a chattel mortgage. Defendant claims under an attachment which was levied prior to the filing of the mortgage. The attachment was for a debt which existed prior to the execution of the mortgage. Hence the lumber company is not a subsequent creditor in good faith and its claim does not take precedence over the mortgage.

Appeal from District Court, Dunn County; H. L. Berry, Judge.

Action by Christ Moen and another against the Kilzer Lumber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

T. F. Murtha, of Dickinson, and H. L. Molloy, of Halliday, for appellant.

Thorstein Hyland, of Mandan, for respondents.

ROBINSON, J. This is an appeal from a judgment of \$400 and costs against the defendant for the conversion of a J. I. Case engine. In May, 1919, at Beulah, the plaintiff sold the Case engine to Sam Crosby, and for the purchase price Crosby made to them a promissory note and a mortgage on the engine for \$700. The mortgage was duly executed, and on December 8, 1919, it was filed in the office of the proper register of deeds. In November, 1919, and before the filing of the mortgage, defendant commenced, or at-

tempted to commence, an action against the mortgagor, obtained an attachment, and levied the same on the engine. Then he obtained a judgment and an execution under which the engine was offered for sale and sold to the defendant. In this action the judgment and the execution were justly held void for the reason that the proof failed to show any service of the summons; but if the judgment and the execution were valid that would be of no avail to the lumber company, because it is not in position to assert any rights as a subsequent bona fide purchaser or a subsequent creditor. Its action against the mortgagor is based on two promissory notes made on December 3, 1918. Hence it cannot be either a subsequent bona fide purchaser or a subsequent creditor, and the filing of the mortgage is of no consequence. This case is ruled and governed by a well-considered decision of this court which is directly in point. *Union National Bank v. Oulm*, 3 N. D. 208-211, 54 N. W. 1034, 44 Am. St. Rep. 533. The reason is that a subsequent creditor parts with his property on the apparent responsibility of his debtor by reason of property then owned and possessed by him. When the lumber company trusted Crosby to the amount of \$400, the presumption is they knew of his circumstances and knew he had the means to buy and pay for the Case engine. That was notice sufficient to put them on their guard. They knew that if he bought such an engine or any property of like value it would be subject to a mortgage or a lien for the purchase money. Good faith consists in an honest intention to refrain from taking an unconscionable advantage of another, even through the forms and technicalities of the law.

Judgment affirmed.

GRACE, C. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

BRONSON, J. (specially concurring). I concur in an affirmance upon the ground that upon the record, the lien of the chattel mortgage was prior to that of the attachment proceedings. *Union Nat. Bank v. Oulm*, 3 N. D. 193, 54 N. W. 1034, 44 Am. St. Rep. 533; *Petrie v. Wyman*, 35 N. D. 126, 144, 159 N. W. 616.

ELLEFSON v. ELLEFSON.

(Supreme Court of North Dakota. Oct. 19, 1921.)

(Syllabus by the Court.)

Divorce ¶252.—In granting divorce for incurable insanity, held proper to divide the property between plaintiff wife and the insane husband.

Plaintiff was granted a decree of absolute divorce from defendant on the ground of his in-

curable insanity. The court in its decree made a division of defendant's property between them, giving to plaintiff all of it except property valued at about \$12,000, which it permitted to remain in defendant's name and as his portion of the property. From the decree plaintiff appeals and assigns error in that the court did not decree her all of the property. It is held, for reasons stated in the opinion, that the decree was proper and without error.

Appeal from District Court, Stutsman County; W. L. Nuessle, Judge.

Action by Aase Ellefson against Nels Ellefson for divorce. Decree for plaintiff giving her all of defendant's property except 160 acres of land, and the plaintiff appeals. Affirmed.

John A. Jorgenson, of Jamestown, for appellant.

John W. Carr, of Jamestown, for respondent.

GRACE, C. J. This was an action brought by the plaintiff against the defendant to obtain a divorce on the ground of his incurable insanity.

The material facts are as follows: Plaintiff and defendant intermarried in Norway in 1886, and they afterward removed to the United States and located in Sargent county, N. D. To the marriage were born seven children, all of whom are living with the exception of two, and all are of legal age except one.

In 1888 the defendant purchased the tree-claim rights of a third party to the southwest quarter of section 14, township 132 north of range 55, in Sargent county, N. D., and filed on the same as a homestead. In 1892 defendant purchased on crop payment the northwest quarter of the same section and later made full payment of the purchase price and received title thereto. In 1901 defendant was committed from Sargent county to the hospital for the insane at Jamestown. He escaped from there and returned home, remaining there until January, 1903, when he was again committed to the said hospital, where he has ever since remained. It is claimed that his insanity is incurable.

Defendant was the owner of considerable property worth between \$2,000 and \$3,000, and \$2,000 in cash at the time of the trial. The homestead of about 160 acres at this time was worth about \$16,000, and the 160 acres which was purchased on contract was worth about \$12,000. Plaintiff at this time also appeared to have between \$2,000 and \$3,000 in cash and Liberty Bonds in her name.

The trial court granted the plaintiff a divorce and decreed to her all of defendant's property with the exception of the 160 acres which had been purchased on contract and

which had been fully paid for by the defendant. In short, the trial court awarded her approximately \$20,000 and left in the name of the defendant the land above mentioned of the value of about \$12,000.

The only error assigned on this appeal is the refusal of the trial court to transfer the whole of the property to plaintiff instead of leaving in his name the northwest quarter of section 14, township 132, range 55. In this we are clear there is no error. The same rule we think would be applicable here as on division of property in a divorce proceeding based upon other statutory grounds for divorce than that of insanity. The trial court made what it thought was a fair division of the property in all of the circumstances of the case.

It would seem that it has exercised a wise discretion in the matter and one which should not be disturbed unless for more forceful reasons than have been presented to us. It is claimed, however, by the plaintiff, that all of her children signed a request that all of the property be transferred to their mother, the plaintiff. But notwithstanding this, the trial court thought it wise and just that a certain portion of the property should remain in the defendant's name, and we are unable to discover any good reason why its decree in this respect is not equitable and just. Certainly the amount left defendant will not be squandered, as it appears he will in all probability spend the remainder of his days in the hospital for the insane. There will also continue to be a guardian over his estate whether it be his wife, who has now procured a divorce, or some other competent person.

There is another very good reason why a portion of the property should be left in the name of the defendant. His estate, in the conditions mentioned in the statutes, section 2579 of the C. L. 1913 as amended by chapter 103 of the Laws of 1915, chapter 144 of Laws of 1919, and other amendatory laws, if any, may be charged with the expense incurred by any county in the state for his treatment and maintenance in the hospital for the insane.

Hence the wisdom of the decree of the trial court requiring that a portion of the estate remain in defendant's name, so that in the event such estate is properly and legally charged with any of such expense there will be property out of which it may be paid. The entire record has been examined with care, and we find no error committed by the trial court.

The judgment is affirmed. Respondent is entitled to his costs and disbursements on appeal.

CHRISTIANSON, ROBINSON, BRONSON, and BIRDZELL, JJ., concur.

MANDAN NEWS v. HENKE, President of Board of City Com'rs, et al.

(Supreme Court of North Dakota. Oct. 13, 1921.)

(Syllabus by the Court.)

1. Mandamus ~~is~~—City officers may not be compelled to issue warrants on general fund, after having offered to issue warrants on special fund for same debt.

Plaintiff brought an action of mandamus to compel defendants to issue to it certain warrants drawn on the general funds of the city of Mandan, they having theretofore declined to issue such warrants, but offered to issue warrants drawn on the special street lighting fund, claiming that the proper one against which the warrants should be drawn.

The court declined to issue the writ of mandamus, and for reasons stated in the opinion, it is *held*, its refusal to do so was not error.

2. Refusal to grant mandamus against defendants held not error.

The court did not err in granting judgment in favor of defendants.

Appeal from District Court, Morton County; H. L. Berry, Judge.

Application by the Mandan News for a writ of mandamus against H. L. Henke, as President of the Board of City Commissioners, and W. H. Seitz, as City Auditor of the City of Mandan, N. D. Writ refused and action dismissed, and the plaintiff appeals. Affirmed.

Charles L. Crum and T. J. Krause, both of Mandan, for appellant.

L. H. Connolly, of Mandan, for respondents.

GRACE, C. J. This action is one where the plaintiff sought to procure the district court of Morton county to issue a peremptory writ of mandamus against the president of the board of city commissioners and the city auditor of the city of Mandan, to compel them to issue warrants for the amounts hereinafter mentioned against the general funds of the city.

The case was tried by the court. It refused to issue the writ, and dismissed the action.

[1] The material facts are as follows: During the year 1919 and 1920 the city of Mandan installed a special system of street lighting, under section 3745 of the Compiled Laws of North Dakota of 1913, as amended by chapter 69 of the Session Laws of 1915. A special street lighting district and a special assessment fund for said district were created. The plaintiff published the resolutions in connection therewith, and certain notices for bids. At the time of these publications, no special fund had been provided, the spe-

cial street lighting system not having been at this time fully established. At the time these publications were made, no question was raised about the method of paying the printer for the publication of them. Subsequently the street lighting system was established in accordance with the laws above mentioned, and the city made contracts for the installation of the lighting system. The commission levied special assessments upon the property within the improvement district, subject to levy for the cost of the lighting system, and afterward plaintiff published the special assessment list, giving two publications thereof. It presented two bills to the city: One for \$280.72, which was allowed November 8, 1920; the other for \$292.16, which was allowed December 6, 1920. At the time they were allowed, the city had made provision for a fund, designated street lighting district No. 1 fund of the city of Mandan, N. D.

After the bill for \$280.72 had been allowed by the city commissioners, the defendants issued a warrant for that sum drawn on the special street lighting fund. This was handed to Mr. Roth, vice president of the board of directors of the plaintiff corporation. At the time he received it he did not examine it, but soon afterward did, and, on finding that it was drawn on the special street lighting fund, returned it to the city auditor and informed him that the plaintiff refused to accept it, because it was not drawn on the general fund. The auditor offered plaintiff warrants drawn on the special street lighting fund, which offer was refused, and warrants on the general fund demanded.

Chapter 69 of the Laws of 1915, *supra*, provide in part as follows:

"If the owners of the majority of the property abutting street or streets where said lighting system is to be installed, shall not within ten days after the last publication of said notice protest against said lighting system or improvement, then the majority of such owners shall be deemed to have consented thereto, and such city may proceed to provide for the construction of such improvement and to assess the costs thereof against the abutting property in the same manner and with the same notice and according to the same forms and procedure as now provided by statute for the construction and assessment of street paving; and upon such proceedings being taken and completed, the cost of such construction or such part thereof as the counsel or commission shall deem proper, be assessed against the abutting property in the same manner and according to the same form as now provided by law for the assessment of the cost of street paving."

Section 3726, Compiled Laws of 1913, provides how special assessments shall be made in case of the construction of sewers, paving, etc., to pay the costs thereof, or such part thereof as is to be paid by special assessment, including all expense in making such assessment, publishing necessary notices with reference thereto, etc. As the cost of the spe-

cial lighting system is to be assessed against the abutting property in the same manner, and with the same notice, and according to the same forms and procedure as now provided by statute for the construction and assessment of street paving, and as section 3726, with reference to street paving, designates publication of notices as part of the expense and costs of construction of the pavement, it would seem that the cost of publication of notices in connection with the establishment of a special street lighting system, or of special assessments therein to be levied, should be considered a part of the cost of construction thereof. With what above has been stated in mind, we may proceed to a disposition of the questions here presented.

This action, as above stated, being one to procure the issuance of a peremptory writ of mandamus for the purpose above mentioned, it is incumbent upon the plaintiff to show that it is the plain legal duty of the defendants to perform the act which it seeks to compel by the writ, and to further show, otherwise than by a mandamus proceeding, that the plaintiff had no plain, speedy, or adequate remedy. From what has above been said, it is clear that no such plain legal duty rested on the defendants. Hence the court, in the circumstances of this case, was fully justified in refusing the issuance of the writ.

[2] The only errors assigned on this appeal are that the court erred in granting the judgment from which appeal had been taken, and further erred in dismissing the action. It is clear that the court erred in neither respect.

The judgment appealed from is affirmed. The respondents are entitled to their costs and disbursements on appeal.

BIRDZELL and ROBINSON, JJ., concur.
BRONSON, J., concurs in the result.

CHRISTIANSON, J. (concurring). The publication of the necessary notices relating to an improvement, to be paid for by special assessments against the property benefited, under article 20, c. 44, Political Code, Comp. Laws 1913, is a proper item of the cost of the improvement. Section 3726, C. L. 1913.

A city has power, subject to the debt limit provisions of the Constitution, to provide that not exceeding one-fifth of the cost of certain local improvements be paid by general taxation. Section 3723, C. L. 1913. But it is averred in the return of the defendants in this case that special assessments were levied to pay all the costs of the improvement, including all expenses incident thereto. Hence, under the facts shown to exist in this case, the plaintiff's claim was properly allowable against, and payable by warrant drawn upon, the special assessment fund; and plaintiff was not entitled to a warrant drawn upon the general fund of the city.

**STATE ex rel. PAYNE, Atty. Gen., v.
REEVES, State Auditor (POLLEY
et al., interveners).**

(Supreme Court of South Dakota. Oct. 27,
1921.)

Part I.

- 1. Constitutional law §26—Legislature's power restricted only by powers delegated to federal government and restrictions of state Constitution.**

The Legislature has every power except that delegated to the federal government and that restricted or limited by the state Constitution; the Constitution being a limitation of power, restrictive in its nature.

- 2. Constitutional law §13—Effect given to intent of framers.**

The court, in construing a constitutional provision, should keep in mind the object sought to be accomplished by its adoption and the evils, if any, sought to be prevented or remedied, and should give effect to the intent of the framers and of the people who adopted it.

- 3. Constitutional law §48—Unconstitutionality of statute must appear beyond reasonable doubt.**

A statute should not be declared unconstitutional unless a conflict between its provisions and some principle of constitutional law is so plain as to leave no reasonable doubt.

- 4. Constitutional law §48—Statute must be construed so as to be held valid, if possible.**

When reasonably possible, a statute must be so construed that it will be held valid.

- 5. Constitutional law §48—Statute presumed constitutional.**

A presumption in favor of the constitutionality of a statute is raised by the mere fact of the enactment thereof.

- 6. Judges §22(2)—Lump sum allowance to Supreme Court judges for expenses held not unconstitutional as payment of additional "compensation," or a "perquisite," or "emolument."**

Rev. Code 1919, § 5131, as amended by Laws 1921, c. 400, providing for a lump sum allowance of \$150 per month to Supreme Court judges for expenses of moving to state capital and of living at place other than that of legal residence, and Laws 1921, c. 21, § 25, making appropriation therefor, held not violative of Const. art. 5, § 30, and article 21, § 2, fixing the judge's compensation and making it unlawful for him to receive any "compensation, perquisite or emoluments" except such salary, since a lump sum allowance for actual expenses is not additional "compensation," or a "perquisite," or "emolument," and since \$150 per month is not so plainly and palpably in excess of any amount of expenses which could be incurred as to show that the Legislature intended to increase the salary and not to provide for the payment of expenses incident to discharge

of their duties, in view of fact that the judges are not required to reside at the capital.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compensation; Emolument; Perquisite.]

- 7. Constitutional law §70(3)—Legislative determination as to expense allowance given judges conclusive in absence of bad faith.**

In proceeding involving validity of Rev. Code 1919, § 5131, as amended by Laws 1921, c. 400, providing for a lump sum allowance to the Supreme Court judges for expenses in moving to state capital and in living at a place other than that of their legal residence, the amount allowed by the Legislature is binding on the court unless it conclusively appears to have been made in bad faith; the allowance being a matter for legislative determination.

- 8. Evidence §18—Judicial notice taken of increased cost of transportation and living.**

In a proceeding involving validity of Rev. Code 1919, § 5131, as amended by Laws 1921, c. 400, providing for a lump sum allowance to the Supreme Court judges for expenses in moving to the state capital and in living at a place other than that of their legal residence, the court will take judicial notice of the increased cost of transportation and living in 1921 as compared with such cost in 1911, when the original statute providing for allowance of only \$50 a month was enacted.

- 9. Constitutional law §38—Validity of statute not dependent on existence of facts rationally believed to be established.**

The validity of legislation necessary or proper under given state of facts does not depend on actual existence of those facts, if law-making body rationally believe such facts to be established.

- 10. Constitutional law §47—Statute constitutional, unless it appears otherwise from language of act or judicially known facts.**

A law must stand, if it cannot be made to appear that it is unconstitutional by argument deduced from the language of the law itself or from facts of which the court can take judicial knowledge.

- 11. Constitutional law §48—Legislature presumed to have found existence of facts necessary to validity of statute.**

The Legislature has power to investigate and determine facts, and courts will presume it has done so; and if, under any possible state of facts, legislation can be held constitutional, courts are bound to presume such facts existed.

- 12. Evidence §18—Supreme Court judges' expense allowance of \$1,800 per year not judicially known to be excessive.**

Courts cannot take judicial knowledge of the fact, if it be a fact, that an expense allowance of \$1,800 per year to each of the Supreme Court judges is excessive.

Hayes, P. J., dissenting.

Part II.

13. States $\S$ 63—Lump sum expense allowance to certain officers not additional "compensation," or a "perquisite," in violation of Constitution.

Rev. Code 1919, $\S$ 7060, providing for lump sum allowance of \$50 per month to the Secretary of State, State Auditor, State Treasurer, Superintendent of Public Instruction, and Commissioner of School and Public Lands, for expenses incident to removal to capital, and increased expenses of living at a place other than that of their legal residence, and Laws 1921, c. 21, $\S\S$ 6, 22, 24, and 27, making appropriation therefor, *held* not violative of Const. art. 21, $\S$ 2, fixing the amounts of the salaries of such officers, and prohibiting an increase therein and the payment to them of fees or perquisites, since the allowance of such amount for expenses does not constitute the payment of compensation additional to amount so fixed or the granting of a perquisite, notwithstanding article 4, $\S$ 12, requiring such officers to keep their offices at the seat of government.

Hayes, P. J., dissenting.

Part III.

14. Evidence $\S$ 18, 40—Judicial notice taken of counties included in circuit and necessary expenses incurred by circuit judge.

In proceedings involving validity of Laws 1919, c. 159, providing for lump sum expense allowance to circuit court judges, the court will take judicial notice of the number of counties included in the circuit of each judge; that it is necessary for judges to hold terms of court at the county seat of each county; that in the discharge of their duties they are absent from their homes much of the time and necessarily incur expenses for traveling, hotel bills, etc.; and that such expenses are much greater than they were at the time of the adoption of the Constitution fixing the judges' salaries.

15. Judges $\S$ 22(2)—Lump sum expense allowance to circuit court judges not unconstitutional as payment of "compensation" additional to constitutional salary, or grant of "perquisite" or "emolument."

Laws 1919, c. 159, providing for lump sum expense allowance to circuit court judges, and chapter 21, $\S$ 7, making an appropriation therefor, *held* not violative of Const. art. 5, $\S$ 30, art. 21, $\S$ 2, fixing the amount of the salary to be paid such judges and prohibiting an increase therein and the payment to them of fees and perquisites, or emoluments, in addition thereto; such expense allowance not constituting additional "compensation," "perquisites," or "emoluments."

Hayes, P. J., dissenting.

Part IV.

16. Constitutional law $\S$ 70(3)—Act not void, regardless of how inconsiderate, illogical, or shocking, where not in conflict with Constitution.

Under Const. art. 3, $\S$ 1, an act which does not contravene some express provision of the Constitution will not be held void, no matter how inconsiderate, illogical, or shocking it may be.

17. States $\S$ 63—Payment by state of Governor's hotel expenses not an increase in compensation in violation of Constitution.

Laws 1921, c. 21, $\S$ 18, making appropriation for hotel expenses of Governor, *held* not violative of Const. art. 21, $\S$ 2, fixing the amount of the Governor's compensation, notwithstanding Laws 1901, c. 110, fixing the Governor's salary as the maximum provided for in such constitutional provision, since payment of the Governor's hotel rental does not operate to increase his compensation.

Hayes, P. J., dissenting.

Part V.

18. Constitutional law $\S$ 70(1)—Acquisition and maintenance of public buildings an exercise of legislative powers with which court has no concern.

The acquiring and maintaining of public buildings is the exercise of purely legislative powers with which the court has no concern.

19. States $\S$ 114—Funds used for establishing official residence for Governor held devoted to a "public purpose" within Constitution.

Laws 1920, c. 84, authorizing the State Capital Commission to expend funds appropriated by Laws 1919, c. 322, in the preparation of plans and the purchase of grounds for an official residence for the Governor, *held* constitutional; the money so raised being used for a "public purpose" within Const. art. 11, $\S$ 2, providing that taxes shall be levied and collected for public purposes only.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Purpose.]

Petition for writ of prohibition by the State of South Dakota, on the relation of Byron S. Payne, Attorney General, against Jay Reeves, as Auditor of the State of South Dakota, to prohibit defendant from drawing warrants for certain purposes, in which Samuel C. Polley and others intervene. Denied.

Byron S. Payne, Atty. Gen., and E. D. Roberts, Asst. Atty. Gen., for plaintiff.

Gardner & Churchill and Haney & McCoy, all of Huron, for Supreme and circuit court judges.

Martens & Goldsmith, of Pierre, for all other interveners.

ORVIS, J. This is an original proceeding commenced in the Supreme Court by the plaintiff, state of South Dakota, on the relation of Byron S. Payne, its Attorney General, seeking to restrain and prohibit the defendant, Jay Reeves, as Auditor of said state, from drawing and issuing warrants on the State Treasurer for purposes hereinafter stated.

Plaintiff's petition consists of five parts, numbered from I to V, both inclusive, each

relating to a separate special proceeding.

"Part I" relates to an expense allowance of \$150 per month to each of the Supreme Court judges; "Part II" to an expense allowance of \$50 per month to each of the state officers named above as interveners, other than the Governor and judicial officers; "Part III" to an expense allowance of \$75 per month to each of the circuit court judges; "Part IV" to rent of living rooms of the Governor at the state capital; and "Part V" to the power of the Legislature to erect a Governor's mansion.

Each of the regular Supreme Court judges and each of the circuit court judges of this state being interested and therefore disqualified, the Supreme Court, under article 5, § 7, of the State Constitution, and chapter 343, Session Laws of 1919, appointed, from the qualified practicing attorneys of the state, Robert O. Hayes, of Deadwood, George Rice, of Flandreau, T. H. Null, of Huron, A. H. Orvis, of Yankton, and L. W. Bicknell, of Webster, to act as judges of the Supreme Court in this proceeding, and to hear, try, and determine the issues involved and to enter judgment accordingly, and said persons having qualified as required by law, and having organized as the Supreme Court by electing Robert O. Hayes, Presiding Judge, proceeded to hear, try, and determine said issues.

Samuel C. Polley, John Howard Gates, Charles S. Whiting, Ellison G. Smith, and James H. McCoy, as the regular Supreme Court judges of this state, having been permitted to intervene, joined in an answer or return to "Part I" of the petition.

C. A. Burkhart, as Secretary of State, W. S. O'Brien, as Treasurer, Fred L. Shaw, as Superintendent of Public Instruction, and N. E. Knight, as Commissioner of School and Public Lands, all of the state of South Dakota, were permitted to intervene, and they also joined in an answer or return to "Part II" of the petition.

R. B. Tripp, L. L. Fleeger, John T. Medin, W. N. Skinner, Frank B. Smith, Frank Anderson, John F. Hughes, Walter G. Miser, James F. McNenny, Alva E. Taylor, Joseph H. Bottum, N. D. Burch, John G. Bartine, and W. F. Eddy, as judges of the circuit court of this state, have likewise been permitted to intervene, and they have joined in an answer or return to "Part III" of the petition.

W. H. McMaster, as Governor of this state, has intervened and filed an answer or return to "Parts IV and V" of the petition.

The defendant, Jay Reeves, as Auditor of the state, has filed a general demurrer to the petition and to each and every part thereof.

The real parties in interest in this proceeding are the state of South Dakota and the interveners. All material facts are conceded

by the parties in interest, and the only issues for determination are questions of constitutional law.

Part I.

The essential facts to be considered in the special proceeding designated as "Part I" are: The interveners Samuel C. Polley, John Howard Gates, Charles S. Whiting, Ellison G. Smith, and James H. McCoy are the duly elected, qualified, and acting judges of the Supreme Court of the state of South Dakota; the legal and actual residence of each of said Supreme Court judges at the time he first entered upon the discharge of his duties as one of the judges of said court was at a place other than the city of Pierre, the capital of South Dakota; each of said judges, at or about the time he first entered upon the discharge of his duties as one of the judges of said court, changed his place of actual residence to said city of Pierre, and since said time has resided in said city. Each of said judges, under the Constitution of this state, has retained his legal residence at his former place of actual residence, and each of said judges voluntarily changed his place of actual residence for the sole purpose of enabling him more efficiently to discharge his official duties.

The Constitution of this state does not require the judges of the Supreme Court to reside at the state capital, and, except "that at least two terms of the Supreme Court shall be held each year at the seat of government," it does not require the judges to perform any of their official duties at the state capital.

Section 5131 of the South Dakota Revised Code of 1919, originally enacted as chapter 239, Laws of 1911, is as follows:

"Whenever a judge of the Supreme Court whose legal residence shall be at some place other than the state capital shall have changed his place of actual residence to the capital, there shall be paid to such judge, in consideration of expenses incident to removal to the capital, the increased expenses of living at a place other than his legal residence, and the expenses of traveling to and from such legal residence, the fixed sum of fifty dollars for each month, payable upon the certified voucher of such judge filed in the office of the State Auditor."

This section was amended by chapter 400, Laws of 1921, so that the law now allows the fixed sum of \$150 for each month, instead of \$50 as provided by the original law. In other respects the original law remains unchanged.

The state Legislature, by section 25 of chapter 21 of the Laws of 1921, being the general appropriation act appropriating money for salaries and expenses of the executive and judicial departments of the state, appropriated and set aside the sum of \$18,000 for the biennial period beginning July

1, 1921, and terminating June 30, 1923, for the payment of expenses of the judges of the Supreme Court of the state of South Dakota, as provided for in section 5131 of the South Dakota Revised Code of 1919, as amended by chapter 400, Laws of 1921.

The annual salary of each of the judges of the Supreme Court is fixed at \$3,000, and under article 21, § 2, of the State Constitution, it is provided that—

"They shall receive no fees or perquisites whatever for the performance of any duties connected with their offices. It shall not be competent for the Legislature to increase the salaries of the officers named in this article except as herein provided."

Again, article 5, § 30, of the State Constitution, provides:

"The judges of the Supreme Court, circuit courts and county courts shall each receive such salary as may be provided by law, consistent with this Constitution, and no such judge shall receive any compensation, perquisite or emoluments for or on account of his office in any form whatever, except such salary: Provided, that county judges may accept and receive such fees as may be allowed under the land laws of the United States."

It is contended by plaintiff that the allowance of \$150 per month to each judge of the Supreme Court in consideration of expenses incident to removal to the capital, the increased expenses of living at a place other than his legal residence, and the expenses of traveling to and from such legal residence, is excessive and unreasonable; that said expense allowance is not based upon any actual expenses that a judge of the Supreme Court might or does reasonably incur incident to the discharge of his duties as such officer; and that said allowance is, in effect, an allowance for living expenses and operates to increase the salary or compensation of each of the Supreme Court judges, and is in contravention of the provisions of the state Constitution above quoted.

It is contended by the Supreme Court judges that the reasonableness of the amount allowed as expenses by chapter 400, Laws of 1921, was a matter wholly within the discretion of the Legislature; that this determination, presumptively made upon due investigation and consideration of all the material facts and circumstances and without intent to violate the state Constitution, cannot be disturbed by this court unless the amount allowed is so plainly and palpably in excess of any amount of expenses which could possibly be incurred by the judges in the discharge of their official duties as to show without evidence or argument, beyond all reasonable doubt, that the Legislature intended to increase the salary of the judges and not to provide for the payment of expenses incident to the discharge of official duties.

Plaintiff also contends that section 5131 of the Revised Code of 1919, as the same was originally enacted, is unconstitutional, for the reason that if the expenses allowed exceed actual expenses necessarily the excess operates as an increase of salary, and therefore is in violation of the constitutional provisions hereinbefore quoted.

[1] It is a fundamental rule that the state Constitution is a limitation of power restrictive in its nature, and that the Legislature has every power except that delegated to the federal government and that restricted or limited by the state Constitution. The generally accepted doctrine is that the Legislature may pass any acts that are not expressly or by necessary implication inhibited by their own Constitution or by the federal Constitution. 12 C. J. 746.

The Constitution of this state does not contain any restrictions upon the power of the Legislature to make allowance for the expenses of the several constitutional state officers who are interveners in this proceeding. What the representatives of the people have not been forbidden to do by the organic law, that they may do. *Russ v. Commonwealth*, 210 Pa. 54, 60 Atl. 169, 1 L. R. A. (N. S.) 409, 105 Am. St. Rep. 825.

[2] In construing a constitutional provision the fundamental purpose is to ascertain and give effect to the intent of the framers and of the people who adopted it. The court therefore should constantly keep in mind the object sought to be accomplished by its adoption and the evils, if any, sought to be prevented or remedied. Constitutional provisions are presumed to have been more carefully and deliberately framed than is the case with statutes; hence it is sometimes said that less latitude should be indulged by the courts in their construction, but, on the other hand, courts are not at liberty to declare an act void because they deem it opposed to the spirit of the Constitution. 12 C. J. 702.

[3] No legislative act should be declared unconstitutional unless the conflict between its provisions and some principle of constitutional law is so plain and palpable as to leave no reasonable doubt of its validity. *State ex rel. Longstaff v. Anderson*, 33 S. D. 574, 146 N. W. 703; *In re Watson*, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; *State v. Becker*, 3 S. D. 29, 51 N. W. 1018; *Bon Homme County v. Berndt*, 15 S. D. 494, 90 N. W. 147; *State v. Summers*, 33 S. D. 40, 144 N. W. 730, 50 L. R. A. (N. S.) 206, Ann. Cas. 1916B, 860.

The Supreme Court of this state has on many occasions laid down the rule that an act of the Legislature will not be held unconstitutional unless its unconstitutionality appears plainly beyond a reasonable doubt. *Metropolitan Casualty Ins. Co. v. Basford*, 31 S. D. 149, 139 N. W. 795,

[4] When reasonably possible a statute must be so construed as to uphold its validity; indeed, a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score. If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, it is the duty of the court to adopt that construction which, without doing violence to the fair meaning of the language, will render it valid. 12 O. J. 788, citing South Dakota cases among others.

[5] A presumption in favor of constitutionality is raised by the mere fact of the enactment of the statute by the Legislature. 12 C. J. 791, citing South Dakota cases among others.

This court in *Queen City Insurance Co. v. Basford*, 27 S. D. 164, 130 N. W. 44, in an opinion by Judge Corson, said:

"The power of the court to declare an act of the Legislature unconstitutional is an extraordinary power and should only be exercised in a case free from all reasonable doubt."

Section 5131, Revised Code of 1919, first enacted as chapter 239, Laws of 1911, was in 1915 before this court for construction in *McCoy v. Handlin*, 35 S. D. 487, 153 N. W. 361, L. R. A. 1915E, 858, Ann. Cas. 1917A, 1046. Handlin, then State Auditor, refused to issue a warrant to McCoy, one of the Supreme Court judges, for the expense allowance of \$50 per month provided for by said law, claiming that the law was unconstitutional because in contravention of the provisions of the state Constitution hereinbefore quoted. McCoy made application to the Supreme Court for a writ of mandamus compelling Handlin, as State Auditor, to issue a warrant upon the State Treasurer for the expense allowance which he claimed was due him. Every judge of the Supreme Court was interested, but at that time there was no other court in which the proceeding could be heard, tried, and determined, and no method provided by the Constitution or any statute for the calling in of substitute judges to hear, try, and determine the proceeding. Under those circumstances the Supreme Court held that, as a matter of necessity, it had jurisdiction and that it was its duty to determine the proceeding. The decision of the court on that question undoubtedly was right. It is sustained by practically all courts of last resort, and the Attorney General concedes that on that question the decision was correct. The court also decided that chapter 239, Laws of 1911, did not violate any provision of the state Constitution.

This court, as now constituted for the decision of this proceeding, might, under the doctrine of stare decisis, hold that the precise questions before the Supreme Court in

McCoy v. Handlin are no longer open to controversy in this state; but as the judges of the Supreme Court in their answer have expressly declined to avail themselves of the doctrine of stare decisis, we shall consider that decision the same as we would had it been made by the Supreme Court of some other state, and shall give it only such consideration and effect as in our judgment it merits by reason of the authorities cited and reasons stated therein. We believe that decision has never been criticized by any court. On the contrary, it has been cited, approved, and followed by courts of the highest standing in other jurisdictions.

In *Smith v. Jackson*, 241 Fed. 749, 154 C. C. A. 449, United States District Judge Clayton rendered a decision which involved the question of what should be considered emoluments. After judgment in that case an appeal was taken therefrom to the Circuit Court of Appeals of the Fifth Circuit, where the judgment appealed from was affirmed, and where the Circuit Court of Appeals adopted the opinion of Judge Clayton as its own without change. 241 Fed. 747, 154 C. C. A. 449. An appeal was then taken from the judgment of the Circuit Court of Appeals to the United States Supreme Court, where the judgment was affirmed. 246 U. S. 388, 38 Sup. Ct. 353, 62 L. Ed. 788. Judge Clayton, in his opinion, speaking of the word "emolument," said:

"The definition of the term is ascertained from adjudged cases cited in Words and Phrases, vol. 8, p. 2367, where it is said: 'Emolument is the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as salary, fees, and perquisites.' I think it may be said, therefore, that an emolument is something positively and directly conferred, as compensation, or gain, that the holder of an office receives, and not something necessarily, inseparably, and incidentally used by him in the discharge of his duty, a duty for which he is paid a fixed salary. * * * This question here is analogous to the one involved in *McCoy v. Handlin*, 35 S. D. 487, 153 N. W. 361, L. R. A. 1915E, 858. In that case the contest was over an extra allowance of a specified sum per month to such judges of the Supreme Court as take up their residence at the capital (of South Dakota) to meet the extra expenses thereby caused."

After quoting the provisions of the South Dakota Constitution, and in speaking of the opinion in *McCoy v. Handlin*, he said:

"The opinion was well considered, instructive, and is illuminating in the consideration of the instant case."

Between one and two pages of the printed opinion in *McCoy v. Handlin* are quoted and made a part of the opinion of Judge Clayton.

The Supreme Court of Tennessee, in *State v. Thomason*, 142 Tenn. 527, 221 S. W. 491,

wherein a lump sum expense allowance was sustained, also cites *McCoy v. Handlin* with approval. The same is true of the Missouri Supreme Court, in *Macon County v. Williams*, 224 S. W. 835.

In *State ex rel. Langer v. Kositzky*, 38 N. D. 616, 166 N. W. 534, L. R. A. 1918D, 237, *McCoy v. Handlin* is cited in support of the proposition that when the amount of a claim based upon a valid law is fixed by law, so that there is no dispute as to the amount of the claim, it then becomes the duty of the Auditor to allow it, and to issue a warrant upon the State Treasurer therefor, provided, of course, that money has been appropriated for the payment thereof.

[6, 7] That an allowance for expenses actually incurred by an officer incident to the performance of the duties of his office is neither emoluments nor perquisites is well settled, and this is conceded by the Attorney General and his assistant in this proceeding. Has the Legislature power to allow expenses in a lump sum? We are convinced that it has, provided it 'does not make the allowance greater than the expenses it was designed to cover. It was so held by this court in *McCoy v. Handlin*, supra. The court in its opinion in that proceeding called attention to the fact that the Constitution of this state, as well as the Constitutions of nearly all the other states, contains no provision requiring the judges of the appellate court to reside at the capital, and that it would therefore have been entirely proper and legal for the plaintiff in that proceeding (Judge McCoy) to have retained his actual residence at Aberdeen, the place of his legal residence, just as many of the judges in other states live away from the capital. The court said:

"If the judges of this court continued to reside at the places of their legal residence, no question, under any authority, could be raised as to the constitutionality of a law which appropriated money to reimburse them for their actual expenses incident to their travel to and from, and for their hotel bills while at, the capital. Such an allowance would leave to the judges clear, as compensation for their official services, the salary provided by law, and no one could, and we apprehend no one would, say that they received perquisites or emoluments. In view of the number of trips that would have to be made to the capital and the number of days that would have to be spent there, it is clear that the aggregate of such expenses would be in excess of \$600 per year for each judge so living away from the capital. Let us suppose that the several judges of this court were living at the places of their legal residence, and the Legislature were asked to enact legislation to reimburse them for their actual expenses incurred in going to and remaining at the capital, which expenses could, from their nature, be itemized. Is it possible that such Legislature could not say to the judges of this court: 'We believe that, owing to the fact that the duties of your office require your presence at the capital a considerable portion of the time, you can better discharge the duties of such of-

fice if you will reside at the capital; hence, in the furtherance of a sound public policy, we ask you to make your actual residence at the capital, and in order that you may do so without financial loss to you, we will, in the place of paying your expenses of traveling to and boarding at the capital, while living at your places of legal residence, allow you such a sum as will cover the extra expense incident to your moving to and living at the capital.'

"Would not the allowance in the one case be as much an allowance for expenses, and in no sense a perquisite or emolument, as in the other? Certainly it would; the only difference being that in the one case the law could provide for the expenses to be itemized and the exact amount paid, while in the other, from the very nature of things, it would be necessary for the Legislature to estimate the reasonable and proper amount of such expenses and appropriate a lump sum therefor. If the Legislature could pass such a law to encourage the judges to move to the capital, for the same reasons it certainly could pass one where, prior thereto, the judges had voluntarily moved to the capital. * * * The Legislature had a right, in determining the advisability of this legislation, to take into account what would have been the probable allowance necessary to meet the expenses for which the judges would have been justly entitled to be reimbursed, if they had remained at their legal residences, and also to take into account the estimated amount of additional expense incident to moving to and living at the capital; so long as it has not exceeded either of these sums there is left no ground to claim that it has increased their salaries."

This lengthy quotation from the opinion in that proceeding is made because the reasoning of the court therein, and in the other cases referred to which have approved and followed it, is, to our minds, unanswerable. As said by Judge Clayton in *Smith v. Jackson*, supra:

"The opinion was well considered, instructive, and is illuminating in the consideration of the instant case."

We hold that the decision in *McCoy v. Handlin* has settled the law in this state on all the questions which it decided, not under the doctrine of stare decisis, but because the reasoning of the court in that decision is unanswerable.

The questions now before this court, as constituted for the purposes of this proceeding, are the same as those before the court in *McCoy v. Handlin*, except that in this proceeding the amount of the allowance to each of the judges is \$160 per month instead of \$50. Does this fact require, or does it justify, a different decision? Applying the principles that are well settled in deciding constitutional questions, we are convinced that it does not. The Supreme Court of Tennessee, in *State v. Thomason*, 142 Tenn. 527, 221 S. W. 491, where an expense allowance in a lump sum was attacked on the ground that it was unconstitutional, said:

"It is urged that to sustain the power of the Legislature to make appropriations of the character here questioned will authorize or result in similar ones of larger amount. It may likewise be plausibly argued that in its control of the public finances the Legislature may authorize unwise and extravagant expenditures, but these insinuations address themselves to the discretion of the Legislature in the proper exercise of its representative power, and are not pertinent to the judicial determination of the existence of that power. The exclusive control of the expenditure of the public moneys is vested in the legislative branch of the government, and is the subject of limitation by the courts only so far as provided by the Constitution."

Each member of the Legislature is required to take the same oath of office as is taken by each of the judges of this court, which is to support the Constitution of the United States and of the state of South Dakota. We cannot, at least in a doubtful case, presume that the members of the Legislature have intentionally violated their oaths of office.

Whether the expense allowance of \$150 per month to each judge of the Supreme Court is or is not excessive is a question depending to some extent upon the standard of living of the judges of the Supreme Court. The station or position in life of the party whose expenses are under consideration should be considered, and the Legislature in enacting the law now under consideration was dealing with the question of the expense of judges of the Supreme Court. Those judges are entitled under the Constitution to the salaries fixed by the Constitution, and they are entitled to such allowance for expenses as will enable them to live in a manner becoming the judges of the Supreme Court of a great state. The legislators may well have thought it the part of wisdom to make provision for the expenses of the judges in such an amount that it would not be necessary for them to take from their inadequate salaries the money necessary to pay such expenses. This court will not presume that the matter of the amount and the necessity for these expenses was not made the subject of proper investigation by the Legislature, and its determination as to the facts cannot, under any principle of constitutional law, be disturbed by this court unless the amount allowed is so plainly and palpably in excess of any amount of expenses which could possibly be incurred by the judges in the discharge of their official duties as to show without evidence or argument, beyond all reasonable doubt, that the Legislature intended to increase the salary of the judges and not to provide for the payment of expenses incident to the discharge of official duties. The question is not what this court might conclude would be a reasonable amount to allow the judges for expenses incurred in the discharge of their official du-

ties, if it were authorized to fix such allowance, but whether the amount fixed by the Legislature is plainly and palpably in excess of any amount which the judges could possibly incur. In other words, this court, to sustain the contention of the learned Attorney General, must take judicial knowledge of the fact, if it be a fact, that \$150 per month allowed to each of the judges as expenses is in excess of any amount that could possibly be incurred. It is the action of the Legislature—the chosen representatives of the people—which is under investigation in this proceeding, and not the action of the Supreme Court or its judges.

[8, 9] This court can and should take judicial notice of the increased cost of transportation and living in 1921 as compared with such cost in 1911, the time when the statute construed in *McCoy v. Handlin* was enacted. It is bound to presume that this change in conditions was duly considered by the Legislature. It is, of course, within the power of the Legislature to repeal or amend the law now under consideration, and it is to be presumed that whenever there is any substantial change in conditions affecting the matter the Legislature will duly consider such change and legislate accordingly. As was said by the Supreme Court of California, in *Ex parte Yun Quong*, 159 Cal. 508, 114 Pac. 835, Ann. Cas. 1912C, 969:

"But the validity of legislation which would be necessary or proper under a given state of facts does not depend upon the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established."

[10] In the case of *People v. Durston*, 119 N. Y. 569, 24 N. E. 8, 7 L. R. A. 715, 16 Am. St. Rep. 859, it was said:

"If it cannot be made to appear that a law is in conflict with the Constitution, by argument deduced from the language of the law itself, or from matters of which a court can take judicial notice, then the act must stand."

[11] It does not appear from the face of the act itself that the expenses allowed are excessive, nor does it appear from any matters of fact of which a court can take judicial notice. The Legislature had the power to investigate and determine these facts, and it has presumably done so.

In the case of *State v. Tower*, 185 Mo. 79, 84 S. W. 10, 68 L. R. A. 402, the court, in speaking of legislative power and legislative discretion, said:

"It had the power, and must be presumed to have inquired into the actual conditions, * * * and the discretion exercised by them within their conceded powers we have no power to control, unless it involves a violation of some right protected by the Constitution."

If, under any possible state of facts, the acts in question can be held to be constitu-

tional, this court is bound to presume that such facts existed. As was well said by the Supreme Court of Iowa, in *McGuire v. C., B. & Q. R. Co.*, 131 Iowa, 340, 108 N. W. 902, 83 L. R. A. (N. S.) 706:

"It is not for the court to inquire or determine whether a state of facts existed calling for the enactment of the legislation in question. That is for the exclusive consideration of the Legislature. If under any possible state of facts the act would be constitutional and valid, the court is bound to presume that such condition existed."

The Supreme Court of the United States, in the case of *Calder v. People of Michigan*, 218 U. S. 591, 81 Sup. Ct. 122, 54 L. Ed. 1163, in which the motives and purposes of the Legislature were attempted to be called in question, said:

"But we do not inquire into the knowledge, negligence, methods or motives of the Legislature if, as in this case, the repeal was passed in due form."

The question of whether or not the Legislature exceeded its powers in making an expense allowance to each of the Supreme Court judges of so great a sum as \$150 per month is the only one in this proceeding which to us has ever seemed difficult or doubtful.

[12] If it be conceded that the Legislature may provide for the allowance of expenses in a lump sum of any amount, no matter how small, the next question is, Where can the line be drawn by this court below which the Legislature in its discretion may go, but beyond which it cannot pass? Can such a line be drawn anywhere? We may and do concede that a so-called expense allowance might be so great that upon its face, without argument, it would furnish conclusive evidence that the Legislature did not and could not believe or intend that it was for expenses incurred or that might be incurred. To illustrate: If instead of \$1,800 per year the Legislature had provided for \$5,000 per year to each of the judges, we would have no hesitation in holding such a law unconstitutional. Perhaps in making an expense allowance of \$1,800 per year the Legislature came dangerously close to the line beyond which this court might say it cannot pass. In this proceeding it is unnecessary to decide whether it did or not, and we do not attempt to do so. What we do decide is that we cannot take judicial knowledge of the fact, if it be a fact, that an expense allowance of \$1,800 per year to each of the Supreme Court judges is so excessive that we could be justified in saying the Legislature in making such allowance acted in bad faith and in fact increased the salaries of the judges in violation of the state Constitution.

The Legislature by making the allowance has, in effect, said it is not excessive.

Whether it is or is not excessive cannot be proved as a fact by witnesses for the purpose of holding the law unconstitutional. It is not a matter of expert opinion. It is a matter to be estimated—a matter of judgment which belongs to the legislative branch of the government, and one with which courts cannot interfere unless it conclusively appears that the Legislature in making the allowance acted in bad faith.

We cannot conclude beyond a reasonable doubt that chapter 400, Laws of 1921, violates any provision of the state Constitution, and where there is a reasonable doubt the law must stand. It may be thought by some that the framers of the Constitution and the people who adopted it should in that instrument have denied to the Legislature the right to provide for any expense allowance in a lump sum to any officer, either constitutional or statutory. It is now about 32 years since the state Constitution became operative, and conditions since 1889 have changed; many things may be considered advisable or necessary now that were not thought of at that time. It may now be believed that the habit or custom of providing for expenses in a lump sum is unwise and liable to abuse. No matter what the members of this court may think as to the wisdom of such legislation, it must be evident to all that it is not a judicial question; it is purely a question of policy with which courts are not concerned.

These conclusions necessarily require that the application for a writ of prohibition, in so far as it would deny to each of the Supreme Court judges his right to the expense allowance of \$150 per month, should be denied; and it is so ordered.

Part II.

ORVIS, J. The separate special proceeding designated Part II relates to an expense allowance of \$50 per month to C. A. Burkhart, as Secretary of the state of South Dakota, W. S. O'Brien as Treasurer of said state, Fred L. Shaw as Superintendent of Public Instruction of said state, and N. E. Knight as Commissioner of School and Public Lands of said state, all of whom are interveners in said proceeding. The issues in this proceeding, as in Part I, relate to questions of constitutional law.

Section 7060 of the Revised Code of 1919, originally enacted as chapter 365 of the Laws of 1917, is as follows:

That "whenever a Secretary of State, State Auditor, State Treasurer, Superintendent of Public Instruction or Commissioner of School and Public Lands, whose legal residence shall be at some place other than the state capital, shall have changed his place of actual residence to the capital, there shall be paid to such officer, in consideration of expenses incident to removal to the capital, the increased expenses of living at a place other than his legal resi-

dence and the expenses of traveling to and from such legal residence, the fixed sum of fifty dollars for each month, payable upon the certified vouchers of such officers, filed in the office of the State Auditor."

By sections 6, 22, 24, and 27 of chapter 21 of the Session Laws of 1921, the Legislature appropriated money sufficient to pay to each of the intervening state officers the sum authorized by said section 7060, Revised Code of 1919. It is contended by the Attorney General and his assistant that said section 7060 is in violation of article 21, § 2, of the state Constitution, which is as follows:

"The Secretary of State, State Treasurer and State Auditor shall each receive an annual salary of \$1,800; the Commissioner of School and Public Lands shall receive an annual salary of \$1,800; the Superintendent of Public Instruction shall receive an annual salary of \$1,800; * * * they shall receive no fees or perquisites whatever for the performance of any duties connected with their offices. It shall not be competent for the Legislature to increase the salaries of the officers named in this article except as herein provided."

By article 4, § 12, of the state Constitution, it is provided that the officers above named shall respectively keep their offices at the seat of government.

It is conceded that each and all of said officers, in order properly and efficiently to conduct their offices, have taken up their actual residence in the city of Pierre, although prior to their assuming their official duties as said officers each and all of them resided in other cities and parts of the state of South Dakota, and that each and all of said officers voluntarily changed their places of actual residence to the capital of the state of South Dakota. Said officers are not required to reside at the state capital by any law, constitutional or statutory; they are simply required, under the Constitution, to keep their offices at the seat of government.

It was within the legislative power to provide as it did, in 1917, by the enactment of the statute hereinbefore referred to, for the expenses of the intervening constitutional state officers a lump sum, provided the sum allowed did not exceed the actual expenses which it was designed to cover.

Nearly every reason given for sustaining a lump allowance to the Supreme Court judges in Part I of this opinion applies with equal force to the intervening state officers. The fact that these officers are required to keep their offices at the seat of government, while the judges of the Supreme Court are only required by the Constitution to hold at least two terms of the Supreme Court at the seat of government each year, cannot be construed as preventing the Legislature from allowing to the intervening state officers the right to such expenses as they would necessarily incur had they retained their actual

places of residence where they resided when elected to the offices which they now hold, and had they made frequent trips to and from the state capital.

[13] For reasons given in Part I of this opinion, we cannot escape the conclusion that section 7060, Revised Code of 1919, is a valid legislative enactment, and that the writ of prohibition applied for, in so far as it would affect the rights of the constitutional state officers who are interveners herein to each receive the sum of \$50 per month, should be denied; and it is so ordered.

Part III.

ORVIS, J. Part III of plaintiff's petition relates to an expense allowance to each of the circuit court judges of this state of \$75 per month. It is contended by the Attorney General and his assistant that chapter 159, Session Laws of 1919, is unconstitutional. Said statute is as follows:

"In consideration of paying the traveling expenses, hotel bills, telephone expenses, furnishing stationery, office supplies and other expenses of circuit court judges in the state of South Dakota while performing the duties of their office, there shall be paid to each judge of the circuit court in the state of South Dakota the fixed sum of \$75 for each month, payable upon certified vouchers of such judge filed in the office of the State Auditor."

By section 7, c. 21, Session Laws of 1921, an appropriation sufficient for the payment of the expenses provided for in said statute was made by the state Legislature. The only provisions of the Constitution which it is contended chapter 159, Session Laws of 1919, contravenes, are article 21, § 2, and article 5, § 30; both of which, so far as material, are quoted in Part I of this opinion. The issues for trial all relate to questions of constitutional law.

Nearly all that has been said in Part I of this opinion is with equal force applicable to the issues relating to the circuit court judges.

[14] There are certain facts in this proceeding of which the court takes judicial notice, different from those considered in Parts I and II of this opinion. There are a number of counties included in and constituting the circuit of each of the circuit court judges, and it is necessary for them to hold terms of court at the county seat of each of said counties. It is necessary in the discharge of their duties that they should go about from county to county and be absent from their homes much of the time. In performing such duties they necessarily incur expenses for traveling, hotel bills, telephone bills, stationery, office supplies, and other expenses incident to the discharge of their official duties. These expenses cannot be avoided. Was it not the plain duty of the Legislature to provide an allowance to each

of the circuit court judges sufficient to pay said expenses?

This court will take judicial notice of the fact that all expenses necessarily incurred by circuit court judges in the performance of their official duties are very much greater than they were at the time of the adoption of the state Constitution. The salaries allowed the circuit court judges are so inadequate (\$2,500 each per year) that the Legislature presumably regarded it as a duty to make an allowance to each of the circuit court judges for such expenses as they must necessarily incur in performing their official duties.

It is contended by the circuit court judges that the amount allowed for expenses by the Legislature is not, in fact, adequate to reimburse them for their actual necessary expenditures in discharging the duties of their said office. Plaintiff's contention is that it is immaterial, even if true, because, as contended, the Legislature is without power to make an expense allowance in a lump sum to any state officer.

[15] We do not think it of any importance in this proceeding whether or not the expense allowance of \$75 per month to each of the circuit court judges is inadequate to reimburse those officers for their actual necessary expenditures in discharging the duties of their office. For reasons given in Part I of this opinion we are convinced that it was within the power of the Legislature to allow expenses in a lump sum to each of the circuit court judges, that the amount of such allowance was for the determination of the Legislature, and that courts cannot, under any sound principle of law, substitute their judgment for that of the Legislature, or interfere with purely legislative acts, unless the amount allowed is so plainly and palpably in excess of any amount that could be incurred by the circuit court judges as to show upon its face, without argument, that the Legislature did not and could not have intended the amount allowed simply for expenses.

It is unnecessary here to repeat the reasons for our conclusions; they are stated at considerable length in Part I of this opinion. These conclusions necessarily require that the application for the writ of prohibition, in so far as it was intended to affect the rights of each of the several circuit court judges to receive \$75 per month as an expense allowance, under chapter 159, Session Laws of 1919, should be, and the same is, denied.

Part IV.

NULL, J. In Part IV plaintiff in his petition alleges:

"That section 13 of chapter 21 of the Laws of 1921, being the general appropriation act, appropriates and sets aside the sum of eighteen thousand and four hundred (\$18,400) dollars

for the biennial period, beginning July 1, 1921, and terminating June 30, 1923, for salary of private secretary to the Governor, clerk hire, stenographers, stationery, office supplies, postage, railroad fare, hotel, rent, and living expenses, and other traveling expenses and incidentals."

"That heretofore vouchers, duly approved by the Governor, for the amount of seventy-five (\$75) dollars per month, for rent of living rooms at the St. Charles Hotel, situate in Pierre (the capital), S. D. for the Governor and his family, have been honored by the defendant (State Auditor) herein, and warrants issued upon funds appropriated by section 2, c. 15, of the Session Laws of 1919, which funds were appropriated for rent, living, and other expenses of the Governor of the state."

"That the appropriation of public funds for the rental of living rooms or a dwelling for the Governor of the state, and the payment thereof by the State Auditor, is without authority of law and is in violation of section 2, art. 21 of the state Constitution. That the salary of the Governor is fixed at three thousand (\$3,000) dollars per year by the provisions of section 5818 of the South Dakota Revised Code of 1919, the maximum amount authorized and permitted by the provisions of said section 2, art. 21, of the state Constitution. That said allowance of seventy-five (\$75) dollars per month for hotel rent of living rooms for the Governor of the state is a grant of a fee, perquisite, or emolument in violation of said constitutional provision, and is, in effect, an additional allowance or salary of nine hundred (\$900) dollars per year paid to the Governor in excess of the salary authorized by the state Constitution."

Then follow appropriate allegations to the effect that the defendant, State Auditor, is about to issue warrants against the appropriation for the current biennial period in payment of vouchers approved by the Governor for rent of living rooms at the St. Charles Hotel.

To this petition the defendant, State Auditor, demurs on the grounds that said petition does not state facts sufficient to constitute a cause of action. Subsequent to the filing of the petition the Hon. William H. McMaster, as Governor of the state of South Dakota, was permitted to intervene, and he presented a return or answer to the petition in which he alleges that the petition does not state facts sufficient to constitute a cause of action, and—

"That the duties of your intervener as Governor of the state of South Dakota require his actual residence in the city of Pierre, S. D., where the capitol of said state is located, and that prior to his assuming his duties as Governor of said state, resided in the city of Yankton, Yankton county, S. D., and that the duties incident to his said office require him to change his actual residence to the said city of Pierre."

The issues thus framed present the sole question: Is the act of the Legislature appropriating money to pay rent for rooms oc-

cupied by the Governor at the hotel in Pierre unconstitutional?

In the general appropriation bill passed at the 1911 session of the Legislature, the paragraph relating to expenses of the Governor read as follows:

"For salary of private secretary, clerk hire, stenographer, stationery, office supplies, postage, railroad fare, hotel expenses and other traveling expense and incidentals \$5,800." Laws 1911, c. 82, § 8.

In the 1913 appropriation bill the words "rent and living" were inserted between the words "hotel" and the word "expenses," so that the paragraph reads:

"For salary of private secretary, clerk hire, stenographer, stationery, office supplies, postage, railroad fare, hotel and living expenses, rent and other traveling expenses and incidentals \$6,000." Laws 1913, c. 23, § 8.

From 1913 down to the session of 1921, the form of the paragraph has remained the same. Since 1913 there have been four general elections, at which members of the Legislature have been elected.

With these facts before us we take up the question presented.

Section 2, art. 21, of the Constitution, reads as follows:

"The Governor shall receive an annual salary of two thousand five hundred dollars; the judges of the Supreme Court shall each receive an annual salary of two thousand five hundred dollars; the judges of the circuit court shall each receive an annual salary of two thousand dollars: Provided, that the Legislature may, after the year one thousand eight hundred and ninety, increase the annual salary of the Governor and each of the judges of the Supreme Court to three thousand dollars, and the annual salary of each of the circuit court judges to two thousand five hundred dollars. The Secretary of State, State Treasurer and State Auditor shall each receive an annual salary of one thousand eight hundred dollars; the Commissioner of School and Public Lands shall receive an annual salary of one thousand eight hundred dollars; the Superintendent of Public Instruction shall receive an annual salary of one thousand eight hundred dollars; the Attorney General shall receive an annual salary of one thousand dollars; the compensation of the Lieutenant Governor shall be double the compensation of the state Senator. They shall receive no fees or perquisites whatever for the performance of any duties connected with their offices. It shall not be competent for the Legislature to increase the salaries of the officers named in this article except as herein provided."

By chapter 110, Session Laws of 1901, the salaries of the Governor and judges were increased to the maximum amount provided for in the above-quoted section of the Constitution.

Section 1, art. 3, of the Constitution, declares that—

"The legislative power of the state shall be vested in a Legislature which shall consist of a Senate and House of Representatives," except that certain provisions are made for the initiative and referendum.

[16] There is no provision in the Constitution giving the judiciary supervisory power or control over the Legislature, so that so long as an act of the Legislature does not contravene some express provision of the Constitution, no matter how inconsiderate, illogical, or shocking such act may be, the judiciary of the state is powerless to interfere.

That the appropriation of money for the payment of the expenses incurred by state officials is the exercise of the legislative power is so well settled and commonly understood as not to be open to discussion. The appropriation to pay such expenses being the exercise of the legislative power, then the proposition must necessarily follow that the Legislature is vested with a discretion as to what expenses it will or will not provide funds for the payment of. This decision of the Legislature is final. If the Legislature fails to make reasonable provision for official expenses, the officers are without remedy, as the judiciary has no power of either appropriating public funds directly or of coercing the Legislature to make such appropriation.

On the other hand, when the Legislature makes lavish and extravagant allowances, the court is equally powerless to correct the error.

In the absence of constitutional limitations, inherent plenary power is vested in the Legislature in all legislative and political matters. *Stephens v. Jones*, 24 S. D. 97, 123 N. W. 705; *State v. Central Lumber Co.*, 24 S. D. 136, 123 N. W. 504, 42 L. R. A. (N. S.) 804; *A. M. Linseed Oil Co. v. Wheaton*, 25 S. D. 60, 125 N. W. 127, 41 L. R. A. (N. S.) 149; *Ohlwine v. Bushnell*, 32 S. D. 426, 143 N. W. 362; *State v. Brown*, 40 S. D. 372, 167 N. W. 400; *In re Watson*, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321.

This brings us to the question: Is there an express (or necessarily implied) prohibition in the Constitution against the appropriation by the Legislature of public funds for the payment of the rent for rooms occupied by the Governor at the hotel?

It will be noticed that the Governor actually occupies such rooms, and that the money is paid directly to the proprietors of the hotel on proper vouchers certified by the Governor. This case is to be distinguished from a case where a certain sum is appropriated to be paid the official whether he actually incurs the expense or not.

As we understand the argument of the Attorney General, it is that the payment of the room rental at the hotel is the payment of the personal and private expenses of the Gov-

error, and therefore operates to increase his salary in contravention of that clause of the Constitution (article 21, § 2), which provides:

"It shall not be competent for the Legislature to increase the salaries of the officers named in this article except as herein provided."

The court cannot presume that the Legislature intended to violate the Constitution; hence we cannot presume that this appropriation was intended by the Legislature as an increase of the Governor's salary. As a co-ordinate branch of the government, the court is bound to give full faith and credit to the act of the Legislature, and is bound to assume that the Legislature simply intended to pay an item of expense which, in its judgment, was a proper item of expense to be paid from the funds of the state.

Let us see what the facts are: The Governor, at the time of his election, resided at the city of Yankton. There is no law requiring him to reside at the capital. The Governor could have continued his residence at Yankton and traveled back and forth between Yankton and Pierre and lodged at a hotel while in Pierre. His expenses incurred in such travel and lodging would certainly have been legitimate expenses to be paid by the state as expenses incurred incident to and in performance of his duties as Governor.

Now to avoid waste of time in travel and the expense incident to such travel, it is deemed expedient to have the Governor reside at the capital. To do this he must maintain a place of residence at Pierre in addition to his home in Yankton. The Governor does not derive any profit from the rooms occupied by him; on the contrary, the rooms are an additional expense incurred by him incident to the performance of his official duties.

There is no contention here that the \$3,000 salary allowed the Governor was to be in full payment for both his services and expenses; hence an allowance for expenses, properly payable by the state, does not operate to increase the constitutional salary of the Governor.

[17] The prohibition against increasing salaries of public officers was not intended as a limitation upon legislative authority to provide for the expenses of such officers. The fallacy of such a contention is apparent when we consider that in many cases the expenses of the officer exceed his constitutional salary.

That the allowance of expenses does not operate as an increase of salary is sustained by the following authorities: *State v. Thomson*, 142 Tenn. 527, 221 S. W. 491; *Throop on Public Officers*, 442; 29 Cyc. 1427, 1429; *Briscoe v. Clark Co.*, 95 Ill. 309, 311; *State v. Atherton*, 19 Nev. 332, 10 Pac. 901, 910; *Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488;

Newman v. Lester, 11 Cal. App. 577, 105 Pac. 785; *People ex rel. Follett v. Fitch*, 145 N. Y. 261, 39 N. E. 972; *State v. Sheldon*, 78 Neb. 552, 111 N. W. 372; *Ware v. Battle Creek*, 201 Mich. 468, 167 N. W. 891, L. R. A. 1918E, 673; *McCoy v. Handlin*, 35 S. D. 487, 153 N. W. 361, L. R. A. 1915E, 858, 872, Ann. Cas. 1917A, 1046; *Milwaukee County v. Halsey*, 149 Wis. 82-85, 136 N. W. 139; *Russ v. Commonwealth*, 210 Pa. 544, 60 Atl. 169, 1 L. R. A. (N. S.) 409, 105 Am. St. Rep. 825.

The rule of law is well settled that the power of the court to declare an act of the Legislature unconstitutional is an extraordinary power, and should only be exercised in a case free from all reasonable doubt. *State v. Becker*, 3 S. D. 29, 51 N. W. 1018; *Bon Homme County v. Berndt*, 15 S. D. 494, 90 N. W. 147; *In re Watson*, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; *Insurance Co. v. Basford*, 27 S. D. 164, 130 N. W. 44; *McCoy v. Handlin*, 35 S. D. 487, 153 N. W. 361, L. R. A. 1915E, 858, Ann. Cas. 1917A, 1046.

We cannot say that the appropriation to pay the rent for rooms occupied by the Governor at the hotel is, beyond a reasonable doubt, within the constitutional prohibition, and therefore the writ so far as Part IV is concerned, should be denied.

HAYES, P. J., dissents as to parts I, II, III, and IV.

Part V.

NULL, J. In Part V of the petition it is alleged that by chapter 84, Session Laws of 1920, the State Capital Commission was authorized and directed to prepare plans for a Governor's home, to secure grounds by purchase or condemnation for a site for such home, and to prepare the grounds for building, and to present plans for the completed building and improvements at the next regular session of the Legislature. For this purpose the Capital Commission shall use funds placed at its disposal by Chapter 322, Laws of 1919; that the Capital Commission has acquired certain lands to be used as a site for a Governor's home and is now negotiating, and will acquire by purchase or condemnation, certain other lands to enlarge and complete the site upon which it is intended that a Governor's home shall be erected; that certain vouchers have been or are about to be presented to the State Auditor for the services of a landscape architect in surveying said site, preparing and drafting plans, and doing other detail work connected with such survey.

It is then alleged that said chapter 84, Laws of 1920, is contrary to and in violation of the state Constitution. It is claimed that the purchase of a site for a Governor's dwelling is in violation of section 2, art. 11, of the Constitution, which provides that taxes "shall be levied and collected for public purposes only"; that the furnishing of a resi-

dence for the Governor is the use of public funds for a private purpose.

In Part IV of this opinion we have discussed the validity of the appropriation for rents paid for rooms occupied by the Governor at the hotel. We reached the conclusion that such appropriation was legal and valid. All that we said on that branch of the case applies with equal force here. If the Legislature may provide rooms for the Governor at a hotel, then why not acquire a dwelling to be used as a Governor's dwelling?

[18] The acquiring and maintaining of public buildings is the exercise of purely legislative powers, with which the court has no concern. The Constitution does not prescribe what public buildings shall be provided, or the uses to which public buildings may be put. This lack of constitutional limitation or restriction leaves the whole subject entirely with the Legislature. Under these circumstances, when the Legislature, in the exercise of its discretion, provides for a public building for a public purpose, its decision is final and not subject to review by the courts.

[19] This leads us to the sole question in this case, i. e.: Is an official residence for the chief executive a public building devoted to a public purpose? In deciding this question we must consider the history and practice of governments such as ours. The United States has its White House and many of the states have their executive mansions.

The Supreme Court of Nebraska, in *State v. Sheldon*, 78 Neb. 552, 111 N. W. 372, in a similar case, said:

"The custom of furnishing an official residence for the chief executive officer of the government has been in force for very many years in representative governments such as ours. It is a matter of common knowledge that Great Britain provides an official residence for its Prime Minister, and, in fact, the practice is so well established and has been continued for so long a time that the name of the street in which the official residence is situated is often used as synonymous with the administration, and 'Downing Street' conveys an idea to a British subject as clear and well defined as the name of the 'White House' does to an American citizen. This practice was followed upon the formation of the United States, and many of the states of the Union, recognizing the added dignity given to the office and other advantages to be derived from the residence of the chief executive officer being certain in location and convenient of access at all times, have provided official residences for the use of the Governor of the state. Some of the states so providing a residence have similar restrictions in their Constitution as exist in that of this state with regard to the acceptance of perquisites. Of course, this goes merely to show the meaning applied to such provisions by the respective Legislatures. It cannot be questioned that the Legislature had the power, the right, and the authority to purchase the property and to provide for its occupancy by the Governor. This was done in the exercise of its proper

powers exercised in behalf of what it deemed to be the public welfare, and its acts in that regard are not subject to review by any other department of the state government. There is no question, then, of legislative power involved."

While the question of the propriety of providing an official residence for the chief executive is a legislative and not a legal question, yet the reasoning of the Nebraska court appeals strongly to our judgment.

The court said:

"It may be doubted whether the occupancy of this mansion does not impose upon the Governor larger expenditures than those which would be exacted from him by the occupancy of a more humble abode for which he paid the usual rent, and, in place of being an additional reward or compensation, it may in fact be, and probably is, an additional drain upon his resources. We agree with the Legislature that it is entirely in keeping with the proper administration of the government of the state, with due regard to the dignity of that high office, that the Governor be provided with an official residence, and that his occupancy of the same, required by law, is in no sense a perquisite of office or of the nature of additional compensation."

An examination of the legislation on this subject shows that our Legislature is proceeding with deliberation and care. It first provided for acquiring suitable land; it then provided for plans to be submitted to the next Legislature. It has not given the Capital Commission carte blanche to spend the public money, but has kept the control of such expenditures in its own hands.

The expenditure being for a public building for a public purpose and authorized by the department of the state government having sole control of such matters, this court is without power to interfere, and therefore the writ, so far as Part V is concerned, is denied.

HAYES, P. J. (dissenting as to parts I, II, III, and IV, of the majority opinion). By section 30 of article 5 of the state Constitution, declaring that a judge shall receive no compensation, perquisite, or emoluments for or on account of his office in any form whatever, and by section 2 of article 21, limiting salaries of judicial and certain executive officers to fixed amounts, and providing that such officials shall receive no fees or perquisite whatever for the performance of any duties connected with their offices, and that it shall not be competent for the Legislature to increase the salaries of such officers, the people in their fundamental law, binding alike upon courts, executive officers, and legislators, have drastically limited these compensations. Both the letter and spirit of these provisions forbid additional reward in any form whatever. These sections, by common consent and by legislative and judicial acquiescence, for over 20 years were held to have

prevented payment of even necessary official expense. The people of this state, at the biennial elections in recent years, have been repeatedly asked to so amend these constitutional provisions that salaries in some manner adequate to the duties performed may be paid, but have steadfastly refused. The spirit as well as the letter of a controlling constitutional provision must be obeyed. Courts, however reluctant to hold void a law enacted by the representatives of the people, such as chapter 400 of the Laws of 1921, have no alternative when a choice must be made between such a law and a constitutional provision. The Attorney General, for plaintiff, on the oral argument conceded to the lawmaking power the right to pay the official expenses of these public officers, i. e., expenses necessarily connected with the discharge of their official duties, but denied the right to appropriate public moneys for private expenses. Household expenses, living expenses, whether increased or diminished and regardless of where an official may elect to reside, are in their nature private, individual. These are the personal burdens on every man's shoulders. Payment directly or indirectly of a dollar thereon constitutes compensation, perquisite, or emolument additional to a prescribed salary. This act, being in the main for an unconstitutional purpose, that is, the payment of increased expenses of living at a place other than the legal residence of a judge of the Supreme Court, must wholly fail.

In the majority opinion it is said that the Constitution of the state does not contain any restrictions upon the power of the Legislature to make allowance for the expenses of the several constitutional state officers who are interveners in this proceeding. The Constitution (section 2, art. 21) does provide that it shall not be competent for the Legislature to increase the salaries of these officers. The Legislature, thus limited, certainly may not go beyond payment of the actual official expense. Payment to or for an officer of public funds in excess of such expenses, or for private or personal use, is an increase of salary and clearly forbidden. It is too patent to be denied that this "expense" law owes its origin to the fact that these salaries, fixed 32 years ago, are now unfair and wholly disproportionate to the duties and the conditions under which they must be performed. The remedy for this wrong and injustice lies, however, not with the Legislature or the courts, but with the people.

It is said that the members of the Supreme Court, if they had continued to reside at the places of their legal residence, might have been allowed expenses of travel to and from the seat of government and living expenses while there, as official expenses. Even if this were true, the fact that these judicial officers for years past have elected to live at

Pierre and are permanently domiciled there precludes the possibility of classifying their living expenses, or part thereof, as in any sense "official." The personal character of living expenses is the same in Deadwood, Aberdeen, or Pierre, and is not affected by mere change of location.

The Supreme Court of this state, in the case of *McCoy v. Handlin*, 35 S. D. 487, 153 N. W. 861, L. R. A. 1915E, 859, Ann. Cas. 1917A, 1046, sustained a law similar in terms to chapter 400 of the Laws of 1921, awarding to the judges of that court \$50 per month for these expenses. The majority opinion here cites *Smith v. Jackson*, 241 Fed. 749, 154 O. C. A. 449, as supporting the same. In the federal case the sole question was to the authority of the auditor of the Panama Canal, without law or departmental regulation, to deduct from the salary of a federal judge rent for use of a house in the Canal Zone, not a question such as is involved here.

In *State v. Thomason*, 142 Tenn. 527, 221 S. W. 492, also cited as supporting *McCoy v. Handlin* Case, *supra*, the expenses provided for were "for stenographer work and other necessary expenses"—presumably expenses incident to the performance of official duty.

In *Macon County v. Williams* (Mo.) 224 S. W. 835, it was held that \$1,200 in lump sum, per annum, which the Legislature had allowed a circuit judge to cover his expenses, was not paid as compensation. The questions involved in *McCoy v. Handlin* and the instant case were not before the Missouri court.

The compensation of \$3,000 per annum provided for by section 2, art. 21, is intended to cover the services of a member of the court and such personal expenses as may be connected therewith. Section 4 of article 5 directs that two terms of the Supreme Court shall be held each year at the seat of government. Chapter 400, Laws of 1921, allowing each member \$150 a month as expenses of removing to the state capital, additional living expenses there, and expenses of travel to and from his legal residence, constitutes additional compensation, and is in conflict with section 30, art. 5, of the state Constitution, prohibiting any compensation, perquisite, or emolument for or on account of his office, in any form whatever, except the salary fixed. *Leckenby v. Post Printing Co.*, 65 Colo. 443, 176 Pac. 490; *Terrell v. Middleton* (Tex. Civ. App.) 187 S. W. 387; *Bailey v. Kelly*, 70 Kan. 869, 79 Pac. 735; *State ex rel. Fox v. Raine*, 49 Ohio St. 580, 31 N. E. 741; *Cullom v. Dolloff*, 94 Ill. 330; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50.

Attention of this court has not been called to an authority of any other state sustaining the payment of the living expenses of a public officer at the place at which he resides, or is called upon to perform his general official duties.

The effect of this enactment is to increase the compensation of Supreme Court judges from \$3,000 to \$4,800 annually, and permit them to pay certain personal expenses themselves. The fact that the compensation probably should be \$7,500 per annum instead of \$3,000 cannot affect the legal situation or validate this act.

The Constitution (article 4, § 12) requires that state officials perform their duties at the seat of government. The compensation, limited to \$1,800 per annum, is intended to cover their official services and personal expenses connected therewith. The act awarding \$50 per month as expenses of removal to the capital, the increased expense of living at a place other than his legal residence, and the expense of traveling to and from such legal residence, awards additional compensation and is in conflict with section 2 of article 21 of the state Constitution. These defined expenses are not public, not official, not connected with the performance of official duties, but of a purely personal and individual character.

The payment of \$900 per annum in a lump sum for expenses of circuit judges violates the constitutional salary limitations. The Legislature may pay circuit judges only the actual expenses necessarily incurred in the discharge of the duties of their office. If this statute is upheld, circuit judges will receive an annual salary not of \$2,500, as provided by the Constitution, but \$3,400, with the personal obligation of paying their own expenses. So far as the state is concerned the payment of \$3,400 is absolute, and the payment of expenses incurred a matter solely within the discretion of the incumbent of the judicial office.

STATE ex rel. McMASTER, Governor, v. REEVES, State Auditor (PAYNE, Atty. Gen., et al., interveners). (No. 4980.)

(Supreme Court of South Dakota. Oct. 27, 1921.)

Part I.

1. Constitutional law § 48—Statute sustained unless clearly unconstitutional.

A statute must be sustained unless clearly in conflict with the Constitution.

2. Officers § 94—Legislature may impose upon constitutional officers duties distinct from their offices and provide compensation therefor.

The Legislature may impose upon a constitutional officer duties separate and distinct from those of his office, and may provide compensation therefor in addition to his salary as a constitutional officer.

3. Attorney General § 3—Salary given Attorney General as member of Securities Commission not additional compensation in violation of Constitution.

Rev. Code 1919, § 10127, as amended by Laws 1st and 2d Sp. Sess. 1920, c. 82, § 1, giving the Attorney General a salary for services performed as a member of the Securities Commission, held not a grant of compensation additional to that provided for by Const. art. 21, § 2, in violation thereof, his duties as a member of the Securities Commission being foreign to his duties as Attorney General, under article 4, § 13, and Rev. Code 1919, § 5364.

4. Evidence § 18—Judicial notice taken of increase in importance of office of Attorney General.

In a proceeding involving the validity of Rev. Code 1919, § 10127, as amended by Laws 2d Sp. Sess. 1920, c. 82, § 1, giving the Attorney General a salary for services performed as member of the Securities Commission, the court may take judicial cognizance of the fact that in 1889, when the office of attorney general was created and the compensation fixed at \$1,000 per annum, there were but few duties to be performed, and that at the present time, with the growth and importance of public business, the exclusive services of an officer of the highest skill and ability are demanded.

Rice, J. dissenting in part.

Part II.

5. Officers § 100(2)—Schools and school districts § 47—Statute giving Superintendent of Public Instruction additional compensation unconstitutional.

Rev. Code 1919, § 7400, as amended by Laws 1921, c. 215, giving Superintendent of Public Instruction a salary as executive officer of the State Board of Education created under Rev. Code 1919, §§ 7406-7410, to accept federal aid for the promotion of vocational education, held violative of Const. art. 21, § 2, fixing the Superintendent of Public Instruction's salary and prohibiting a grant of additional compensation, and article 12, § 3, prohibiting an increase in compensation during term of office, since his duties as executive officer of the State Board of Education are in furtherance of public education and instruction, and are therefore duties to be performed by him as Superintendent of Public Instruction, under article 4, § 13, and since the payment of a salary therefor is in effect a grant of additional compensation, in violation of the Constitution.

6. Constitutional law § 26—Rule as to implied powers and limitations stated.

A constitutional grant of a power carries with it by implication the right to do all things necessary to the exercise of the power granted, and a prohibition carries with it implications as broad as those that go with the granting of a power.

Petition for writ of prohibition by the State of South Dakota, on the relation of William H. McMaster, Governor, against Jay Reeves,

as Auditor of the State of South Dakota, in which Byron S. Payne, as Attorney General, and Fred L. Shaw, as Superintendent of Public Instruction, intervened, to restrain and prohibit the defendant from issuing warrants for certain purposes. Petition denied as to warrants affecting the Attorney General, and granted as to warrants affecting the Superintendent of Public Instruction.

The Supreme Court being of the opinion that all of its judges and all of the judges of the circuit court are disqualified to act herein, and having entered of record an order reciting the fact and selecting from the attorneys of record of said court the following persons to act in their place, to wit: ROBERT C. HAYES, of Deadwood, T. H. NULL, of Huron, A. H. ORVIS, of Yankton, LEWIS, W. BICKNELL, of Webster, and GEO. RICE, of Flandreau—and they having qualified as provided by law, and organized as a court, ROBERT C. HAYES presiding, proceeded to hear and determine this proceeding.

This is an original proceeding commenced in the Supreme Court by the plaintiff, the state of South Dakota, on relation of William H. McMaster, its Governor, seeking to restrain and prohibit the defendant Jay Reeves, as Auditor of the state, from issuing warrants on the state treasurer for purposes hereinafter stated. In this proceeding Byron S. Payne, at Attorney General, and Fred L. Shaw, as Superintendent of Public Instruction, have intervened.

Plaintiff's petition consists of two parts, each relating to a special proceeding.

Charles E. De Land, of Pierre, and A. L. Wyman, of Yankton, for plaintiff.

Byron S. Payne, Atty. Gen., and E. D. Roberts, Asst. Atty. Gen., for defendant and interveners.

Part I.

HAYES, P. J. (after stating the facts as above). The relator petitions the court for a writ of prohibition to restrain the state Auditor from issuing warrants to the Attorney General in payment of his salary of \$1,200 per annum as a member of the State Securities Commission. Defendant demurs to the petition, and the issue raised relates to the validity of section No. 10127 of the Revised Code of 1919, as amended by section 1 of chapter 82 of the Laws of the Second Special Session of 1920. The amendment is as follows:

"The Securities Commission, heretofore created, whose duty it shall be to administer and provide for the enforcement of the provisions of this chapter, shall continue to consist of the Superintendent of Banks who shall be president thereof, the Attorney General, the Rural Credit Commissioner, all of whom shall be members of such commission during their terms of office and one other member to be appointed

by the Governor and who shall serve for a term of three (3) years, unless sooner removed by the Governor. * * * The other members of said Commission shall be entitled to receive for their services, a salary of \$1,200.00 per year, payable monthly as the salaries of other state officers are paid: Provided that any member of this Commission who receives \$4,000.00 per annum or more as salary or compensation for his services in connection with any other state office, shall not be entitled to receive any additional compensation for services performed as a member of the State Securities Commission."

It is contended by the relator that this statute, in providing payment of salary to the Attorney General for services as a member of the State Securities Commission, violates that part of section 2, art. 21, of the state Constitution wherein it is declared that the Attorney General shall receive an annual salary of \$1,000, and that certain state officers, including the Attorney General, "shall receive no fees or perquisites whatever for the performance of any duties connected with their office."

Section 13, art. 4, of the Constitution provides that the powers and duties of the Attorney General shall be as prescribed by law. The Legislature is prohibited by said section 2, art. 21, of the Constitution from paying to the Attorney General additional compensation for services which he may perform as the law officer of the state.

[1] The legislative enactment in question must be sustained unless clearly in conflict with the constitutional provisions. The duties of the Attorney General at common law, as defined by section 5364 of the Revised Code of 1919, and as universally understood are those which he may render the state in his professional capacity.

The section of the Code referred to requires him to appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state shall be interested or a party; to attend to all civil cases remanded by the Supreme Court to the circuit court, in which the state shall be a party or interested; to prosecute, at the request of the Governor, State Auditor, or State Treasurer any official bond or contract in which the state is interested, upon a breach thereof, and prosecute or defend for the state all actions, civil or criminal, relating to any matter connected with either of their departments; to consult with, advise, and exercise supervision over the several state's attorneys of the state in matters pertaining to the duties of their offices; to mail copies of certain opinions rendered by him to the executive accountant, state's attorneys, and county auditors; to give opinions upon questions of law, when requested, by the Legislature, or either branch thereof, or by the

Governor, Auditor, Treasurer, or Superintendent of Public Instruction; to prepare contracts, forms, and other writings, which may be wanted for use of the state on request of the State Auditor, Treasurer, Superintendent of Public Instruction, or Commissioner of School and Public Lands; to report to the Legislature, or either branch thereof, upon any business relating to the duties of his office; and to prosecute state officers who neglect or refuse to pay into the state treasury public funds.

The Attorney General is a constitutional officer, the title designates him as the attorney for the state, and his duties, independent of the statute, are those of a law officer. This section of the Code in its specific enumeration of the functions of his office, recognizes the fact that the scope of his duties does not extend beyond law matters.

The law imposes upon the Attorney General as a member of the Securities Commission the duties and responsibilities borne by the other members; that is, by the Superintendent of Banks and the Rural Credit Commissioner. The Securities Commission examines all statements and documents filed in its office by investment companies, conducts examinations, determines the character of stocks, bonds, and securities, contracts and plans of business of such companies, and on approval thereof may permit sales of stocks or other securities. These are not duties connected with the office of Attorney General, but are of an administrative character, and wholly foreign thereto.

[2] It is within the province of the Legislature to impose upon a constitutional officer duties separate and distinct from those of his office, and to provide compensation therefor in addition to his salary as a constitutional officer. In *State v. Roddle*, 12 S. D. 483, 81 N. W. 980, the Supreme Court of South Dakota has had occasion carefully to consider this question. In that case the Legislature had imposed upon the Secretary of State certain duties as a member of the brand and mark committee, and provided compensation therefor. As he was in receipt of an annual salary of \$1,800, it was argued that this additional compensation constituted a violation of paragraph 2, art. 21, forbidding state officers from receiving any fees or perquisites for the performance of duties connected with their offices. The court said:

"We are clearly of the opinion that it was within the province of the Legislature to provide for a new officer to perform such duties, and the question arises whether in this instance it intended to do so. The language of the act is plain, its meaning is unmistakable, and there can be no doubt that the Legislature intended the person holding the office of Secretary of State to retain 20 per cent. of the brand fees as compensation for his services as a member of the brand and mark committee. Such act

cannot be construed as adding new duties to the office of Secretary of State, because such construction would impute an intention on the part of the Legislature to violate the Constitution."

This decision is reaffirmed in *Burns v. Board of County Commissioners*, 39 S. D. 426, 164 N. W. 1028. In this case the Supreme Court held that the constitutional provision affecting the salary of a county judge (section 30 of article 5) that he should receive no "compensation perquisite or emoluments, for or on account of his office in any form whatever, except such salary," precluded retention of fees for services as a member of the county board of insanity. The constitutional provision considered in the *Roddle Case* (section 2, art. 21) forbade additional compensation to state officers for the performance of any duties connected with their office. The distinction in the constitutional provisions was recognized in the following language:

"There is a recognizable difference in meaning between fees 'for the performance of any duties connected with their offices,' as construed in the *Roddle Case*, and fees or compensation 'for or on account of his office.' The former prohibits extra compensation for the duties of the office; the latter prohibits extra compensation on account of, because of, or by reason of the office. The latter includes the former and prohibits extra compensation, not only for the duties of the office, but also extra compensation by reason of the office itself."

In *Love v. Baehr*, 47 Cal. 864, it was held that, although the Constitution was wholly silent with respect to the duties to be performed by the Attorney General, and contained no expressed limitation on the part of the Legislature as to the nature of the duties it might impose upon him, yet a limitation on this power was necessarily implied from the nature of that office; and further, that the Legislature had no power to compel the Attorney General to perform the duties of a member of the Board of Examiners to examine and approve or reject claims against the state; but if such duties were imposed upon him by law, and he performed them, the Legislature might compensate him for this unofficial service by paying him a salary in addition to that which he received as Attorney General, even if the law allowing him such salary was passed during the term of office. In California the constitutional provision was that during the term of office the compensation of the Attorney General should not be increased or diminished, and that he should receive no fees for the performance of his official duties. The court said, in this California case, relative to the powers of the Legislature to impose duties upon the Attorney General not within the scope of his office:

"Some of these services [as member of the Board of Examiners] have not the slightest relation, even upon the most liberal construction, to the duties of an Attorney General, as such duties were generally understood at the adoption of the state Constitution, as they were doubtless understood by the framers of that instrument. The business of counting money in the treasury, examining books of account, requiring the skill of an expert accountant rather than the professional learning of a lawyer, and the investment of public money in bonds, is wholly foreign to the duties of an attorney, and is no more cognate to them than the management of a state prison or lunatic asylum. The Legislature has no more power to compel the Attorney General to perform such service as a part of the duties of his office than it has to compel the Superintendent of Public Instruction to take charge of the state prison, or to perform the duties of State Gauger. The Attorney General is, therefore, under no obligation to perform such services, and he may decline to perform them without any breach of his official duty as Attorney General. If, however, he voluntarily performs them, he does not thereby enlarge the scope of his official duties as a constitutional officer. By no compact between him and the Legislature can his official duties as Attorney General be extended beyond the limits contemplated by the Constitution."

In *Crosman v. Nightingill*, 1 Nev. 323, the reasons for holding that a constitutional provision similar to that contained in paragraph 2, art. 21, of our state Constitution does not prohibit a constitutional officer from receiving compensation for performance of duties of a separate office, are distinctly set forth, to wit:

"The constitutional restriction imposed by section 9, art. 15, and section 33, art. 4, is doubtless intended only to prevent the increase of salary or compensation of officers as such officers, or for duties naturally belonging to their positions, and can scarcely be extended to prevent the allowance of a compensation to officers upon whom duties or responsibilities in no wise connected with their offices are imposed. * * * It would be putting a construction too restricted upon the constitutional limitation to hold that the provision which prohibits the increase of salary or compensation would prevent the holding of two offices by the same person, or the receipt of the salary of both by the same individual. We think the limitation in article 15, § 9, and article 4, § 33, should be confined to the increase of salary or compensation for the discharge of duties naturally belonging to a certain office, and should not prohibit compensation for the performance of other and independent duties in no wise belonging to it."

In *United States v. Saunders*, 120 U. S. 126, 7 Sup. Ct. 467, 30 L. Ed. 594, it was held, referring to certain statutes precluding additional compensation for the performance of official duties:

"This legislation was to prevent a person holding an office or appointment, for which the

law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of Congress or by order of the head of his department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case, he is in the eye of the law two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations. In the former case, he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation."

In *State ex rel. Chatterton v. Grant*, 12 Wyo. 1, 14, 73 Pac. 470, 2 Ann. Cas. 382, it was held that the offices of Governor and Secretary of State were not incompatible, and that on the death of the Governor during his term of office a vacancy existed in such office to be filled by the Secretary of State, who was entitled to receive the salaries of both offices. In this state the constitutional provision fixed the salary of the Secretary of State at \$2,000, and prescribed that it should not be increased during the period for which he was elected. These rulings are further supported by *Melone v. State*, 51 Cal. 549; *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428; *State v. Clausen*, 111 Wash. 254, 190 Pac. 829; *Detroit v. Redfield*, 19 Mich. 376; *State v. Vassaly*, 98 Minn. 46, 107 N. W. 818; *Dyche v. Davis*, 92 Kan. 971, 142 Pac. 264; *Howell v. La Grave*, 23 Nev. 373, 48 Pac. 674; *State ex rel. Walker*, 97 Mo. 162, 10 S. W. 473.

It is ably contended by counsel for plaintiff:

First. That chapter 127 of the Laws of 1901 (now section 6965 of the Code of 1919), making it unlawful "for any officer receiving a salary from the state to keep or retain any money, emolument, fee or perquisite, paid to or received by him for the performance of any duty or duties connected with his office, or in any manner paid to him as such officer or by reason of his holding such office, it being the true intent and meaning of this section that no officer receiving a salary from the state shall keep or retain any money, emolument, fee or perquisite paid to him by reason of his holding such office, other than the annual salary payable to such officer as provided by the Constitution," is of controlling force here.

Second. That chapter 319 of the Laws of 1913, creating the Securities Commission,

consisting of certain constitutional officers, and providing for their service without additional compensation, demonstrates a legislative intent merely to add to the duties of those officers that of serving upon the Securities Commission, and not to create a new office.

Third. That the Attorney General's duties as a member of the Securities Commission are germane to his office, for the reason that many law questions must necessarily come before that commission for solution.

It is sufficient to say that section 1 of chapter 82 of the Laws of the Special Session of 1920 is the later legislative enactment, and supersedes section 6965 of the Code; that the existing statutes prescribe for the Attorney General duties as a member of the Securities Commission not within the scope of his constitutional office, and lawfully provide a compensation for their discharge; that the fact that the Securities Commission may have legal problems to solve—may require legal advice—in no manner affects the general character of its executive duties.

[3] We are of the opinion that the duties of the members of the Securities Commission are foreign to those of the Attorney General, not germane to his office; that the act in question awards compensation for duties which are not connected with the office of Attorney General, and, as it does not award him additional compensation for any duty connected with his constitutional office, it is not in conflict with the constitutional provision limiting his recompense to \$1,000 for services as law officer of the state. We are not at liberty to extend limitations found in section 2, art. 21, to duties not connected with this office.

[4] It is a recognized fact, of which judicial cognizance may be taken, that when in 1889 the office of Attorney General was created, and the compensation fixed at \$1,000 per annum, there were few duties to be performed; that now, with the growth and importance of public business, exclusive services of an officer of the highest skill and ability are demanded. The compensation is so grossly inadequate that it may truthfully be said that this officer serves the state not for pay, but out of a sense of public duty. This situation, however, is one which the courts are powerless to correct.

We must conclude from a careful examination of the statutory and constitutional provisions and the authorities that the Legislature, in creating the Securities Commission, imposed upon the Attorney General duties not germane to his office, and that, when it granted compensation, in addition to his constitutional salary, it granted it for services which he was not bound, as Attorney General, to perform, and for which he is not prohibited from receiving compensation.

The petition of the plaintiff for a writ of prohibition restraining the issue of salary warrants to the Attorney General is denied.

RICE, J. (dissenting). I concur in much of what is said by the Presiding Judge in the majority opinion as to the power of the Legislature to create a new office and impose the duties thereof upon one or more of the constitutional officers, and, if the duties required in the new office are not germane to the duties of the constitutional office, the Legislature may lawfully pay for the services rendered in the new office (State v. Roddle, 12 S. D. 433, 81 N. W. 980); but I do not concur in the conclusion of the majority of the court that the Attorney General, when acting as a member of the Securities Commission, was filling any other office than that of Attorney General. I do not concur in the conclusion that the duties imposed upon the Attorney General as a member of the Securities Commission are not germane to the office of Attorney General. The statute provides that the commission shall consist of certain state officers, including the Attorney General, and creates one new office, that of secretary of the Commission, and provides that he shall receive a salary of \$3,600 per year; that he shall take an oath of office and file a bond. There is no provision in the law for the other members of the Commission filing a bond or taking an oath of office. The fact that no provision is made for the giving of a bond by any of the officers excepting the secretary indicates that, the Legislature did not intend to create any office except that of secretary. Whether there was or was not a new office created is not very important. The real question is: Were the duties imposed upon the Attorney General germane to his office? It was argued in behalf of the Attorney General that by implication the Legislature was prohibited from imposing duties upon the Attorney General other than those required under the common law.

"It is a maxim with the courts that statutes in derogation of the common law shall be construed strictly—a maxim which we fear is sometimes perverted to the overthrow of the legislative intent; but there can seldom be either propriety or safety in applying this maxim to Constitutions." Cooley's Con. Lim. (5th Ed.) p. 74.

The duties of "the Attorney General shall be as prescribed by law." Section 13, art. 4, Constitution.

When the framers of the Constitution provided for an Attorney General, it was undoubtedly intended that he should be the law officer of the state; that it could ask and require from him any service reasonably within the limits of those usually rendered by an attorney at law, or such service as an attorney usually accepts from a private em-

ployer. To properly understand and construe the statute providing for a State Securities Commission, and defining its duties, it is necessary to understand the conditions which brought it forth. Such statutes have been enacted in many states. They are usually known as "Blue Sky Laws." Great frauds were being perpetrated upon the public by the organization of numerous corporations with high-sounding names and beautifully engraved certificates of stock and bonds, purporting to be engaged in all kinds of commercial and industrial enterprises, with misleading and false statements as to assets, earnings, etc. It was for the purpose of preventing the sale of such fraudulent certificates, bonds, etc., that the statute under consideration was enacted. The purpose of the law is shown by the title to the first statute enacted:

"An act entitled, An act to prevent fraud in the sale and disposition of stocks, bonds or other securities sold or offered for sale within the state of South Dakota, providing for the enforcement thereof, and creating a State Securities Commission." Chapter 275, Laws 1915.

The last statute enacted in the emergency clause recites:

"Whereas a large number of enterprises are being organized at the present time and whereas the present law is inadequate and whereas this statute is necessary for the immediate preservation of the safety and support of the state government and its existing institutions, an emergency is hereby declared to exist, and this act shall take effect and be in force from and after the date of its passage and approval." Chapter 82, Second Special Session Laws, 1920.

A bank or trust company that had been defrauded by purchasing the class of paper regulated by the statute and which wished redress would at once turn the matter over to an attorney for investigation. If such bank or trust company was about to make investments, and its suspicions were aroused as to the fraudulent character of the paper offered, it would undoubtedly at once turn the matter over to its attorney for investigation. It is a matter of general knowledge that within recent years, when there was great scandal as to the fraudulent management of the three greatest insurance companies in the nation, the man selected to investigate the matter was one of the nation's greatest attorneys whose name it is not necessary to mention. The result shows the wisdom of his selection. One of the present Justices of the Supreme Court of the United States performed his most notable service as an attorney at law in the investigation of the internal affairs and management of corporations, to the great advantage of the public, as well as to the stockholders and creditors of the corporations. A large percentage of the business transacted

by attorneys at the present time is of a class that was unknown to attorneys in the days of Daniel Webster and Rufus Choate. Lawyers are becoming less the advocate and more the counselor. They are using less of their time to get their clients out of trouble, and more to keep them from getting into trouble. They are spending less time trying cases in court, and more time in keeping their clients from having cases in court to be tried. If the state can demand the services of the Attorney General in the prosecution of persons for perpetrating frauds within the state, it may require his services to prevent the perpetration of frauds within the state, whether such frauds consist in obtaining money by false pretense, whether by bank checks, drafts, forged instruments, counterfeit money, or by the sale of beautifully engraved certificates of stock in corporations with captivating names.

The Legislature is to be commended for the wisdom shown in selecting appropriate state officers to act as the Securities Commission. There is no part of the duties of that Commission that is not appropriate to some one of the officers selected. It will not be presumed that the Legislature intended that the Attorney General should act as accountant or the accountant to act as an attorney. The statute does not provide what part of the duties of the Commission is to be performed by the Attorney General. It is to be presumed that the Legislature intended that each member of the commission should perform the duties appropriate to his office. If the entire duties of the Commission were to be performed by or under the supervision of one person, who would be better qualified than an attorney at law? The state had a right to require the Attorney General to act upon the Securities Commission as a part of his duties. It is not probable that the Legislature intended or expected the Attorney General to devote any more of his time to the state than he did prior to the enactment of the statute creating the Securities Commission. It is a matter of general knowledge that at no time since the adoption of the Constitution could the Attorney General personally do all the work of his office; that for many years he could not do more than give the office general supervision, and give his personal attention to some of the most important business; that the first state Legislature provided an assistant for him. If the salary provided by the Constitution for constitutional officers can be increased by the device of forming a commission, imposing upon it part of the duties of a constitutional officer, making such officer an ex officio member of the commission and paying him an additional salary, the constitutional provision fixing and limiting the salary of constitutional officers is less than a rope of sand. It is a mere myth.

(184 N.W.)

Suppose the Legislature should create a commission composed of the Attorney General, the Secretary of State, and the State Auditor; impose upon that Commission a part of the legitimate duties of each of the officers, or even all of the duties of each of the officers; each could say that he was entitled to additional pay because some of the duties of the Commission did not pertain to his particular office. To establish such a precedent is dangerous in the extreme. It is offering a direct reward for the creation of new commissions with overlapping and conflicting powers and duties that will lead to complications, confusion, and shifting of responsibility, and may cause serious losses and expensive litigation as to the liability on official bonds. The court should not establish such a precedent unless the language of Constitution and statute is such that no other reasonable construction can be given.

A peremptory writ of prohibition should issue.

Part II.

RICE, J. The question presented by this proceeding is the right of Fred L. Shaw, the Superintendent of Public Instruction, to receive \$600 per year as executive officer of the State Board of Education.

The state contends that the statute authorizing the payment is unconstitutional, and an attempt to increase the salary of the Superintendent of Public Instruction contrary to the constitutional inhibitions. It is contended on behalf of the defendant that the Legislature, by the statutes hereinafter referred to, created a new office to be filled ex officio by the Superintendent of Public Instruction, and that the duties of the new office are not germane to the office of the Superintendent of Public Instruction. Chapter 227, Laws 1917, is entitled:

"An act to accept the benefits of an act passed by the Senate and House of Representatives of the United States of America in Congress assembled to provide for the promotion of vocational education and to establish a State Board of Education for that purpose."

Section 1 is a formal acceptance of the provisions made by Congress for the promotion of vocational education. Section 2 is in part as follows:

"To this end there is hereby created the State Board of Education to consist of the Superintendent of Public Instruction, the president of the University of South Dakota, the president of the State College of Agriculture and Mechanic Arts and four persons appointed by the Governor, two of whom shall be members of the faculty of a state normal school, one a superintendent or principal of a city or town school and one a county superintendent."

It also provides that the appointed members of the Board shall hold their office for

four years. Section 3 provides that the Board shall hold meetings at the capitol in July and January, and such special meetings as shall be deemed necessary. It defines the duties of the Superintendent of Public Instruction.

"The Superintendent of Public Instruction shall be ex officio president of the Board and shall furnish all necessary record books and blanks for its use."

It also provides that the members of the State Board of Education shall receive no salary for their services thereon, but that they shall be reimbursed for the actual expenses incurred in the performance of their duties.

Section 4 further defines the duty of the Board. Section 5 designates the State Treasurer as the custodian of the funds paid to the state from the federal appropriation. Chapter 227 is carried into the Revised Code of 1919 without material change, and appears as sections 7406 to 7410, inclusive.

The Legislature in 1919, by chapter 184, amended section 7409 by further defining the duties of the Board, and by implication further defines the duty of the Superintendent of Public Instruction as follows:

"The State Board of Education shall have authority to appoint upon the recommendation of the Superintendent of Public Instruction such officers and assistants as he may deem necessary to properly administer the federal act and this act of the state of South Dakota. * * * The State Board of Education shall, on or before the last Tuesday in July authorize the Superintendent of Public Instruction to certify to the State Auditor the amount apportioned as state and federal aid to each school approved under the provisions of this act."

Sections 7409 and 7410 were further amended by the Legislature in 1921, chapter 215, and provide:

"That the executive officer of the State Board of Education shall receive a salary of \$600 a year, * * * payable in twelve monthly installments."

It is contended on behalf of plaintiff that the last statute quoted contravenes the following provision of the Constitution:

"The Superintendent of Public Instruction shall receive an annual salary of \$1,800.00." Section 2, art. 21, Constitution.

"He shall receive no fees or perquisites whatever for the performance of any duties connected with his office and it shall not be competent for the Legislature to increase the salaries of the officers named including the Superintendent of Public Instruction." Section 2, art. 21.

"Nor shall the compensation of any public officer be increased or diminished during his term of office." Section 3, art. 12.

The real question involved in this case is: Was the Superintendent of Public Instruc-

tion, when acting as executive officer of the State Board of Education, acting as Superintendent of Public Instruction and discharging the duties imposed upon him as such officer? In plain terms the Legislature has required him, as Superintendent of Public Instruction, to act as such executive officer.

"The powers and duties of the * * * Superintendent of Public Instruction * * * shall be as prescribed by law." Section 13, art. 4, Constitution.

As to whether the Legislature created a new office when it created the State Board of Education is not important. The Legislature has full power to define and fix his duties, with an implied inhibition against requiring him to perform duties that are not germane to his office. If the duties imposed pertain to and are in furtherance of public education and instruction, they are germane to his office, and the Superintendent of Public Instruction is under an implied obligation to give the state the benefit of his services in discharge of the duty imposed.

[5] The kinds or class of public instruction which the state will provide rests wholly with the Legislature. If it is deemed advisable by the lawmaking power that the state give instruction as to vocational occupations, it has full power to do so, and it can require from the Superintendent of Public Instruction his assistance or superintendence of such instruction. It is no concern of his as to the source from which the funds for carrying on vocational education are derived—whether from the sale of school lands, the collection of fines and penalties, by direct taxation, voluntary donation, or otherwise

—so long as the instruction is provided for by the state for the benefit of the public, it is public instruction, and germane to the duties of the Superintendent of Public Instruction. If by the device of creating a commission and making a constitutional officer a member thereof, and imposing upon the commission duties germane to the constitutional officer, the Legislature can provide a salary in addition to that provided by the Constitution, it can take each part of the statute defining the duties of the Superintendent of Public Instruction, create a commission, make the Superintendent an ex officio officer thereof, give the office a new title, pay him a salary, and annul the constitutional provisions heretofore quoted. The Superintendent of Public Instruction as an ex officio officer would be rendering the same service to the state that he formerly performed as Superintendent of Public Instruction. The only actual change would be the title of the office and the salary paid.

[6] It is a fundamental principle of law that the granting of a power carries with it by implication the right to do all things necessary to the exercise of the power granted. A prohibition carries with it implications as broad as those that go with the granting of a power. The Constitution prohibited the Legislature from increasing the salary of the Superintendent of Public Instruction not only directly, but by implication; from doing so in any manner whatever. The wisdom of the constitutional provisions, the adequacy or inadequacy of the salary, are not before the court.

A peremptory writ of prohibition will issue.

CHRISTOPHERSON v. REEVES, State Auditor (STATE, Intervener).
(No. 4981.)

(Supreme Court of South Dakota. Oct. 27, 1921.)

1. Constitutional law §14—Words presumed to have been used in their ordinary sense.

In construing a constitutional or statutory provision, the words must be taken and are presumed to have been used in their usual and ordinary sense, unless there is a constitutional or statutory definition of the word, or unless the context is so plainly repugnant to the usual and ordinarily accepted meaning of the word as of very necessity to impose another meaning upon it.

2. States §60—Word "pay," within constitutional provision relating to legislators, means compensation.

The word "pay," within Const. art. 3, § 6, providing that legislators shall receive a specified amount per day and specified mileage for their services, and shall receive no other "pay" or perquisites, means compensation (citing 6 Words and Phrases, First Series, Pay).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pay.]

3. States §60—Lump sum expense allowance to legislators held constitutional; not being "pay" or "perquisite" in addition to compensation fixed by Constitution.

Sess. Laws 1921, c. 279, making lump sum expense allowance of \$200 to each legislator and chapter 50, making appropriation therefor, held not violative of Const. art. 3, § 6, entitling legislators to receive "for their services" a specified amount for each day's attendance and specified mileage, but "no other pay or perquisites except per diem and mileage," since the expense allowance is not "other pay or perquisites," within the Constitution, the word "pay" meaning compensation, and the word "perquisites" meaning reward, compensation, profit, or gain received because of the possession of a public office, and since the constitutional allowance for mileage is made as compensation for services and does not preclude the Legislature from making other allowance for expenses.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Perquisite.]

4. States §60—Lump sum expense allowance to legislators not interference with State Auditor's discharge of constitutional duties.

Laws 1921, c. 279, making a lump sum expense allowance to legislators, and chapter 50, making an appropriation therefor, held constitutional, as against contention that it interferes with the State Auditor's discharge of his duties under Const. art. 12, § 4, providing for an itemized statement of all receipts and expenditures of public money to be published annually, and Rev. Code 1919, §§ 5842-5352, prescribing his duties under such constitutional provision.

5. States §60—Lump sum expense allowance to legislators not a grant of "compensation" after rendition of services in violation of Constitution.

Laws 1921, c. 279, providing for lump sum expense allowance of \$200 to legislators and chapter 50, making appropriation therefor, held not violative of Const. art. 12, § 3, prohibiting the Legislature from granting extra "compensation" after rendition of services, since an expense allowance is not a grant of "compensation" within the statute; the word "compensation" being synonymous with salary, pay, or emolument.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compensation.]

Hayes, P. J., and Rice, J., dissenting.

Petition for writ of mandamus by A. Christopherson against Jay Reeves, as Auditor of the State of South Dakota, in which the State of South Dakota intervened. Petition granted.

An order having been made by the Supreme Court of the state of South Dakota finding that the regular judges thereof and all of the circuit judges in and for the several circuits of the state of South Dakota were, by reason of their interest in a similar question disqualified to sit in this proceeding, and the court, pursuant to the provisions of article 5, § 7, Constitution of the state of South Dakota, and chapter 343 of the Laws of South Dakota for the year of 1919, having appointed from the attorneys of record of said court ROBERT C. HAYES, of Deadwood, T. H. NULL, of Huron, GEORGE RICE, of Flandreau, A. H. ORVIS, of Yankton, and LEWIS W. BICKNELL, of Webster, to act as judges of the Supreme Court in place of the disqualified judges, and said persons having qualified by filing the oath of office required by law, and organized as a court, ROBERT C. HAYES, presiding, they proceeded to hear and determine this cause as the Supreme Court of the state of South Dakota.

Danforth & Barron and Bailey & Voorhees, all of Sioux Falls, for petitioner.

Byron S. Payne, Atty. Gen., and E. D. Roberts, Asst. Atty. Gen., for respondent, and for the State.

BICKNELL, J. The petitioner asks a writ of mandamus, directed to the respondent Reeves as State Auditor, commanding and directing him forthwith to issue to petitioner a warrant for the sum of \$200, being his expense allowance as a member of the Legislature of the state of South Dakota, under the provisions of chapter 279, Laws of South Dakota for 1921. The petition recited, in substance, that the petitioner was a duly elected and qualified member of the House of

Representatives from the Tenth district of Minnehaha county, S. D., who was in regular attendance at the session of the Legislature of South Dakota beginning on the 4th of January, 1921, and adjourning on the 4th of March, 1921; that at said session of the Legislature there was passed an act known as chapter 279 of the Session Laws of South Dakota for 1921, which is set out in full, and which provides for the payment of \$200 to each member of the Senate and House of Representatives of South Dakota:

"In consideration of the expense incidental to traveling to the state capital and the increased expense of living at a place other than his legal residence during the regular session of the Legislature," the sum above prescribed, "to cover the expenses of such members incident to their being away from home in the discharge of their duties," etc.

The petition also recites the passage of chapter 50 of the Session Laws of South Dakota for 1921, which is the appropriation act providing funds to meet the requirements of the law above referred to; the passage of chapter 279 with an emergency clause and its approval by the Governor; the election and qualification of the respondent as State Auditor; the presentation by petitioner of a certified voucher for the amount of money above referred to; the refusal of the respondent to draw the warrant upon such voucher; the residence of petitioner in the city of Sioux Falls, Minnehaha county, S. D., and his necessary absence from his home in the discharge of the duties of his office. To this petition the auditor has demurred, and the state of South Dakota, added as a party in intervention, joined in the demurrer.

It is the contention of the Attorney General, appearing for the Auditor and for the state, that the statute granting the sum of \$200 to each member of the Legislature for expenses and the purposes therein specified is unconstitutional, violating section 6, art. 3, of the Constitution of the state of South Dakota; that it conflicts with the provisions of section 3 of article 12 of the Constitution; and that it is in violation of the terms of article 4, § 13, of the Constitution, prescribing and fixing the duties of the State Auditor, in that it prevents him from exercising and discharging his duties, and in support of these contentions it is urged that the Legislature may not in advance of an expenditure audit and estimate the amount thereof; that the effect of the act in question is to increase the compensation of the public officers to whom the sum of \$200 is available, in violation of the aforesaid constitutional provision; that the grant of expense money in a lump sum is in violation of the spirit and provisions of the Constitution; that the Auditor is deprived of his functions if the expenses are estimated in advance and a fixed

sum for such expenses is determined and allowed; and that the expenditure violated the provisions of section 3, art. 12, of the Constitution, in that it provided additional compensation for services after the same had been partly rendered, and in this connection the Attorney General pointed out that the act was passed on January 31st, when the duties of the Legislature, under the terms fixed by the Constitution, had been almost half performed.

1. This court, in the case of *McCoy v. Handlin*, 35 S. D. 487, 153 N. W. 361, L. R. A. 1915E, 858, Ann. Cas. 1917A, 1046, and in the case of *State ex rel. Payne v. Reeves*, 184 N. W. 993, decided at this term of the court, has disposed of the question of the propriety of a lump sum for expenses, and the accompanying question of the power of the Legislature to provide expense money for constitutional officers.

As was said by this court in the case of *McCoy v. Handlin*, supra:

"The Legislature had the right, if deemed best as a matter of public policy, to enact the law which it did enact, provided it did not make the allowance greater than the expenses it was designed to cover; and it was for such Legislature to determine a reasonable and proper amount. It is clear that the Legislature did not intend, in the enactment of such legislation, to increase the salaries of the judges, or grant them any perquisites or emoluments for the discharge of their duties, but only intended to assure them, in so far as possible, that for the performance of their official duties alone, and not for the performance of such duties and the payment of expenses incident thereto, they should receive the salaries provided by law for the performance of such duties."

Speaking further on the same subject, the court said:

"One question will be found running through all the decisions wherein courts have passed upon the validity of statutes providing allowances to public officers, to wit: Was the purpose of the Legislature to increase the salary, or was its purpose merely to save such salary, so that the officer would, in fact, receive the whole thereof, for the performance of his official duties?"

The court having sustained the proposition in that decision and in the more recent one above cited, the law upon the point is settled, unless the peculiar language of the section of the Constitution here before us necessitates a different decision in this proceeding.

It is the contention of the Attorney General that the words "five cents for every mile of necessary travel," in section 6 of article 3 of the Constitution, necessarily imply the idea that this is a provision for expense, and that the expression "no other pay or perquisite except per diem and mileage" necessarily excludes the idea of any reimbursement for expense upon any theory whatsoever.

[1] It is elementary that in construing a constitutional or statutory provision the words must be taken, and are presumed to have been used, in their usual and ordinary sense, unless there is a constitutional or statutory definition of the word, which, of course, would control, or unless the context is so plainly repugnant to the usual and ordinarily accepted meaning of the word as, of very necessity, to impose another meaning upon it.

Having the foregoing principle in mind, let us examine the language of section 6 of article 3 of the Constitution. It provides:

"The terms of the office of the members of the Legislature shall be two years; they shall receive for their services the sum of five dollars for each day's attendance during the session of the Legislature, and five cents for every mile of necessary travel in going to and returning from the place of meeting of the Legislature on the most usual route.

"Each regular session of the Legislature shall not exceed sixty days, except in cases of impeachment, and members of the Legislature shall receive no other pay or perquisites except per diem and mileage."

[2] The word "pay," as used in the foregoing portion of the Constitution of South Dakota, means compensation. 6 Words and Phrases, First Series, 5243. The word "perquisite" is variously defined as follows:

"An allowance paid in money or things beyond the ordinary valued salary or fixed wages for services rendered, especially a fee allowed by law to an officer for a specific service." Webster.

"Emolument or incidental profits attaching to an office or official position beyond the salary or regular fee." Black, Law Dictionary.

"Perquisite means something gained by a place or office beyond the regular salary or fee." Bouvier's Law Dictionary.

The foregoing definitions of this word, the correct interpretation of which is highly important here, are quoted with approval in the case of *Ware v. City of Battle Creek*, 201 Mich. 468, 167 N. W. 891, L. R. A. 1918E, 673, 674. In that case it is held that the word "perquisite" means emolument or profit beyond the salary paid to the officer in question, and, the court proceeds, "cannot be said to mean moneys which were allowed him for expenses, because there was no profit or emolument to him in the allowance for office rent which he had to disburse." Thus it will be seen that the ordinary accepted meaning of the word "perquisite" is a reward, a compensation, a profit, or a gain arising out of, or received because of, the possession of a public office. Nowhere is the word used as synonymous with, or inclusive of, expenses.

Quoting the second paragraph of section 6 of article 3 of the Constitution, the Attorney General asks, after having recited the words "no other pay or perquisite except per diem and mileage:"

"Could the framers of the Constitution have used language which would with more force indicate their intention that the members of the Legislature should receive no compensation or *expenses*, other than per diem or mileage?"

We have italicized the word "expenses" in the quotation from the Attorney General's brief to bring to notice the fact that he himself has used language which more strongly and explicitly indicates the meaning which he contends should be given the Constitution than the language of the Constitution indicates; indeed, which reads into the Constitution a meaning which we cannot find there.

On the other hand, we are satisfied that the words "for their services," used in the first paragraph of section 6, refer to the per diem allowance, and also to the mileage allowance; and this interpretation is strengthened by the fact that in the second paragraph of the same section the words "pay or perquisite" are used with reference to the words "per diem and mileage"; in other words, the per diem and mileage are allowed for the services performed as "pay and perquisites," that is, as compensation, reward, or gain arising from the enjoyment of the office, and not for the payment of expenses.

[3] It is easy enough to argue that the constitutional convention meant that the mileage should go to defray expenses, but they did not say so, and we have no right, 35 years after the event, to read into their work that which does not appear on its face. If they intended the per diem above mentioned to be allowed for expense money, the use of the word "perquisite" in the succeeding paragraph is incorrect and improper. We have no right to presume that they used it in other than its usual sense. And it is entirely consistent with logic and reason that the members of the Legislature, coming from different parts of the state, traveling different distances, which necessitated varying periods of actual service, should have been paid by a fixed per diem during the period of actual attendance at the Legislature, and by further compensation adjusted and equalized among them by reference to the distance they traveled. Such a way of fixing compensation is neither novel nor unreasonable. We conclude, therefore, that an intelligent and correct construction of the language of the Constitution imposes the necessity of holding that the words "per diem" and "mileage" are referred to in section 6 of article 3 of the Constitution as compensation for services. This being so, under the familiar principle that the Constitution is a limitation and not a grant, it follows that the Legislature, not being forbidden by the Constitution, possesses inherently the power to provide expense money, and the provisions of law recited in the petitioner's bill are not in conflict with this section of the Constitution.

Our attention was called, on the argument, and by the briefs of counsel, to the case of *State ex rel. Weldon v. Thomason*, 142 Tenn. 536, 221 S. W. 491. The facts, the discussion of the law in this case, and the provisions of the Constitution of Tennessee, as restricted by the interpretation by the Supreme Court of that state, render it instructive and convincing and fully in line with conclusions hereinbefore announced, and it is cited with approval, but without relying upon it entirely, for the reason that the constitutional provisions of the several states differ in such important particulars as to render the interpretation of them by the courts available to us rather for comparison and by way of argument than as precedents. We have also examined and considered the following authorities, which sustain our conclusion and are in point: *Throop on Public Officers*, 1442; 29 Cyc. 1427, 1429; *Briscoe v. Clark Co.*, 93 Ill. 309, 311; *State v. Atherton*, 19 Nev. 332, 10 Pac. 901, 910; *Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488; *Newman v. Lester*, 11 Cal. App. 577, 105 Pac. 785; *People ex rel. Follett v. Fitch*, 145 N. Y. 261, 39 N. E. 972; *State v. Sheldon*, 78 Neb. 552, 111 N. W. 372; *Milwaukee County v. Halsey*, 149 Wis. 82-85, 136 N. W. 139; *Russ v. Commonwealth*, 210 Pa. 544, 60 Atl. 169, 1 L. R. A. (N. S.) 409, 105 Am. St. Rep. 825.

The Attorney General, in his brief, quotes at length from, and relies upon, the decisions of the Appellate Court of Illinois in the cases of *Fergus v. Russell*, 270 Ill. 626, 110 N. E. 887 and 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120, where an injunction was sought against the auditor of public accounts to restrain him from issuing warrants for various expenses to the members of the General Assembly. Statutes had been passed appropriating sums for mileage and for telephone services to the members of the Assembly under a Constitution which provided (section 21, art. 4, Constitution of Illinois) that—

"Members of the General Assembly are prohibited from receiving, in addition to such salary as may be fixed by law, 'any other allowance or emolument, directly or indirectly, for any purpose whatever, except the sum of \$50 per session to each member, which shall be in full for postage, stationery, newspapers and other incidental expenses and perquisites.'"

Thus it will be seen that the framers of the Constitution of that state provided for expenses, mentioned them expressly in the Constitution, and used the word as distinguished from the word "perquisite," and the interpretation of this Constitution must, of necessity, have precluded any other allowance for mileage or for other expenses. If the word "expenses" had occurred in our Constitution, we would not hesitate for one moment to declare the law unconstitutional.

It is the absence of this word, and the absence of any provision limiting the right of the Legislature to provide expenses, which makes it difficult for us to see the applicability of this case to the matter at bar.

2. But it is contended that the provisions of a lump sum of expense money deprives the Auditor of the discharge of his constitutional duties. Section 13 of article 4 of our Constitution provides that the powers and duties of the Auditor shall be as prescribed by law. The Legislature has prescribed the duties of the Auditor generally by sections 5342 to 5352, both inclusive, of the South Dakota Revised Code. Under the terms of section 5342 it is made the duty of the Auditor to examine all claims against the state, and for the sums which shall be found due from the state to issue warrants payable at the state treasury. Section 5345 provides for verified accounts. It also prescribes the manner in which these accounts shall be presented, itemized, etc. And it is contended by the Attorney General that section 4, art. 12, of the Constitution, providing for an itemized statement of all receipts and expenditures of the public money to be published annually in the manner provided by the Legislature, and that the same shall be submitted to the Legislature at the beginning of each regular session, is violated, because the Auditor cannot itemize the expense accounts of the officers to whom the money for expenses is granted in a lump sum.

[4] This, it seems to us, is not logical. His account will, in any event, exhibit the warrants issued to the several persons entitled to receive these payments and the amount of each warrant, and, as the law is the authority for paying them, his accounts will exhibit everything that could be required. Indeed, it is difficult to see the force of the contention that the Auditor is in anything hindered in the discharge of the duties of his office by this practice, for he must still ascertain that the person presenting the claim is by law entitled to do so; that the amount is the amount fixed and allowed by law; that the claim is presented in the form required by law; when he has done these things he most certainly may be said to have audited the account. To be sure, the law in question provides that the account shall be paid on certified vouchers, and this might be in conflict with section 5345 of the Revised Laws of 1919. If it is, indeed, impossible to construe it in harmony with those provisions, it necessarily follows that a repeal of that section, so far as it pertains to the expense allowance of the Legislature, would have been effected. We hold, however, that the law, while in *pari materia* with the provisions of the Code, deals with a subsequent provision for expense money, and should be construed as supplemental to and not repug-

nant to the provisions of the earlier enactment.

3. Coming now to the contention that the law in question is unconstitutional for violation of section 3 of article 12 of the Constitution, it is argued that chapter 279, Laws of 1921, operates to grant extra compensation to a public officer in violation of the constitutional prohibition. And in this connection it was also contended that the court should examine the question of whether or not the emergency clause, added to chapter 279, Laws of 1921, operates to render the act effective before the 1st of July, 1921, and it was argued that the law did not take effect until July 1, 1921; and that even if the allowance of \$200 to each member of the Legislature for expenses would be a valid enactment as to legislators at the next session, it cannot apply to the members of the present Legislature who served during the 1921 session.

The entire argument, whether directed against this law because of the emergency clause, or directed against it because of the allowance of \$200 a year for expense money, is based upon the same hypothesis, that is, that the effect of this act is to increase the compensation of a public officer. So it is urged by counsel in a supplemental brief that the act creates "a new right to compensation for expenses," etc. This quotation, with its involved and extraordinary phraseology, is an excellent index to the character of reasoning which we must, of necessity, adopt, if we are to sustain this contention.

[8] We hold that chapter 279, Laws of 1921, was not an act providing compensation, but, on the other hand, that it provides expense money for a perfectly legitimate purpose. We hold that the word "compensation," as employed in section 3, art. 12, of the Constitution of South Dakota, is synonymous with salary, pay, or emolument, and is intended to convey the idea of reward for, or compensation for official services; that it does not convey the idea of the repayment of expenditures allowable by law. It follows, as a matter of course, that the payment of expenses, not being prohibited by the direct language of the Constitution nor any necessary inference arising therefrom, is a valid and proper subject for legislative enactment.

We do not feel called upon to decide, and therefore refrain from expressing an opinion, as to whether the emergency clause contained in chapter 279, Laws of 1921, is or is not operative. The law became effectual, in any event, before the commencement of this proceeding, and, as it provides for expense money only, is operative now without regard to the time of its taking effect.

In this connection it is well to recall the language of the Supreme Court of Tennessee in the case of *Weldon v. Thomason*, previously cited:

"That the expenses of public officers incurred in the performance of their official duties are distinct from and not included in the compensation allowed them, unless authoritatively so declared, is well established upon reason and authority, and the apparently uniform consensus of opinion in those cases wherein the question has been considered is to the effect that constitutional prohibitions against change in the compensation fixed for public officers are not intended to be construed as limitations upon legislative authority to provide for the expenses of such officials."

It is urged that to sustain chapter 279, Laws of 1921, will nullify section 6 of article 3 of the Constitution. This we do not concede. This section refers to compensation, and as such will be upheld and enforced by the courts, but, as pointed out by the Supreme Court of Tennessee (*Wendel v. Thomason*, supra), where the Constitution is silent as to allowance for necessary expenses of public officers, it is to be presumed that it left that matter to the discretion of the people, acting through their Legislature.

The writ of mandamus should be granted; and it is so ordered.

HAYES, P. J. (dissenting). Article 3, § 6, of the state Constitution, provides that the members of the Legislature shall receive for their services the sum of \$5 per day for each day's attendance during the session of the Legislature, and 5 cents for every mile of necessary travel in going to and returning from the place of meeting of the Legislature. The \$5 per day is a recompense for services and necessarily attendant personal expenses at Pierre, and the mileage covers time and expense in reaching the place of meeting. The allowance of \$200 in this act is in conflict with the closing paragraph of this section of the Constitution declaring that the members of the Legislature shall receive no other pay or perquisite except per diem and mileage.

The fundamental law declares, in effect, that members of the Legislature shall receive \$5 a day for each day's attendance, receive also 5 cents a mile for necessary travel, and no other compensation. An allowance of \$200 for expenses incident to travel to the state capital and for increased expense of living there during the session is compensation both for travel and attendance additional to that fixed by the Constitution. The Legislature has no power, under the guise of "expense," to add \$200 to the per diem and mileage prescribed by said section 6.

RICE, J. (dissenting). The writer does not agree with the majority of the court as to the construction of the Constitution or the statute involved. The real question involved in this proceeding is the constitutionality of section 1 of chapter 279, Laws 1921, which is as follows:

"Be it enacted by the Legislature of the state of South Dakota: Section 1. That whenever a member of the state Legislature, whose legal residence shall be at some other place than the state capitol, shall attend any regular session of the state Legislature at the state capitol there shall be paid such member in CONSIDERATION OF THE EXPENSE INCIDENTAL TO TRAVELING to the state capitol and the increased expense of living at a place other than his legal residence during the regular session of the Legislature the fixed sum of two hundred dollars (\$200.00) to cover the expenses of such members incident to their being away from home in the discharge of their duties, which fixed sum shall be paid to each such member of the Legislature at the close of the regular session which such member attended upon certified vouchers of each such member being filed in the office of the State Auditor."

This law contravenes section 6 of article 3 of the Constitution, fixing the term of office and pay of members of the Legislature, providing:

"They shall receive for their services the sum of five dollars for each day's attendance during the session of the Legislature, and FIVE CENTS FOR EVERY MILE OF NECESSARY TRAVEL in going to and returning from the place of meeting of the Legislature on the most usual route, * * * and members of the Legislature shall receive no other pay or perquisites except PER DIEM AND MILEAGE."

The Constitution having expressly provided that the members of the Legislature shall receive both per diem and mileage, by implication prohibited them from receiving either directly or indirectly anything more for any purpose. "Expressio unius est exclusio alterius." If the Legislature had sought to enact a law in direct violation of the inhibition of the Constitution, it could scarcely have used more apt language.

"The object of construction, as applied to a written Constitution, IS TO GIVE EFFECT TO THE INTENT OF THE PEOPLE IN ADOPTING IT. In the case of all written laws it is the intent of the lawgiver that is to be enforced." Cooley's Con. Lim. (5th Ed.) p. 68.

The majority opinion devotes much space to commenting upon the construction the courts have given to certain words of the Constitution, and reached the conclusion that the provision under consideration for the payment of \$5 for each day's attendance and 5 cents per mile for travel is for COMPENSATION and not for EXPENSES, and that the prohibition against the members receiving any other PAY or PERQUISITE except PER DIEM and MILEAGE does not prohibit them from receiving their living expenses while at Pierre and expenses for travel in going to

and returning from Pierre. The word "mileage" in the Constitution is the equivalent of "traveling expenses." In other words, if the framers of the Constitution, instead of writing "mileage," had written "traveling expenses," it would have meant exactly the same thing.

"MILEAGE is a compensation allowed by law to officers for their trouble and expense in traveling on public business." 2 Bouv. Law Dict. 2209.

This definition has been universally adopted by the courts.

Mileage "is defined in the Century Dictionary as 'payment allowed to a public functionary for the expenses of travel in the discharge of his duties, according to the number of miles passed over.' The same definition substantially is found in Bouvier's and other law dictionaries." Richardson v. State, 63 N. E. 593, 594, 66 Ohio St. 108.

"The term 'mileage' has a well-defined legal meaning, and signifies usually compensation allowed by law to officers for their travel, and expenses in traveling on public business. Richardson v. State, 10 O. C. D. 458, 460 (citing Bouv. Law Dict. vol. 2, p. 409)." 5 Words and Phrases, First Series, p. 4502.

The Supreme Court of Wyoming adopts Bouvier's definition. Board v. Blakely, 20 Wyo. 259, 123 Pac. 77, Ann. Cas. 1915B, 584.

At the time the Constitution was adopted Webster's Unabridged Dictionary was recognized as the standard dictionary. About that time the Legislature enacted a law requiring each school district to purchase a Webster's Unabridged Dictionary. If the average voter, wishing to know the meaning of the constitutional provision now under consideration and what was meant by mileage, had examined Webster's Dictionary, he would have found it defined as follows:

"An allowance for traveling expenses at a certain per cent. per mile."

There cannot be the slightest doubt as to what every voter understood the constitutional provision to mean. The Constitution expressly provided for paying the members their traveling expenses and, if not directly at least by implication, prohibited the payment to them of any other expenses. The statute under consideration is a plain violation of the Constitution. Expenses incurred in conducting the business of the Legislature are entirely distinct from the personal expenses of the individual members.

Quoted words in capital letters do not indicate that the original was so printed.

The petition for a peremptory writ of mandamus should be denied.

BOZICH et ux. v. FIRST STATE BANK OF BUHL. (No. 22445.)

(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

1. Homestead $\S$ 133—Evidence held to sustain finding that mortgagor falsely represented that he was unmarried and obtained mortgage on homestead.

The evidence sustains a finding that the plaintiff falsely represented to the defendant that he was unmarried and thereby obtained a loan upon the faith of a mortgage upon his homestead in which his wife did not join.

2. Homestead $\S$ 118(5), 122—Mortgage void unless signed by wife; husband, fraudulently representing himself single and obtaining mortgage on homestead, may not assert its invalidity after wife's death.

A mortgage by a married man upon his homestead is void unless his wife joins; but when the husband falsely and fraudulently represents to the mortgagee that he is unmarried, and thereby gets a loan upon the faith of a mortgage without his wife joining, he will not be heard in a court of equity, after the death of his wife, he remaining the owner, to assert its invalidity, but will be held estopped by his misrepresentation.

Appeal from District Court, St. Louis County; Bert Fesler, Judge.

Action by Stanley Bozich and wife against the First State Bank of Buhl. Findings for the defendant, and from an order denying motion for new trial, the plaintiff Stanley Bozich appeals. Order affirmed.

Carl A. Onkka, of Virginia, and O. J. Larson and Geo. B. Sjoselius, both of Duluth, for appellant.

Austin & Austin and Chas. T. Wangenstein, all of Chisholm, for respondent.

DIBELL, J. Action by the plaintiffs, husband and wife, to cancel a mortgage made by the plaintiff Stanley Bozich, his wife not joining, on their homestead. There were findings for the defendant and the plaintiff Stanley Bozich appeals from the order denying his motion for a new trial. Mrs. Bozich died after the commencement of the action. The questions are:

(1) Whether Bozich secured the loan for which the mortgage was given by fraudulently representing that he was unmarried.

(2) If so, whether he will now be heard to assert that the mortgage is void because his wife did not join, or is estopped to assert its invalidity.

[1] 1. The plaintiffs were married on November 27, 1914. Helda died on January 7, 1919. This was after the commencement of this action but before issue joined.

On December 22, 1914, Bozich mortgaged

to the defendant two lots in Kinney to secure a loan of \$3,000. Helda did not join. The property was their homestead. Bozich represented to the bank in his application for the loan, and in response to a direct question, that he was a single man, and it was so recited in the mortgage and in the acknowledgment. The defendant believed and relied upon such representation and by it was induced to make the loan and take the mortgage.

The facts stated were found by the trial court from evidence amply sustaining them. Bozich knew that his wife should sign. Whether he knew the full legal effect of a failure to sign when the mortgage was upon the homestead is not apparent. He knew that the bank supposed it was getting a good lien and his representation was necessarily fraudulent.

[2] 2. A mortgage by the owner of the homestead without the joinder of the other spouse is void. G. S. 1913, § 6961. The defendant's claim is that Bozich, his wife having died, and he still owning the property, cannot now be heard in a court of equity to say that the mortgage was void, and that he is estopped to assert its invalidity.

In reviewing the facts and applying the law the trial court said:

"Stanley Bozich unquestionably perpetrated a fraud on the defendant. The purpose of estoppel is to prevent fraud resulting in injustice. If any state of facts justifies the application of the doctrine of estoppel it ought to be applied here. Stanley obtained \$3,000 from the defendant by falsely representing that he was a single man. He now asks the court to release the mortgaged property from the lien of the mortgage without requiring him to pay the loan. His wife is dead. No one will be benefited by such a decree but the party who perpetrated the fraud. The courts cannot be used for such purpose."

The language quoted forecasts the correct result. Many cases, speaking directly to the facts presented and with emphasis upon the importance of preserving unimpaired the homestead right, have used language from which on casual view an inference might be drawn that an estoppel cannot be involved at all when a spouse fails to sign. Usually in these cases the estoppel was predicated upon covenants in the conveyance. In *Alt v. Banholzer*, 36 Minn. 57, 29 N. W. 674, the court was unable to agree whether a husband, who mortgaged the homestead, his wife not joining, representing to the mortgagee that he was unmarried, was estopped, after a divorce, from denying the validity of the mortgage; and the question was left undecided. It has not been decided since. There are cases holding or implying that an estoppel may be invoked from facts apart from the covenants. *Lucy v. Lucy*, 107 Minn. 432,

120 N. W. 754; Ekblow v. Nelson, 124 Minn. 335, 144 N. W. 1094; Bullock v. Miley, 133 Minn. 261, 158 N. W. 244; Esty v. Cummings, 75 Minn. 549, 78 N. W. 242; Law v. Butler, 44 Minn. 482, 47 N. W. 53, 9 L. R. A. 856. It is held that covenants of title in a deed of the homestead, the wife not joining, will not work an estoppel against the husband. Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681. This is not such a case. The defendant does not predicate the estoppel which it invokes upon the covenants in the mortgage. Upon inquiry made Bozich fraudulently represented that he was unmarried and by his misrepresentation induced the defendant to part with \$3,000 upon the faith of the proffered security. The fraudulent misrepresentation is the basis of the estoppel claimed.

We go no further than the question directly presented. We hold that where, as here, the mortgagor, a married man, procures a loan on his homestead by fraudulently representing that he is unmarried, and afterwards his wife dies, ownership remaining in the meantime unchanged, the situation then being that a mortgage executed by himself alone is valid, he will not be heard to say in a court of equity that the mortgage which he made when his wife was living was void and will be held estopped to assert its invalidity.

Instructive cases from other jurisdictions are Pittman v. Mann, 71 Neb. 257, 98 N. W. 821; Adams v. Gilbert, 67 Kan. 273, 72 Pac. 769, 100 Am. St. Rep. 456; Mason v. Dierks & Co., 94 Ark. 107, 125 S. W. 656, 26 L. R. A. (N. S.) 574.

Order affirmed.

STATE v. WOMEN'S AND CHILDREN'S HOSPITAL ASS'N. (No. 22470.)

(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

1. Statutes $\S$ 107(1)—Act defining and regulating maternity hospitals held not to embrace more than one subject.

Chapter 50, Laws Ex. Sess. 1919, entitled "An act defining and regulating maternity hospitals," is not unconstitutional, as embracing more than one subject, within article 4, $\S$ 27, of the Constitution.

2. Constitutional law $\S$ 296(1)—Hospitals $\S$ 3—Act defining and regulating maternity hospitals held not in violation of Constitution.

The statute was enacted in the exercise of the police power, and infringes no right of the defendant under article 1, $\S$ 7, of the Constitution, relative to the taking of property without due process, or other constitutional right.

Appeal from Municipal Court of St. Paul; John W. Finehout, Judge.

The Women's and Children's Hospital Association, a corporation, was convicted in the municipal court of St. Paul of maintaining a maternity hospital without first having obtained a license, and appeals from an order denying a new trial. Order affirmed.

C. D. O'Brien and Chas. L. Hayes, both of St. Paul, for appellant.

Clifford L. Hilton, Atty. Gen., Jas. E. Markham, Asst. Atty. Gen., Arthur E. Nelson, Corp. Counsel, and L. L. Anderson, Pros. Atty., all of St. Paul, for the State.

DIBELL, J. The defendant was convicted in the municipal court of St. Paul of maintaining a maternity hospital without first having obtained a license, and appeals.

Two questions are raised: (1) Whether chapter 50, Laws Ex. Sess. 1919, is unconstitutional because it embraces more than one subject. (2) Whether it is unconstitutional within article 1, $\S$ 7, of the Constitution guaranteeing due process.

[1] 1. The statute is entitled "An act defining and regulating maternity hospitals." The Constitution provides that—

"No law shall embrace more than one subject, which shall be expressed in its title." Article 4, $\S$ 27.

The statute defines a maternity hospital, for the purposes of the act, and provides for its licensing by the state board of control. Conducting such a hospital without a license is a misdemeanor. Regulations are prescribed for its conduct, and for the health and well-being of the inmates, and public welfare is in view. The purpose of the constitutional provision is to prevent a fraud upon the public and the Legislature by the passage of acts, the nature of which is not disclosed in their titles, and to prevent the passage of unrelated measures by a combination of interests concerned with only a part of them and regardless of the others, so that each does not receive separate legislative consideration on its merits. State v. Erickson, 125 Minn. 238, 146 N. W. 364; State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935, 9 Ann. Cas. 634; State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765; Dunnell, Minn. Dig. $\S\S$ 8906-8920, and cases cited. We are unable to see that the act under consideration contains anything which is not germane to the title. Within the constitutional sense it embraces but one subject.

[2] 2. The statute is a police regulation. Its purpose is to secure the health and comfort and well-being of the inmates of the hospital and to safeguard the interests of the public. That in doing so it somewhat restricts the activities of those conducting maternity hospitals, if the restriction be no

greater than is reasonable, is not important. Others than the owners are interested. The Legislature may require physicians to be licensed. *State v. State Board*, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575; *State v. Board*, 34 Minn. 387, 26 N. W. 123. It may require the licensing of rendering plants. *Hunstiger v. Kilian*, 130 Minn. 474, 153 N. W. 869. Many callings having to do with public health or welfare may be regulated. *Dunnell's Minn. Dig.* § 1603. That the Legislature may require the licensing of maternity hospitals has been held. *People v. Hagan*, 52 App. Div. 387, 65 N. Y. Supp. 120, affirmed without an opinion in 165 N. Y. 607, 58 N. E. 1091; *Adleman v. Board of Health*, 84 Conn. 691, 81 Atl. 1055. Whether the licensing of maternity hospitals should be regulated, as it is by the statute drawn in question, was a matter of legislative discretion; and the statute invades no constitutional right of the defendant under article 1, § 7, of the Constitution, or other constitutional right.

We do not agree with counsel for the defendant that the statute grants to the board of control arbitrary power to withhold a license, regardless of conditions, and that it is therefore void within *Noble v. Douglas* (D. C.) 274 Fed. 672, and other cases cited in his brief. The statute is paternalistic. So are other statutes enacted in the exercise of the police power. It contemplates an investigation and consideration of conditions and a supervision and regulation by the board; but an arbitrary refusal of a license is not intended.

The only questions decided are that the title of the act is sufficient within the constitutional requirement, and that in the exercise of the police power the Legislature may require maternity hospitals to be licensed.

Order affirmed.

NORDELL v. NEILSEN et al.
(No. 22366.)

(Supreme Court of Minnesota. Nov. 4, 1921.)

(Syllabus by the Court.)

1. Set-off and counterclaim § 49(2)—A chose assigned before maturity is subject to offsets for claims against assignor acquired before notice of assignment.

A chose in action assigned before maturity is, in the hands of the assignee suing thereon, subject to offsets on account of claims or obligations against the assignor acquired by the defendant before notice of the assignment.

2. Set-off and counterclaim § 49(1)—In assignee's action, it was error to exclude proof of amount due defendants prior to notice of assignment of chose.

It was error to exclude proof that, under a separate oral contract made at the same time

the contract sued on was signed, a certain amount was due and payable to defendants prior to notice of the assignment.

3. Set-off and counterclaim § 44(2) — Note against plaintiff's assignor of chose in action held provable as a set-off.

The note of one of the defendants was provable as an offset.

Appeal from District Court, Ramsey County; Hugo O. Hanft, Judge.

Action by Andrew Nordell against C. E. Neilsen and others. Judgment for plaintiff, and from an order denying a new trial, the defendant, C. R. Wilkinson, appeals. Reversed.

Walter L. Chapin, of St. Paul, for appellant.

George Nordlin, of St. Paul, for respondent.

HOLT, J. Oliver Nolan had invented a machine for molding concrete. On April 22, 1913, he made a written contract with defendants, as partners, whereby the latter were licensed to manufacture and vend the machines, and, for the license to so do, they agreed to pay Nolan \$25 for each machine manufactured, "and further that the amount of license fee upon the molding machines to be manufactured by them within one year from the date of this agreement shall not be less than three hundred and seventy-five dollars." On December 13, 1913, Nolan, to secure the repayment of money loaned to him by plaintiff, transferred the contract to the latter, and particularly the payment of the said \$375. This action to recover that amount was brought by the assignee. Defendants answered separately, and alleged set-offs. The court found for plaintiff, and the defendant Wilkinson appeals from the order denying a new trial.

The court excluded evidence offered of the two set-offs pleaded, and this presents the only assignments of error. The appellant alleged that prior to the making of the contract with Nolan the defendant Neilsen had made five machines for Nolan at the agreed price of \$75 each; that Nolan was unable to pay for them; that thereupon the contract in suit was made, and it was further agreed at that time, between Nolan and the defendants, that "Nolan should within a reasonable time dispose of the five machines at \$125 each and should pay these defendants therefrom the sum of \$100 for each machine out of which should be paid the initial cost of \$75 and the balance applied on the sums, if any, due under the terms of" the contract in suit; and that Nolan never took possession of or sold any of the machines. The excluded offer of proof was substantially in accord with the allegations.

[1] It is to be noted that the contract as-

signed to plaintiff was executory. It contemplated that defendants should proceed to manufacture the machines. If they failed, as they did, nothing came due until the end of the year, when the minimum royalty was payable; hence, it is argued, the claim is not subject to any set-off. *Bradley v. Thompson Smith's Sons*, 98 Mich. 449, 57 N. W. 576, 23 L. R. A. 305, 39 Am. St. Rep. 565, is cited, which holds that a creditor cannot set off, against the assignee of a chose in action not due at the time of the assignment, a claim that was mature before that time. But the contract there assigned was a logging contract, wholly executory, and the court says of it that—

It is "but an executory promise to pay upon the performance of something else. His right of action, when it accrues, may be a mere action for damages for a breach of contract. He could not set off such right, if the promisor should sue him upon the cross-demand, and it is a matter which may never become a debt."

However the Michigan statute does not read like ours, but provides that a defendant's demand may be set off "if the demand be such as might have been set off against such plaintiff or such assignee while the contract belonged to him." The court in the case cited seems to hold that assignee as used in the statute means assignor of the claim. Our statute (section 7675, G. S. 1913) differs. It reads:

"If a thing in action be assigned, an action thereon by the assignee shall be without prejudice to any set-off or defense existing at the time or before notice of the assignment."

California has a similar statute; and in *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 35 Pac. 876, it was held that against a demand not due at the time defendant received notice of the assignment a set-off may be had; the demand and set-off being both due at the time the suit was instituted. The court says:

"A debtor may fortify himself against the coming suit of his creditor by the purchase of any cross-demands which may be counterclaimed when that suit shall come; and between them an assignee has no standing until he shall have given notice of the assignment. * * * The relative times at which the notes in the case at bar matured is of no consequence, since they were due at the commencement of the action."

The chose in action there was a nonnegotiable note not due when assigned, and neither was the claimed set-off. In *Martin v. Pillsbury*, 23 Minn. 175, it was held that the defendant had the right of set-off against the chose in action assigned to plaintiff, even though not due when the defendant received notice of the assignment. In that case authorities from New York were relied on to

the point that no proper set-off could be had since the claim sued on had not matured at the time the notice of the assignment was given; but the court called attention to the difference between our statute and that of New York, the latter having the clause contained in the Michigan statute above quoted. We, therefore, hold that, although the contract had not matured at the time it was assigned, that fact did not deprive defendants of any set-off they then had or might have acquired against the assignor before notice of the assignment. Counsel for plaintiff cites 22 Am. & Eng. Enc. of Law (1st Ed.) 301; 24 R. C. L. & 46, Set-Off and Counterclaim; and 84 Cyc. 746. The text, to the effect that unless the chose assigned and the set-off claimed are both due when the transfer is made the set-off is not available, is supported by decisions from New York, Michigan, Montana, and Ohio. The clause quoted from the New York statute in *Martin v. Pillsbury*, supra, is common to the statutes of Michigan and Montana, and the Ohio court construes their statute to mean the same as that of New York.

[2] The contract transferred to plaintiff is not contingent. Three hundred and seventy-five dollars became due and payable absolutely at the end of the year; and it may be noted that it was assigned to plaintiff to the extent of that amount only.

The claimed set-off was matured, under the pleading and offer of proof, when the assignment was made. To constitute an offset, however, the claim or demand must be liquidated, or susceptible of computation. 24 R. C. L. § 60, title, Set-Off and Counterclaim. We are inclined to think that at least as to the amount that should be applied upon the contract plaintiff holds, viz. \$125, or \$25 for each of the five machines Nolan agreed to sell, the claimed set-off is liquidated and certain.

[3] The other set-off pleaded, and of which proof was excluded, was a promissory note made by Nolan to the defendant Wilkinson for \$100, dated October 24, 1912, and due six months after date. It is clear that this was a proper set-off under the interpretation of section 7675, G. S. 1913, herein adopted, provided a partner may offset his separate claim against an obligation sought to be enforced against his partnership. We think he may do this. The contract sued on was the joint and several obligation of defendants, and plaintiff asks for a several judgment against them. A several judgment may be entered on a partnership obligation against one partner. Section 7916, G. S. 1913.

We think there was error in excluding proof of the set-offs pleaded.

The order is reversed.

WEEKER v. HAMEL et al. (No. 22472.)

(Supreme Court of Minnesota. Nov. 10, 1921.)

*(Syllabus by Editorial Staff.)***Physicians and surgeons § 18(8) — Evidence held insufficient to show negligence.**

In an action against physicians for causing the death of a child, evidence held insufficient to show negligence or to connect defendants with the surgical treatment.

Appeal from District Court, Hennepin County; Joseph W. Molyneaux, Judge.

Action by Clarence A. Weeker, as administrator, against Dr. C. F. Hamel and another. Directed verdict for the defendants, and from an order denying new trial, the plaintiff appeals. Order affirmed.

Lewis Severance, of Minneapolis, for appellant.

Dille, Hoke, Krause & Faegre, of Minneapolis, for respondents.

PER CURIAM. At the close of plaintiff's evidence, the court directed a verdict for defendants, and plaintiff appeals from an order denying a new trial.

Plaintiff sought to recover damages for the death of his infant child on the ground that defendants, as physicians and surgeons, negligently failed to diagnose the ailment of the child correctly and treated it improperly. We are unable to find any evidence in the record tending to show that defendant's diagnosis was incorrect or their treatment improper. We also fail to find any error in the rulings of the court admitting or excluding evidence.

Plaintiff urges that an operation was performed on the child without the consent of its parents. After one of defendants had treated the child for two or three weeks, at their suggestion it was taken to a hospital by its parents where some sort of an operation seems to have been performed. The nature and extent of the operation does not appear, but apparently it consisted in opening an abscess in the neck or throat of the child. Neither does it appear who performed the operation, nor whether either of defendants were present or had anything to do with it. The action is brought under section 8175, G. S. 1913, which provides that "when death is caused by the wrongful act or omission of any person," the personal representative of the decedent may maintain an action therefor. There is no evidence that this operation was not necessary and proper treatment, and properly performed, or that it had any part in causing the death of the child.

There is an utter absence of proof tending to show actionable negligence on the part of either defendant, and the order denying a new trial is affirmed.

STATE ex rel. BERMAN v. BROWN, Sheriff. (No. 22702.)

(Supreme Court of Minnesota. Nov. 10, 1921.)

*(Syllabus by the Court.)***Intoxicating liquors § 242 — Penalty for unlawful transportation is destruction of liquor, forfeiture of transporting vehicle, and fine and imprisonment.**

The penalty for unlawfully transporting intoxicating liquor, under chapter 455, Laws of 1919, supplemented by chapter 835, Laws of 1921, and amended by chapter 391, Laws of 1921, is the destruction of the liquor, the forfeiture of the vehicle in which it is being transported, and a fine and imprisonment.

Appeal from District Court, Hennepin County; Frank M. Nye, Judge.

Proceeding by the State, on the relation of Louis Berman, against Earl Brown, as Sheriff of Hennepin County, in habeas corpus, in which a writ was obtained from and discharged by the district court, and the relator appeals. Order discharging writ affirmed.

Brady, Robinson & Bonner, of Minneapolis, for appellant.

Floyd B. Olson, Co. Atty., of Minneapolis, and Clifford L. Hilton, Atty. Gen., for respondent.

LEES, C. The relator was indicted for the crime of transporting intoxicating liquor, entered a plea of guilty, and was sentenced to pay a fine of \$150 and be confined in the workhouse of the city of Minneapolis for 30 days, and, in default of the payment of the fine, for an additional 30 days. A commitment was issued, under which he was imprisoned. Alleging that the court was without jurisdiction to sentence him to pay a fine or to be imprisoned, he obtained a writ of habeas corpus from the district court of Hennepin county. The writ was discharged, and he appealed.

He contends that the sentence passed upon him was beyond the jurisdiction of the court, for the reason that under chapters 835 and 391, Laws of 1921, the offense of transporting intoxicating liquor is not punishable either by fine or by imprisonment. Chapter 455, Laws of 1919, prohibited the transportation of intoxicating liquor within this state. *State v. Brothers*, 144 Minn. 837, 175 N. W. 685. Subdivision A. of section 25 of that act provides that the penalty for manufacturing or selling such liquor (transportation not being mentioned) shall be a fine for the first offense and a fine and imprisonment for each subsequent offense. Subdivision B provides a like penalty for a willful failure or neglect

to perform any duty imposed by the act or for any violation of any of its provisions for which no special penalty is prescribed. We think this subdivision prescribed the penalty for the offense of unlawfully transporting liquor.

Chapter 335, Laws of 1921, was enacted to provide for the enforcement of the laws prohibiting such transportation and was declared to be supplemental to the act of 1919 and not to modify or repeal any of its provisions. It provides for the seizure and destruction of the liquor and for the seizure and sale of the vehicle in which it is transported, the proceeds of such sale to be paid into the county treasury of the county where the seizure takes place.

Section 24 of chapter 455, Laws of 1919, charged certain public officers with the duty of enforcing the provisions of that act, and declared that any official who should willfully refuse or neglect to perform a duty imposed by the act should be removed from office and forfeit not less than \$100 nor more than \$500, to be recovered in an action against him personally or on his official bond. This section was amended by section 14, chapter 391, Laws of 1921, but the forfeiture clause in the original section was not disturbed. Section 25 of the act of 1919 was also amended. As amended, subdivision E. thereof reads:

"Any person who shall willfully fail or neglect to perform any duty imposed by this act or who shall violate any of the provisions thereof, for which no special penalty or forfeiture is prescribed herein shall upon conviction thereof * * * be punished," etc.

It is contended in relator's behalf that a special penalty or forfeiture was prescribed for the unlawful transportation of liquor by chapter 335, Laws of 1921, providing for the seizure and destruction of the liquor and the forfeiture of the vehicle in which it is being transported; that there is no other penalty, and hence no authority for the imposition of a fine or a sentence to imprisonment. We cannot place this construction upon the several acts in question. The confiscation of the liquor and the vehicle in which it is carried was in addition to the penalty prescribed by the 1919 act. The words "or forfeiture," inserted in subdivision E by the 1921 amendment thereto, clearly refer to the forfeiture exacted from a public officer willfully refusing or neglecting to perform an official duty required by the law and was probably intended to exempt him from punishment by fine and imprisonment in addition to the forfeiture provided for on the theory that, if subject to both, the penalty would be too severe.

The order discharging the writ is therefore affirmed.

HOLMAN v. IVINS. (No. 22460.)

(Supreme Court of Minnesota. Nov. 10, 1921.)

(Syllabus by the Court.)

Municipal corporations ~~§~~ 705(2)—Law requiring driver approaching intersection to give way to vehicle on his right applies on leaving a street to enter one connecting, but not crossing.

Subdivision 2 of section 2552, Gen. St. 1913, as amended and as found in 1917 Supplement, § 2552, subd. 2, to Gen. St. 1913, requiring a driver of a vehicle approaching or crossing a street intersection to yield the right of way to any other vehicle approaching from his right, is applicable where a driver attempts to cross the street along which he is driving to enter a cross street, which does not continue on the other side of the first-mentioned street.

Appeal from District Court, Ramsey County; Chas. C. Haupt, Judge.

Action by Fred C. Holman against W. N. S. Ivins. Judgment for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Samuel A. Anderson, of St. Paul, for appellant.

Charles A. Lethert, of St. Paul, for respondent.

HOLT, J. Summit avenue runs east and west, and has a 55-foot driveway for some distance on both sides of where Mackubin street enters it from the north. The latter street goes no further south than to Summit. Plaintiff was driving his automobile westerly on Summit avenue, approaching Mackubin street, when defendant driving easterly on that avenue was nearing the same street. The latter turned to go north upon Mackubin street; but the right front spring of plaintiff's car caught in the right rear wheel of defendant's, and both vehicles were considerably damaged. Plaintiff sued to recover the damages resulting to him from the collision, and defendant answered, denying responsibility and counterclaiming for the damages he sustained. Plaintiff recovered. Defendant appeals from the order denying a new trial.

The only error assigned questions the propriety of submitting for the jury's consideration the statute reading:

"The driver of any vehicle approaching or crossing a street or highway intersection shall give the right of way to any other vehicle approaching from his right on the intersecting street or highway, and shall have the right of way at such crossing over any vehicle approaching from his left on such intersecting street or highway." Section 2552, G. S. 1913, as amended by the addition of subdivision 2 in section 22, c. 119, Laws 1917 (Gen. St. Supp. 1917, § 2552).

The claim of defendant is that the statute does not apply, because Mackubin street ends at Summit avenue, and does not continue on to the south. At places where two streets cross, there is a space common to both, on which space the traveler must yield the right of way to any one approaching on his right. So we think there is a space in common to both streets where one street opens into another only on one side. The space to the north of the center line of Summit avenue and within the east and west line of Mackubin street extended is such a space. As soon as defendant turned towards this space, plaintiff was approaching to defendant's right, and the latter's duty was to yield the right of way. Again plaintiff, traveling on Summit avenue westerly, and on the north half thereof, was bound to give the right of way to one driving south on Mackubin street into Summit avenue. There is an intersection, at least, as to the northerly half of the space in common there would have been, had Mackubin street continued to the south. We are of the opinion that the north half of Summit avenue must be held to be intersected by Mackubin street, and hence the statute quoted was properly applied. Indeed, the situation calls for the observance of the rule of the statute even more urgently than where both streets pass on beyond.

The fact that there is a statute (section 2634, G. S. 1913) requiring vehicles in turning into an intersecting street, or in making a turn at an intersection to keep to the right of the center thereof, does not suspend the operation of the right of way statute while the turn is made. In turning the driver of the vehicle must heed the requirements of both statutes mentioned, as well as the one found in section 2635, G. S. 1913, relating to the speed in turning a corner. They are not contradictory, and may all be applicable in a given case.

The order is affirmed.

DUNN v. REEVES COAL YARDS CO., Inc.
(No. 22457.)

(Supreme Court of Minnesota. Nov. 10, 1921.)

(Syllabus by the Court.)

Master and servant §316(1)—Truck owner delivering for coal dealer, held a servant, and not an independent contractor.

Waters v. Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564, to the effect that a person temporarily employed by a coal dealer to haul and deliver by means of his own conveyance and facilities coal and fuel to a patron of the dealer at a stipulated rate per ton or load is, for the time being, the agent and servant of the dealer, and not an independent contractor, followed and applied.

Appeal from District Court, Hennepin County; Frank M. Nye, Judge.

Action by William Dunn, father of Colin Dunn, a minor, against the Reeves Coal Yards Company, Inc. Judgment for defendant, and from an order denying new trial, plaintiff appeals. Order reversed, and new trial granted.

B. W. Wilder and O. L. Bruce, both of Minneapolis, for appellant.

Ernest E. Watson, of Minneapolis, for respondent.

BROWN, C. J. This action was brought to recover for injuries to plaintiff's minor son, claimed to have been caused by the negligent operation of an automobile truck by one McCann, an employé and servant of defendant. At the conclusion of the trial below a verdict was directed for defendant, and plaintiff appealed from an order denying a new trial.

There is no question on the record as to the injury complained of, and that it was caused by the negligence of McCann in the operation of his truck upon and over one of the streets of the city of Minneapolis is made clear by the evidence; at least the case must be so considered on this appeal. In directing a verdict for defendant the learned trial court held, on the evidence presented, that McCann was not at the time the agent or servant of defendant; hence that defendant cannot be charged with his wrongdoing. The correctness of that conclusion presents the only question on the appeal.

The facts are not in substantial dispute. It appears that defendant is a retail coal and fuel dealer doing business in the city of Minneapolis. In the usual conduct of its business a sale of a quantity of coal or other fuel includes a delivery thereof upon the premises of the purchaser. To effect such deliveries to its numerous customers defendant employed among others, McCann, who owned and operated the truck in question in his business of carting and delivering commodities and articles of trade for hire. He was engaged in that work on his own account, and in no way connected or associated with defendant, except as he was so employed by defendant from time to time as its business might justify and require. He was paid for such services, not the value thereof per day, week, or month, as the term of employment might be, but an agreed amount per ton for the quantity of coal carted and delivered. McCann was in the service of defendant only when so engaged; and was in such service at the time complained of, and had been continuously for several days prior thereto. When charged with the delivery of coal to be paid C. O. D. he was authorized to and did collect and account therefor to

defendant. He collected for the delivery on the particular occasion. Defendant furnished him assistance from its regular employes in loading at the yards and unloading at the place of delivery when necessary.

The case, on these facts, cannot be distinguished from *Waters v. Pioneer Fuel Company*, 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564, which we follow and apply, holding that the question whether McCann was at the time of the accident an independent contractor, or the servant of defendant, if not to be answered in the affirmative as a matter of law, was at least a question of fact for the jury, and the directed verdict was error. The *Waters Case* has never been criticised, doubted, or overruled, and is not out of harmony with adjudications on similar facts in other jurisdictions. *Standard Oil Co. v. Parkinson*, 152 Fed. 681, 82 C. C. A. 29; *Murphy v. Herold Co.*, 137 Wis. 617, 119 N. W. 294; *O'Neill v. Blase*, 94 Mo. App. 648, 68 S. W. 764; *White on Personal Injuries*, 601; *Cooley on Torts* (3d Ed.) 1101; *Shearman & Redfield on Neg.* (5th Ed.) 248. The case has been often cited with approval in later decisions of our own, though not in all instances in cases involving identical facts. *Crandall v. Boutell*, 95 Minn. 116, 103 N. W. 890, 5 Ann. Cas. 122; *State ex rel. v. District Court*, 128 Minn. 43, 150 N. W. 211; *Winters v. American Radiator Co.*, 128 Minn. 508, 151 N. W. 277, L. R. A. 1915D, 476; *Zuponcic v. Val Blatz Brewing Co.*, 131 Minn. 112, 154 N. W. 790; *Boll v. C. S. Brackett Co.*, 134 Minn. 268, 158 N. W. 609, 159 N. W. 1095.

Following the *Waters Case*, which does not appear to have been called to the attention of the learned trial court, the order appealed from must be, and is, reversed, and a new trial granted.

MIDLAND TRUST & SAVINGS BANK v. NAGLE et al. (No. 22447.)

(Supreme Court of Minnesota. Nov. 10, 1921.)

(Syllabus by the Court.)

1. Deeds ¶130—Construed as granting life estate to plaintiff's intestate and leaving in grantor land not conveyed in fee.

A deed containing the provisions set out in the opinion conveyed only a life estate to plaintiff's intestate. Title to so much of the land as was not conveyed in fee to the other grantees remained in the grantor, although there was no reservation written into the deed.

2. Release ¶13(1)—Grant of interest in land held sufficient consideration for release of obligation to support.

The grantor conveyed a two-thirds interest in fee to his brothers. Such conveyance was a detriment to him and a sufficient considera-

tion for a release by plaintiff's intestate of his obligation to support her.

Appeal from District Court, Dakota County; Willard L. Converse, Judge.

Action by the Midland Trust & Savings Bank against Terrence W. Nagle and others. Findings for the defendants, and from an order denying a motion for amended findings or a new trial, plaintiff appeals. Order affirmed.

T. A. Alexander and H. S. Locke, both of St. Paul, for appellant.

Allen & Straight, of St. Paul, for respondent.

LEES, C. This is an action to determine adverse claims to land in which the findings were against the plaintiff and were followed by this appeal which is from an order denying a motion for amended findings or a new trial.

The land was originally owned by John Nagle. January 18, 1898, he and his wife, Ann, conveyed it to their son Terrence. The deed recited that the land conveyed was the grantors' homestead, reserved an estate for life to them, and contained a condition to the effect that the grantee would support the grantors on the premises during their several lifetimes and would not incumber the land or sell or convey it except to his brothers or to his father or mother. If he failed to fulfill these conditions, the deed was to become void. May 18, 1898, Terrence executed a deed of the land in which his mother, Ann Nagle, and his two brothers, Joseph and Frank Nagle, were named as grantees. The deed purported to grant all of the land to the grantees named therein. Immediately after the description there was written into the deed a clause reading as follows:

"In the following proportions and to each of said grantees the following interests to wit:

"To said Joseph P. Nagle and Frank R. Nagle the undivided two-thirds of said lands, subject to the life estate of Ann Nagle herein-after named, to have and to hold to them and their heirs forever, subject only to said estate for life.

"To said Ann Nagle the said lands and the whole thereof for and during the term of her natural life, to have and to hold to her said Ann Nagle for and during the term of her natural life.

"And the said Ann Nagle for and in consideration of the foregoing conveyances to her and to her two sons Joseph P. Nagle and Frank R. Nagle does by the acceptance of this deed release the said Terrence W. Nagle, party of the first part, from all the covenants and agreements to be by him kept and performed as specified in a certain deed from John Nagle and Ann Nagle, his wife, to Terrence W. Nagle wherein the above-described land is conveyed to said Terrence W. Nagle. Which deed bears date the 18th day of January, A. D. 1898."

(184 N.W.)

The deed contained the usual habendum clause followed by the words "and in the proportions hereinabove specified."

[1] Ann Nagle died intestate September 9, 1913. Plaintiff is the administrator of her estate. In its complaint it alleged that by this deed Mrs. Nagle became the owner of a life estate in all the land described therein and also of an undivided one-third in fee. Defendants assert that all Mrs. Nagle took under the deed was a life estate, and that the grantor retained the one-third interest in fee which was not conveyed to his two brothers. It is argued in support of plaintiff's position that by the granting clause in the deed all the land was conveyed; that there was no reservation of any interest to the grantor; that Mrs. Nagle already owned a life estate in the land, and hence there was no reason for conveying such an estate to her again; and that, unless a one-third interest in fee was conveyed to her, she parted with her right to support for no consideration whatever. The argument is plausible, but any force it might otherwise have is overcome by the provisions in the deed above set out. In *Witt v. St. Paul, etc., Ry. Co.*, 38 Minn. 122, 35 N. W. 862, it was said that the cardinal rule of construction is to ascertain and give effect to the intention of the parties to the deed, and to this end the court must consider all parts of the instrument. This has been repeated in subsequent cases and is the rule which controls in the construction of this deed. *Grueber v. Lindenmeyer*, 42 Minn. 99, 43 N. W. 964; *Flaten v. City of Moorhead*, 51 Minn. 518, 53 N. W. 807, 19 L. R. A. 195; *Lawton v. Joesting*, 96 Minn. 163, 104 N. W. 830. To give the granting clause the effect plaintiff claims it has would nullify the subsequent provisions of the deed. It would enlarge Mrs. Nagle's estate by adding a fee interest to it, whereas the explicit declaration of the grantor is that each grantee shall take the interests in and proportions of the land granted which he then proceeds to define. If he had intended to convey a fee interest to his mother, he not only failed to say so, but, on the contrary, has taken pains to say that she shall only hold the land for and during the term of her natural life. This language is controlling and limited the interest of plaintiff's intestate to a life estate.

[2] It cannot be said that there was no consideration for Mrs. Nagle's release of her right to support. When the deed was made the grantor owned the land, subject only to the life estate of his father and mother. By his deed he deprived himself of the two-thirds interest in the land which he conveyed to his brothers. In consideration thereof his mother released him from his obligation to support her. True, she did not directly receive anything for her release, but

the new arrangement was presumably detrimental to the interests of the grantor, and it is elementary that detriment to one party to a contract is no less a consideration than is benefit to the other party. *Dunnell's Dig.* 1750; *Heltsch v. Cole*, 47 Minn. 320, 50 N. W. 235. The fact that the grantor did not expressly reserve an interest in the land is unimportant. It is too plain to admit of argument that, when the owner of the fee conveys an undivided two-thirds interest to others, he remains the owner of the one-third not conveyed, whether he reserves it or not.

The order denying a new trial is affirmed.

KASBO CONST. CO. v. MINTO SCHOOL DIST. OF CAVALIER COUNTY.

(Supreme Court of North Dakota. Oct. 20, 1921.)

(Syllabus by the Court.)

1. Schools and school districts $\S$ 86(2) — In action against district for balance for building, evidence held to show defective performance.

Plaintiff's action is to recover the balance claimed to be due under the terms of a written contract, and for extras alleged to have been furnished for the construction of a building, to wit, a schoolhouse. The defendant interposed a defense to the effect that the building was not constructed in accordance with the terms of the contract, plans, nor specifications; that the workmanship was poor, etc. The evidence abundantly established that the building was not so constructed, and that it was very defective. The jury returned a verdict in defendant's favor for a dismissal of the action, and judgment was entered accordingly.

2. Denial of motion for new trial held not error.

Thereafter, plaintiff made a motion for a new trial which was denied and an order to that effect entered, and in this it is held there was no error.

(Additional Syllabus by Editorial Staff.)

3. Contracts $\S$ 320—Right of recovery for defective performance stated.

Where a building contract was defectively performed, if the defects were irremediable, the contractor was not entitled to recover, but, if remediable, he was entitled to recover the contract price plus proved extras which ought to be paid for, less the amount necessary to remedy the defects.

4. Schools and school districts $\S$ 85—District using defective schoolhouse held not to have waived claims for defective construction.

In an action against a district for balance of constructing schoolhouse, where there was no other proper place where a school could be held, so that defendant was compelled to use the defective building, by doing so it waived none

of its claims or causes of action for defective construction.

Appeal from District Court, Cavalier County; A. G. Burr, Judge.

Action by the Kasbo Construction Company against the Minto School District of Cavalier County, N. D. Judgment for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

Sinnes & Duffy, of Minnewaukan, for appellant.

G. Grimson, of Langdon, for respondent.

GRACE, C. J. This is an action to recover \$3,486.40, the balance of the contract price about \$9,241.40, and \$877.68 for alleged extra work, labor, and material for the construction of a certain schoolhouse for defendant. The defendant paid about \$7,000 of the contract price.

The defendant admits that plaintiff erected and constructed such building, but denies that it was constructed and finished according to the plans and specifications, and by appropriate pleading sets up two separate counterclaims aggregating \$9,000. The issues were submitted to a jury and resulted in a verdict in favor of defendant for a dismissal of the action. Plaintiff made a motion for a new trial which was denied, and from the order denying new trial plaintiff appeals and assigns 7 errors based upon alleged erroneous instructions by the court and 28 specifications of the insufficiency of the evidence to sustain the verdict.

[4] The material facts necessary to be stated are as follows: The defendants published notices for bids for the construction of a schoolhouse, according to plans and specifications, to be erected in Minto township in Cavalier county. On about April 1, 1918, at a meeting of the school board, it let the contract for the construction of the building to the plaintiff. At that time the terms of the contract were discussed between the parties and a written contract, Exhibit C, was entered into and signed by both parties. It is of too great length to be set out in full and it is needless to do so.

Exhibits D and E, specifications and plans, are part of the contract. There is another alleged contract, Exhibit A, which plaintiff contends is the contract under which the work was performed. It claims that though this contract is unilateral, having been signed by the plaintiff only, nevertheless it was sent to the defendant and retained by it. Plaintiff claims that the defendant agreed that the work should be done under the latter contract. There is positive testimony, however, that Exhibit C was the contract agreed upon and signed by both parties. After its completion, Kasbo took it with him for the purpose of making copies of it and was to return it. At the trial plaintiff attempted to

introduce Exhibit A in evidence. It was excluded, and properly so, as it never was accepted nor approved by the school board. It was a contract materially different from Exhibit C. Furthermore, the following stipulation was made in open court between the plaintiff and defendant which was dictated by Mr. Devaney, one of plaintiff's attorneys:

"It is stipulated by and between the plaintiff and defendant that Exhibit C is the original contract entered into by and between plaintiff and defendant on or about April 1, 1918, excepting therefrom the portions which are stricken out with a red pencil and including those portions contained in brackets and green ink which the plaintiff made in the contract after the contract was reduced to writing, and signed therein approved and consented to by the defendants. It is further stipulated that Exhibit F is a true copy of said original agreement and may be used upon the trial of this case for any purpose for which the original may be used. It is further stipulated that Exhibit D is the specifications referred to in said contract, and it should be admitted in evidence as such and as the specifications according to which the schoolhouse was to be built, and that Exhibit E may be admitted in evidence as the original plans of the schoolhouse to be built by the plaintiff under this contract and according to which plans it was to be built."

Certainly and especially in view of the above stipulation, there was no error in excluding Exhibit A. Exhibit C, as it originally existed before the changes inserted into it by Kasbo and which is represented by Exhibit F, is the contract and the only contract between the parties, and the trial was had on that theory, and the plaintiff cannot now change its position. The 28 assignments of error relative to the insufficiency of the evidence to sustain the verdict need no lengthy discussion. If there is competent evidence in the record which will support the verdict, then all errors based upon the insufficiency of the evidence must be considered of no merit. An examination of the evidence not only discloses that there is some competent evidence, to support the verdict, but that there is an abundance of it. It is entirely unnecessary to set it forth in detail. It is sufficient to state that there is an abundance of evidence to show that the foundation of the building was improperly and poorly constructed; that the cement and gravel used therein were not in proper proportion nor in compliance with the specifications, and as a result, according to the testimony of Mr. Shannon, an architect of 25 years' experience, who examined the building, the foundation, and basement walls, it appears that the walls were soft; that they were very irregular and not straight and out of plumb in places; that the concrete was soft. He found a crack in the northeast corner and one in the southwest corner, stating that these were ruptures in the wall. In explaining what he meant by the walls being soft, he stated, in

substance, that they are not of the density that concrete usually is; that it would rub off by hand, or pieces could be taken out of it. He stated that the walls were not safe nor durable and that as an architect he would not allow such a wall, but would condemn it, have it taken out and another put it. He stated further that the rafters, ceiling, and joists had sagged; that they were not properly braced; that the floor had sagged some; that the frame at the plate line was very roughly thrown together and not put in according to plans and as a result seems to let the building spread; that the cornices were open and let the daylight in; that some of the wainscoting was out of plumb; that the outside walls were not in plumb.

There is much more evidence by the same witness largely to the same effect. He further testified as follows:

Q. What difference in money in your opinion would there be between the building as it stands now, as erected by Mr. Kasbo, and the building as it should have been erected under that contract? A. \$4,500.

He testified further to the effect that the building could not be repaired and put in condition as required by the specifications for \$4,500; that there was no way that the wall could be repaired and made to stand up according to the plans and specifications; that it would have to be wrecked and rebuilt; and that in his opinion it would cost, to take out and rebuild a foundation for a new building, about \$3,000. In substance his testimony shows that to make the building, aside from the foundation or basement walls, comply with the plans and specifications, it would have to be wrecked and rebuilt, and that this could not be done for \$1,500.

The evidence of Shannon is substantiated by that of other competent witnesses. The evidence is abundant to sustain the verdict of the jury. If the verdict of the jury had been for a much larger amount, there is abundant evidence in the record to have sustained it.

[2. 3] The several assignments of error predicated upon alleged erroneous instructions have been carefully analyzed and are of no real substance, and are largely without merit. The parts of the instructions from which excerpts are taken are entirely too lengthy to be here set out and none of them merit discussion. It will, however, do no harm to briefly discuss the only one of importance. It is claimed that it does not state the true measure of damages. It is as follows: "It would be your duty to deduct the costs of supplying the defects." This is but an excerpt from the following portion of the instructions:

"To entitle the contractor to recover on a building contract, which has not been fully

complied with by him, when he admits there are defects but claims the contract was substantially performed, it must appear and he must show that not only he endeavored to perform it in good faith, but also that he has done so, except as to unimportant omissions or deviations which are the result of mistake or inadvertence, and were not intentional, and which are susceptible of remedying so that the other party will get substantially the building he contracted for. For example, if the building is substantially erected, but the contractor has failed through mistake or inadvertence or some other reason that is not intentional, to give the required thickness of painting, and it is shown how much it will cost to supply this defect and if the defects were supplied, the building would be substantially correct, then he would be entitled to recover, but it would be your duty to deduct the cost of supplying the defects. I mention painting, not that it is proof of a defect, but merely as an illustration."

Certainly there is no error in giving that instruction. The following is complained of:

"If the building is fairly in compliance with the contract, but has defects which should and can be remedied, then the defendant has the right to deduct the cost of remedying from the contract price and if then it has overpaid the plaintiff, it is entitled to judgment for the difference."

If it cannot be remedied, then the defendant is entitled to judgment for the amount it paid, and if it can be remedied, then deduct from the contract price \$9,241.40, and from the proved extras which ought to be paid for, the amount necessary to remedy it, and if the remainder be less than the amount paid, then the defendant is entitled to judgment for the difference. Even though the foregoing instructions be considered by itself, and not in connection with the instructions as a whole, it is clear that the giving of it was not error, and, if so, the error was harmless, for certainly it states the correct rule of damages.

In 9 C. J. p. 110, the rule is thus stated:

"The measure of damages occasioned by failure strictly to perform the building contract is, in the case of substantial performance, the difference between the value of the work done or the building erected and the value of that which was contracted for."

In *Walter v. Huggins*, 164 Mo. App. 69, 148 S. W. 148, it is stated:

"The fundamental idea running through all of the case law is that an owner is entitled to a performance of the contract by the contractor, and, where the contract is breached, is entitled to recover damages that will be a just equivalent for the breach."

In *White v. McLaren*, 151 Mass. 553, 24 N. E. 911, it is stated that—

"The question ordinarily is, how much less is the building fairly worth than it would have been had the contract been performed?"

In *Gibson v. Carlin*, 13 Lea (Tenn.) 440, it is stated that—

"The measure of damages is ordinarily the difference between the contract price and the value of the work as done for merely inferior work, and for defective work the cost of replacing it so as to make it equal to the work contracted for."

In *Hartford Mill Co. v. Hartford Tobacco Warehouse Co.* (Ky.) 121 S. W. 477, it is stated that—

"In an action for breach of a building contract for alleged improper construction, the owner's measure of damages is the difference between the value of the building when constructed and what its value would have been if constructed according to contract, and with reasonably sound material and reasonably skillful workmanship."

In *Small v. Lee & Brothers*, 4 Ga. App. 395, 61 S. E. 831, it is stated that—

"The true measure of damages is the difference between the value of the house as finished and the house as it ought to have been finished under the contract, plans, and specifications."

The language of the instruction complained of stated the rule enunciated in those cases. The language used is different than in those cases, but in reality it states the same rule, for when defects, etc., are supplied, the building would be according to contract.

The instructions were not erroneous and prejudicial for failure to set forth the law relative to settlement or adjustment.

[4] The plaintiff contends that after the completion of the schoolhouse the defendant accepted it by taking possession of it and using it. There is no merit in this contention, as there was no other proper place where a school could be held, and of necessity defendants were compelled to use the building in its defective condition, and in doing so it waived none of its claims or causes of action, if any, against plaintiff.

There is no reversible error in the record, and the order appealed from should be affirmed.

It is affirmed.

Respondent is entitled to its costs and disbursements on appeal.

BIRDZELL, ROBINSON, BRONSON, and CHRISTIANSON, JJ., concur.

WERTZ v. RYAN. (No. 34197.)

(Supreme Court of Iowa. Nov. 15, 1921.)

Limitation of actions §53(1)—Petition held to set out continuous open account on which limitations ran only from last item.

A petition alleging that from July 1, 1913, to May 5, 1919, plaintiff furnished materials and

performed work and labor for defendant upon various residences and other buildings of the aggregate value of \$752.92, and that during all of said period plaintiff resided in one of defendant's residences and became indebted to him for rent in the sum of \$349.33, held to set out a continuous current open account, and limitations did not start to run until the date of the last item thereof, although a year and ten months elapsed between two items.

Appeal from District Court, Poweshiek County; H. F. Wagner, Judge.

Action upon an account for materials furnished and for work and labor performed by plaintiff for the defendant upon several buildings owned by him. Judgment for plaintiff. Defendant appeals. Affirmed.

Talbott & Talbott, of Brooklyn, for appellant.

U. M. Reed, of Brooklyn, for appellee.

STEVENS, J. Plaintiff alleged in his petition, which is in one count, that during the years from July 1, 1913, to May 5, 1919, he furnished certain materials and performed work and labor for defendant upon various residences and other buildings owned by him; that the aggregate value of the materials furnished and labor performed was \$752.92; that during all of said period plaintiff resided in one of defendant's residences and became indebted to him for rent in the sum of \$349.33; that on or about August 19, 1917, he paid the defendant \$50 in cash, making the total indebtedness of the defendant to plaintiff \$399.33, which he alleges has been credited upon his account against the defendant, leaving a balance due of \$353.59. A full itemized statement of the account was attached to plaintiff's petition, showing the date of the first item to be July 1, 1913. The statement shows the date and amount of each item of material furnished and labor performed for and upon each building separately, together with the aggregate of the items. The statement shows debits during each year except 1915. There is a break in the account from May 13, 1914, to April 11, 1916, a period of about one year and ten months.

The defendant first moved the court to require plaintiff to separate his cause of action into counts. This motion being overruled, he demurred to all items of the account antedating April 11, 1916, upon the ground that it appeared upon the face of the petition that they were barred by the statute of limitations. The demurrer was also overruled, and the defendant, electing to stand thereon, refused to plead further, and judgment was entered against him as stated.

The question for decision is: Does the petition of plaintiff show upon its face a series

of completed independent contracts or a cause of action based upon a continuous open current account. Other questions are discussed by counsel, but, in view of the conclusion reached, we limit our decision to the point stated.

Section 3449 of the Code provides that—

"When there is a continuous, open, current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial."

A "continuous, open, current account" was defined by this court in *Tucker v. Quimby*, 37 Iowa, 18, as follows:

"An account to be 'continuous' must be without break or interruption. By the term 'open,' we mean something that is not closed, and the term 'current,' as used in the statute, signifies 'running,' 'passing,' a 'connected series.' See Webster's Unabridged Dictionary. Hence a 'continuous, open, current account' is an account which is not interrupted or broken, not closed by settlement or otherwise, and is a running, connected series of transactions."

As appears from the allegations of the petition, the parties, during all of the time covered by the several transactions, owned mutual accounts—plaintiff for materials furnished and labor performed and defendant for rent for the residence occupied by plaintiff. Just what was contemplated or understood by the parties is not shown by the pleadings, but nothing appears therein from which the court can say that separate contracts were entered into between the parties for the material furnished and labor performed upon each of the several buildings. The mere fact that plaintiff kept a separate itemized account thereof is, when considered with the allegations of the petition as a whole, of little controlling importance. Nor do we regard the fact that a period of approximately one year and ten months elapsed between items of the account as decisive of the question.

It is true that we held in *Gavin v. Bischoff*, 80 Iowa, 605, 45 N. W. 306, which involved an action upon an account for labor, that, as there was a break in the account of at least two years' duration, it could not be regarded as a continuous, open, current account. Emphasis, however, was not there placed so much upon the lapse of time as upon the further fact that separate contracts were shown. A period of one year and nine months elapsed between entries upon the account in *Keller v. Jackson*, 58 Iowa, 629, 12 N. W. 618, and yet we said that—

"It is true that there is something over a year and nine months between the item of March 13, 1874, and December 27, 1875, but taking those before and after and the whole together, and considering that all of the items have relation to the same open and continuous transaction between the parties, we are inclined to think

there was no such break in the account, or cessation of dealing as to cause the statute of limitations to commence to run at any time before the date of the last item."

The character of materials furnished and of the labor performed was similar throughout and the transactions are such as frequently occur between parties similarly situated. There was no interruption of the relation of the parties. It continued to be the same throughout the period, and whatever the proof might have shown as to the contract, or contracts, under which plaintiff furnished the material and rendered the services set out in his statement of the account, the petition on its face stated a good cause of action and the demurrer was properly overruled. *Cedar County v. Sager*, 90 Iowa, 11, 57 N. W. 634; *Kilbourn v. Anderson*, 77 Iowa, 501, 42 N. W. 431; *Sullenbarger v. Ahrens*, 168 Iowa, 288, 150 N. W. 71.

It follows that the judgment of the court below is affirmed.

EVANS, C. J., and ARTHUR and FAVILLE, JJ., concur.

PAGE v. PEDEN. (No. 34226.)

(Supreme Court of Iowa. Nov. 15, 1921.)

Limitation of actions § 3452—Where services rendered in state, immaterial that cause barred in state of defendant's residence.

Where a physician's services were rendered to a resident of South Dakota in the state of Iowa while she was there temporarily, it was immaterial that the cause of action was barred in South Dakota, as Code, § 3452, relative to causes of action barred in the country of defendant's residence, by its express provisions, does not apply where the cause of action arose in Iowa.

Appeal from District Court, O'Brien County; Wm. Hutchinson, Judge.

Action upon an account. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

G. A. Gibson, of Sheldon, for appellant.

STEVENS, J. Appellant, formerly a resident of this state, became a resident of South Dakota in the spring of 1909. In the fall of that year she returned to Sheldon, Iowa, where appellee, who is a physician, attended her during confinement. It is to recover for these services that this action is prosecuted.

The defense relied upon is the statute of limitations of South Dakota, which is six years upon an open account. The contention of counsel is that, as this period elapsed be-

between the rendition of the services and the commencement of this action, it is barred under the provisions of the South Dakota statute. This position is untenable. Code § 3452, which is as follows:

"When a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter; but this section shall not apply to causes of action arising within this state"

—by its plain provisions, does not apply to causes of action arising within this state. The services were rendered by plaintiff, and the cause of action arose in this state. It is therefore immaterial that the action could not be maintained in South Dakota because of the bar of the statute. The question is fully settled in this state. *Ross v. Rees*, 55 Iowa, 296, 7 N. W. 611; *Moran v. Moran*, 144 Iowa, 451, 123 N. W. 202, 30 L. R. A. (N. S.) 898; *McNamara v. McAllister*, 150 Iowa, 243, 130 N. W. 28, 34 L. R. A. (N. S.) 436, Ann. Cas. 1912D. 463; *Jarl v. Pritchett*, 179 N. W. 945.

The ruling of the court overruling defendant's motion for new trial must be sustained. Affirmed.

EVANS, C. J., and ARTHUR and FAVILLE, JJ., concur.

SHAW v. DES MOINES CITY RY. CO. (No. 33959.)

(Supreme Court of Iowa. Nov. 15, 1921.)

1. Trial $\Leftrightarrow$ 273—Extending time for motion for new trial does not extend time to except to instructions.

The granting of an extension of time in which to file a motion for a new trial does not extend the time in which to take exceptions to the instructions given.

2. Appeal and error $\Leftrightarrow$ 263(1)—Instructions not excepted to not considered.

Alleged error in the giving of instructions cannot be considered on appeal, where no exceptions thereto are preserved.

Appeal from District Court, Polk County; J. D. Wallingford, Judge.

Action for personal injury. Verdict and judgment for the defendant. Plaintiff appeals. Affirmed.

E. A. Lingenfelter, of Des Moines, for appellant.

W. H. McHenry, of Des Moines, for appellee.

FAVILLE, J. The only error relied upon for reversal is thus stated in appellant's argument:

"The court erred in its instructions to the jury in giving instruction No. 2, instruction No. 11, and instruction No. 12, in which instructions the plaintiff was required to prove her freedom from contributory negligence before she could recover. The error is made and repeated in the above-numbered instructions, and upon these errors the plaintiff relies for a reversal."

The record shows that verdict in said cause was returned on January 20, 1920, and that on the 22d day of January, 1920, the court made an order as follows:

"Plaintiff is hereby granted ten days from January 22, 1920, within which to file motion for new trial."

A motion for a new trial was filed on January 28, 1920. No exceptions to the instructions were taken at any time.

[1, 2] We have expressly held that the granting of an extension of time in which to file a motion for a new trial does not extend the time in which to take exceptions to the instructions given. The only error relied upon is in respect to the giving of instructions, and no exceptions to said instructions are preserved. Upon such a record we cannot consider the sole error relied upon for reversal.

Our holding in the recent case of *Henry v. Henry*, 179 N. W. 856, is conclusive on this question.

The judgment of the lower court must be, and the same is, affirmed.

EVANS, C. J., and STEVENS and ARTHUR, JJ., concur.

MATHENY v. MILEY. (No. 34141.)

(Supreme Court of Iowa. Nov. 15, 1921.)

Appeal from District Court, Lucas County; Francis M. Hunter, Judge.

This is an action for damages for alleged alienation of the affections of plaintiff's wife by criminal conversation. There was a judgment dismissing the petition, and the plaintiff appeals. Plaintiff's petition disclosed that he had been adjudged the guilty party in a divorce proceeding, and that a decree of divorce had been entered against him in favor of his wife. In such divorce proceeding he had charged his wife with adultery, and had named the present defendant as correspondent. Such issue was tried in the divorce proceeding, and was found adversely to the plaintiff. These facts being conceded, the trial court directed a verdict for the defendant. Affirmed.

Holly & Holly, of Des Moines, and W. Collinson, of Chariton, for appellant.

J. A. Penick and W. W. Bulman, both of Chariton, for appellee.

PER CURIAM. The case is fully ruled by our recent case of *Duff v. Henderson*, 183 N. W. 475, and by the same division of opinion indicated in the cited case. The judgment below is therefore affirmed.

Affirmed.

JOHN HOFFMAN & SONS CO. v. PARKS.

(Supreme Court of Wisconsin. Nov. 15, 1921.)

1. Limitation of actions $\S$ 155(3)—Agreement between indorsee, indorser, and maker for application of rents to note held legal.

An agreement between the indorsee, indorser, and maker of a note, whereby rents due from the maker to the indorser were to be applied in payment held supported by consideration, and not forbidden by law; hence such payments could be relied on against the defense of limitations.

2. Appeal and error $\S$ 1070(2)—Special verdict in alternative held not prejudicial error.

In an action on a note, where an agreement between indorsee, indorser, and maker for application of rent due the indorser by the maker was set up, submission to the jury of a question whether the maker agreed with the indorsee's agent "that the rent checks or some of them" might be applied by the indorsee as payments, to which the jury answered "Yes," held not prejudicial error as misleading the jury, in view of the testimony.

3. Appeal and error $\S$ 218(2)—Objection and exception necessary where form of special verdict erroneous.

Where a special verdict is objectionable in form, counsel must object and enter due exception to the refusal of the court to correct it.

Appeal from Circuit Court, Price County; G. N. Risjord, Judge.

Action by the John Hoffman & Sons Company against W. B. Parks. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action by the plaintiff, as indorsee, against the defendant, as maker, of a promissory note for \$1,600 dated February 14, 1907, payable on demand to E. L. Hunt, and given as part of the purchase money for a stock of goods.

The note matured on August 23, 1911, when the plaintiff demanded payment. The action was commenced July 28, 1919. Defendant denied liability by reason of the statute of limitations (section 4222, St. 1919). Plaintiff contended that the statute was tolled by payments within the six years next preceding the bringing of the action.

The note was indorsed to the plaintiff company in payment of Hunt's indebtedness to it. Until August 14, 1911, defendant paid the interest to plaintiff. On August 23, 1911, after demand, defendant paid \$200 on the principal. These were the only payments which he made directly to the plaintiff.

In March, 1912, Mr. Riemer, credit man of the company, by agreement was appointed trustee of the grocery business of defendant and his partner; and thereafter, until July, 1918, defendant acted as manager under the direction of the trustee. The business was carried on in a building owned by Hunt, who had a store in the same building, a door connecting the two places of business.

On April 9, 1912, plaintiff sent to Hunt the following letter:

"Milwaukee, April 9, 1912.

"F. L. Hunt, Phillips, Wis.—Dear Sir: With reference to the rent due you on the Parks & Waterhouse store: We notice that this will be due and payable on the 12th inst., and will amount to \$30.00. We wish to inquire if it will be agreeable to you to have this rent credited on your indebtedness with us. We make this proposition believing it will be the easiest way for you to pay it off. Will you kindly advise us by return mail, and greatly oblige.

"Yours very truly,

"John Hoffmann & Sons Co."

Hunt returned the letter with the following indorsement:

"Yes, I intended writing you to do so. Truly yours, F. L. Hunt."

Thereafter, on November 30, 1912, in the presence of Parks, Hunt indorsed and delivered to plaintiff checks aggregating \$135, and this amount was indorsed on the note to the credit of Parks. The checks were written by Parks, payable to Hunt, and signed by Riemer as trustee. They represented payments for the rental of the store.

Further indorsements of rent checks were made as follows: May 21, 1913, \$180; December 30, 1913, \$210; December 17, 1914, \$70; September 30, 1918, \$70. The delivery of all of these checks to Riemer as agent of the plaintiff took place in the store of Hunt, generally, if not always, in the presence of Parks.

Riemer testified that all of these payments were made in pursuance of an agreement between Parks, Hunt, and himself, whereby the rent money due Hunt from Parks should be paid by Parks to plaintiff and applied on the note, and that Parks was to reimburse Hunt to the amount of these payments.

Hunt testified that he did not remember that Parks had any part in the agreement as to the application of rents, and that there was no express agreement that Parks should reimburse him; that he (Hunt) knew that the rent checks were being applied on the note, and that he considered that Parks was under a moral obligation to reimburse him; and that he hoped to get the money back; that he made the payments because he knew he was liable as an indorser.

Parks denied the agreement, but testified he considered himself under moral obligation

to reimburse Hunt. He further testified that he had considered that this note should be taken care of by the trustee, and that he was free from liability on it.

The court submitted the following question to the jury:

"Did the defendant, Parks, agree with Mr. Riemer that the rent checks or some of them might be applied by the plaintiff as payments on the note in question?"

The answer was "Yes."

Both parties moved for judgment. Judgment was rendered for the plaintiff in the sum of \$1,450.54.

W. K. Parkinson, of Phillips, for appellant.
Barry & Barry, of Phillips, for respondent.

JONES, J. (after stating the facts as above). The principal exception of the defendant's counsel is that the court erred in submitting the special verdict in the alternative.

Passing that subject for the present and assuming that the error was not fatal, the finding of the jury is based on such evidence that we cannot properly set it aside. Both the defendant and Hunt, the indorser of the note, were undoubtedly liable to the plaintiff. It does not seem inherently unreasonable that there should have been an agreement to apply the payments made by the defendant on this indebtedness. It was conceded by Hunt that this would be the easiest way to pay the indebtedness. If some such arrangement had not been made, it would have been natural for the plaintiff to insist upon payment of the note in a manner which might have been more burdensome to both Parks and Hunt. The testimony makes it clear that Hunt expected the rent checks to be applied as they were, and throughout the whole period the plaintiff made the application relying on the supposed agreement.

To this agreement Riemer testified very positively. Although Hunt testified that he did not remember that Parks was present when it was made, he did not directly deny the agreement, and his whole course of conduct seems to us to corroborate the testimony of Riemer.

[1] There is no rule of law which would prevent the three parties interested from making such an agreement. The liability of the defendant and Hunt upon the note and the mutual agreement of all the parties interested would be ample consideration. *Mainzinger v. Mohr*, 41 Mich. 685, 3 N. W. 183; *National Bank of Delavan v. Cotton*, 53 Wis. 31, 9 N. W. 926.

It is earnestly argued by defendant's counsel that the verdict was fatally defective for uncertainty. It is undoubtedly true that ordinarily a verdict in the alternative is not to be approved, and such verdicts have often been disregarded. Thus, where a jury was asked to find whether there was a contract,

express or implied, that defendant should receive compensation for certain services, and an affirmative answer was given, the court said:

"This answer not only leaves it uncertain whether the jury found there was an express or implied contract between the parties, but we are unable to ascertain whether the jury agreed that either contract was made. A part of them may have found there was an express contract, but no implied one; and the others may have reached the conclusions that there was an implied, but no express, contract. Thus it is rendered uncertain whether the jury in fact determined this issue. * * * Under these circumstances the question is faulty for duplicity, and is fatally defective for uncertainty as to the determination of the issue." *Lowe v. Ring*, 123 Wis. 370, 375, 101 N. W. 698, 8 Ann. Cas. 731.

There have been numerous other decisions holding the same general rule.

Does this rule apply in the present case? Although there was considerable testimony as to facts more or less collateral, the whole effort on the part of the plaintiff and defendant during the trial was directed to the question whether or not an agreement was made between the parties regarding the application of the rent checks to the note in question. Riemer testified to a positive agreement at a given time and place that the rent checks should be thus applied. Parks denied the agreement. There was no contention by either party that any other agreement was made. On the motion for new trial the court said:

"* * * It was not contended upon the trial that, if the plaintiff had a right to apply some checks upon Park's note, it had not the right to apply all of them that were released by Hunt."

We consider that the trial court rightly came to the conclusion that, if Parks agreed that the rent money might be applied as testified to by Riemer, the agreement included all the rent checks, that were in fact so applied.

[2] In view of the issues which were tried and the whole course of the trial, we consider that the form of the verdict did not mislead the jury, and that there was no testimony from which they could have inferred that some of the payments applied upon the note were included in the agreement, and that others were not, and we have come to the conclusion that no injustice was done by the submission of the verdict in the form it was left to the jury. *Berger v. Abel & Bach Co.*, 141 Wis. 321, 124 N. W. 410; *Korn v. Pfister & Vogel Leather Co.*, 147 Wis. 526, 133 N. W. 586. See *Tosty v. Morgan Co.*, 151 Wis. 601, at 604, 139 N. W. 402.

[3] Moreover, it does not appear that any exception was taken to the form of the verdict or that the attention of the court was called to it until after the trial or that any

other form of question was proposed by defendant's counsel. If the verdict was objectionable in form, counsel should have objected and entered due exception to the refusal of the court to correct it. *Dolphin v. Peacock Mining Co.*, 155 Wis. 439, 144 N. W. 1112; *Moering v. Falk Co.*, 155 Wis. 192, 144 N. W. 207; *Landauer v. Kasik*, 155 Wis. 376, 144 N. W. 974; *Ludvigson v. Superior Shipbuilding Co.*, 147 Wis. 34, 132 N. W. 621.

Judgment affirmed.

KRONER v. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA.

(Supreme Court of Wisconsin. Nov. 15, 1921.)

1. Insurance §549—Provision for forfeiture for failure to notify of intention to cremate held void.

Provision in an accident insurance policy, that in the event of death by accidental means the policy is forfeited if the assured is cremated without first giving the company seven days' notice, held void. (Affirmed by divided court.)

2. Appeal and error §1123—Court divided on appeal affirms judgment.

Where on appeal the reviewing court is divided, the judgment below is affirmed.

Appeal from Circuit Court, Juneau County; James O'Neill, Judge.

Action by Louise Kroner against the order of United Commercial Travelers of America. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought to recover on an accident policy held by the deceased in the defendant order. Plaintiff contended that her husband's death was caused by drowning, the defendant contended that his death was caused by disease. The answer further sets up forfeiture of plaintiff's rights by reason of the cremation of her husband's body without first giving notice to the defendant order of the intention to cremate. The case was tried before the court and a jury. By a special verdict the jury found that the deceased received a bodily injury effected through external, violent, and accidental means; that his death was caused by his falling into a ditch and being drowned or suffocated in the mud and water; that his death was occasioned by such bodily injury alone and independent of all other causes.

[1] Certain questions involving the interpretation of the contract were raised in the case. In regard to these questions the court found: That the defendant issued the certificate of insurance and agreed to indemnify the beneficiary in case death resulted through external, violent, and accidental means, alone and independent of all other

causes; that the contract provided for forfeiture in case of cremation without first giving seven days notice; that Fred Kroner died June 1, 1918, and his body was cremated on June 3, 1918; that the cremation was at the expressed wish of the deceased, and was done in good faith and without fraud; that plaintiff had no knowledge of the existence of the certificate of insurance until after the cremation; that on the 4th, 13th, and 29th days of June, 1918, the plaintiff gave separate notices in writing of the death of deceased to the Supreme Secretary of the defendant, giving the name and address of deceased, and stating the cause of death and full particulars of the accident; that the defendant failed, neglected, and refused to furnish blanks for proofs of death; that the defendant on July 2, 1918, in writing, notified Louise Kroner that it denied all liability to her as beneficiary under the certificate on the sole ground that the remains of Fred Kroner had been cremated without first giving notice thereof to the Supreme Secretary at least seven days in advance of the intended cremation.

As conclusions of law the court found: That the defendant accepted the notices of death sent by Louise Kroner as sufficient notices under the contract, and waived all other notices and proofs of death, and the time and manner in which such notices and proofs are to be given, required in the certificate and contract; that under the evidence and facts as found in this case it is unreasonable to declare and to enforce a forfeiture of the plaintiff's claims under the insurance certificate on the ground that the body was cremated without first giving notice; that the beneficiary was excused from giving such notice; and that as to the plaintiff, under the facts and circumstances shown in this case, the provision as to cremation in said certificate is inapplicable, null, and void.

Judgment was entered for the plaintiff in the sum of \$7,409.81, from which judgment defendant appeals.

E. J. B. Schubring and A. R. Petersen, both of Madison (John A. Millener, of Columbus, Ohio, of counsel), for appellant.

J. T. Dithmar and R. P. Clark, both of Elroy, for respondent.

SIEBECKER, C. J. (after stating the facts as above). [2] Mr. Justice JONES is disqualified from participation in the decision of this case in this court for the reason that before he became a justice of this court he had acted as an attorney for the defendant in this litigation. The other six justices of this court who participated in the decision on this appeal are equally divided in opinion as to the correctness of the judgment en-

tered in the trial court and appealed from to this court. Three of such Justices are of the opinion that the judgment appealed from is correct and should be affirmed, and three of such Justices are of the opinion that such judgment should be reversed, and that judgment should be awarded dismissing the complaint. This, under the rule, requires an affirmance of the judgment awarded by the trial court. *Hagenah v. Milwaukee E. R. & L. Co.*, 136 Wis. 300, 116 N. W. 843, and cases there cited.

It is so ordered.

WEISNER et al. v. JAEGER et al.

(Supreme Court of Wisconsin. Nov. 15, 1921.)

1. Easements $\S$ 36(1). — Easement of way cannot arise from long-continued use based on permission.

Where an easement is claimed for more than 20 years' use of a path across the plaintiff's premises, the mere fact that the user continued for that period did not raise the presumption of adverse hostile user.

2. Easements $\S$ 8(2, 3). — Permissive use cannot create easement by prescription.

A permissive user, no matter how long continued, cannot ripen into an easement by prescription.

3. Easements $\S$ 36(3). — Use of way held permissive.

Facts held to show that use of path across plaintiff's premises was permissive and not adverse.

Appeal from Circuit Court, Waukesha County; Martin L. Lueck, Judge.

Action by John A. Weisner and others against Jacob Jaeger and others, to determine plaintiffs' right to use an alleged easement of way across his premises. From a judgment in defendants' favor, plaintiffs appeal. Reversed and remanded, with directions for judgment for plaintiffs.

The plaintiffs are the owners of an irregularly shaped piece of land on the south shore of Lake Muskego, in Waukesha county. On the west it is bounded by a strip of land about 20 feet in width, owned by Mary Weisner, running from a highway some 300 or 400 feet distant from the lake shore to the lake. West of the land of Mary Weisner is an irregular shaped piece of land bordering on Lake Muskego, owned by Samuel Kingston and known as Kingston's Grove. To the east of plaintiffs' property between the highway and the lake shore, is a piece of land owned by John Schuett. Upon the Schuett property there has been for many years a hotel, general store, post office, and public amusement

grounds. The property known as Kingston's Grove has been used for many years as a place of residence by the defendant Samuel Kingston and upon it he has constructed a large number of cottages which are rented during the outing season to various parties. It also appears that on the northerly end of the plaintiffs' premises at points near or contiguous to the lake shore and extending across the plaintiffs' premises following the general contour of the lake shore, there was an embankment or elevation of ground, along the top of which there has been for many years a well-known and definitely located path used by pedestrians. The plaintiffs' premises were originally the property of one John Ferguson, who died in the year 1882. His estate was never probated. He left surviving, his wife, a daughter, and one son, George Ferguson. The wife and daughter died in the year 1889, leaving George Ferguson the sole owner of the property. He became of age March 29, 1898. In the year 1907, George Ferguson sold the property to Mary Weisner, from whom the plaintiffs derived their title in 1909.

Upon the trial the court found:

"That for more than 20 years immediately preceding the commencement of this action the defendants, their families and guests, the tenants of the cottages in Kingston's Grove and their families and guests, and all other persons desiring to pass from Kingston's Grove to the Schuett property and from the latter to visit the former, or to walk along the lake shore on business or pleasure, walked along and over said path so situated on the plaintiffs' said premises, regularly, uninterruptedly, openly, notoriously, under claim of right and with the knowledge and acquiescence of the several successive owners of said premises." That the plaintiff claimed the right to obstruct the path and prevent defendants and other persons from walking along or over the path.

The court concluded that at the time the action was commenced the plaintiffs had, and they now have, no legal right or authority to obstruct said path or otherwise prevent the defendants and said other classes of persons from walking along or over the same, and that the defendants, their families and guests, had a prescriptive right to walk along the path, and are now entitled to the free and unobstructed use of the path as pedestrians. Judgment was entered accordingly, from which the plaintiffs appeal.

Fawcett & Dutcher, of Milwaukee (Frank J. Lenicheck and Arthur E. Lenicheck, both of Milwaukee, of counsel), for appellants.

Connell & Wiedner, of Milwaukee, for respondents.

ROSENBERRY, J. (after stating the facts as above). On behalf of the plaintiffs it is contended that the court erred in finding that the defendants and other classes of persons

specified in the findings acquired a prescriptive right in the premises in dispute, and further in finding that the plaintiffs had and now have no legal right or authority to obstruct the path or otherwise prevent the defendants and other classes of persons named in the findings from walking along and over the same.

Upon the trial there was no proof of any continued adverse, open, notorious, and hostile possession of the premises by the defendants, and the defendants rely upon the proposition that upon proof of 20 years' user a presumption that such user is adverse and hostile to the rights of the owner of the premises, and that such presumption has not been overcome by the proof offered on behalf of the plaintiffs, and that the defendants are therefore entitled to the benefit of the judgment as rendered. The undisputed facts are stated as follows by the trial court:

"There is a well-defined and worn path across plaintiffs' premises, which is located as shown on defendants' Exhibit No. 1, and which path has existed in substantially the same place for 50 years; that this path is the shortest land route between Kingston's Grove, in which there are something like 30 cottages, and the Schuett property, upon which is located a general store, saloon, dance hall, and amusement park, and upon which the post office was located until about 2 years ago. For a period of more than 20 years prior to the commencement of this action this path was used by the defendant Kingston and the occupants of the cottages in Kingston's Grove and others passing to and from the Schuett property and in traveling along the lake. Said use of the path was without the express permission of the owners of the plaintiffs' premises, but was known to and acquiesced in by them, and there was no objection made to such use until August, 1918. There was always a free passage from the path on the Kingston property through or over the fence between the Kingston property and the plaintiff's premises. At first there was a step that could be used in getting over the fence, then afterwards there was an opening which was protected by posts so as to prevent cattle from getting through, but permitted people to get through in passing back and forth and that finally was a gate. There were signs on the premises at different times, warning people to keep off from the premises, to keep off from them, but not so placed as to indicate that the path was not to be used by people traveling over the premises, but rather warning them, in my judgment rather warning them to keep off from the property on the side of the path. * * * While the people making use of the path never asked permission to go across the same, nevertheless they were justified in believing, and did believe, that they

had a right to use it for the purpose of traveling thereon. I think that covers the facts."

It appears that at or near the Schuett property there was in an early day a saw-mill, and that the path along the lake shore has been there for at least 50 years. The plaintiffs' contention is that such use as was made of the path by the defendants and others was permissive, was not hostile, and that therefore the presumption which might arise upon proof of 20 years of open, notorious, hostile possession adverse to the rights of the plaintiffs does not arise. The issue in this case lies in a very narrow compass.

[1-3] The presumption upon which the defendants rely does not arise unless the user, during the statutory period, is adverse and hostile to the rights of the owner. The mere fact that the user has continued for 20 years does not raise the presumption of adverse, hostile user. The nature of the user, as well as the length of the period over which it is extended, must both be established by evidence. We think the trial court was in error in holding that the proof of this case establishes an adverse, hostile user of the premises. In fact, it appears to be quite clear that such use as the defendants made of the premises was not under claim of right, but was permissive. There is nothing in the evidence to show that the defendants, or any of them, ever claimed any right adverse to the plaintiffs, and there was certainly nothing in the character of the user which could have brought home to the plaintiff notice of the fact that any right was claimed other than a permissive right. The right claimed by the defendants is a private as distinguished from a public right. The presumption does not arise in this case because the use from the beginning is shown to be permissive. There is no hostile entry or other fact established upon which the presumption can rest. The possession of the defendants in this case was neither hostile nor exclusive. In the case of *Pitman v. Hill*, 117 Wis. 318, 94 N. W. 40, the nature of the use of the premises was such as to make it open, continuous, hostile, and exclusive. A user permissive, no matter how long continued, cannot ripen into an easement by prescription. *Kolpack v. Kolpack*, 128 Wis. 169, 107 N. W. 457, 116 Am. St. Rep. 29; *Thoemke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030; see note cases cited 44 L. R. A. (N. S.) 89.

Judgment reversed, and cause remanded, with directions to enter judgment for the plaintiffs in accordance with the prayer of the complaint.

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